

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) – Superfund and State Program Basics

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CERCLA History

- ▶ CERCLA enacted on December 11, 1980
 - ▶ Initially financed with several taxes on chemical and petroleum industries, lapsed in 1985
 - ▶ Broad response authorities to deal with contaminated sites
- ▶ Goals
 - ▶ Protect human health and the environment
 - ▶ Involve impacted communities
 - ▶ Make responsible parties pay
 - ▶ Return contaminated land to productive use
- ▶ Major Amendments
 - ▶ Superfund Amendments and Reauthorization Act of 1986
 - ▶ Small Business Liability Relief And Brownfields Revitalization Act of 2002 ('Brownfields Amendments')



CERCLA Overview

- ▶ Applies to uncontrolled releases/threatened releases of hazardous substances, pollutants and contaminants
 - ▶ Which “may present an imminent and substantial risk” to “public health and welfare”
- ▶ Excludes
 - ▶ Petroleum, crude oil, synthetic and natural gas
 - ▶ Fed. permitted releases
 - ▶ Certain recycling transactions
 - ▶ CERCLA §104(a)(3) (i.e. asbestos in buildings)
- ▶ Authorities include
 - ▶ Response authorities (CERCLA § 104), applicable to pot. releases of hazardous substances, pollutants and contaminants
 - ▶ Enforcement authorities (CERCLA § 106 & 107) authorities, applicable only to pot. releases of hazardous substances

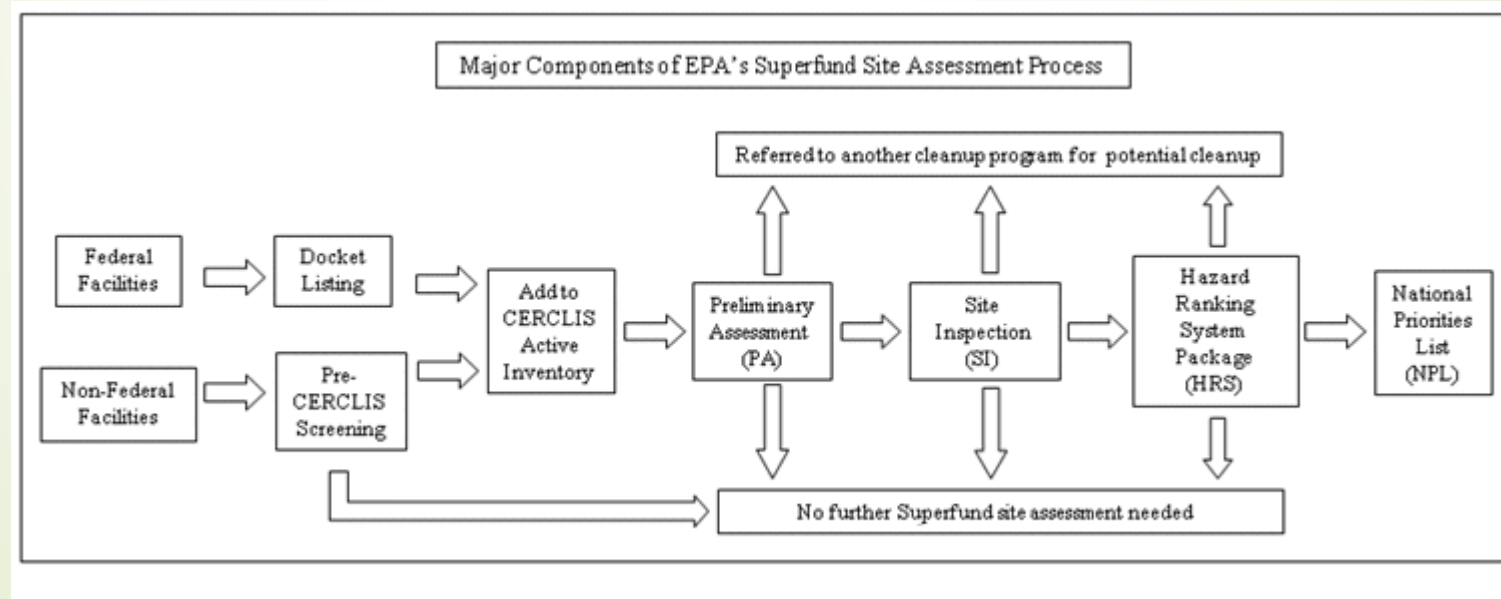


CERCLA Responses

- ▶ Removal Responses
 - ▶ Emergency spills (leaking drums or tankers, contaminated drinking water)
 - ▶ Time critical and non-time critical pathways
- ▶ Remedial Responses
 - ▶ Complex sites that need long-term cleanups

CERCLA Cleanup Process

- Removals (at any time)
- Site Identification
- Preliminary Assessment
- Site Investigation
- Evaluate Risk





CERCLA Cleanup Process

- ▶ Remedial Action
 - ▶ NPL listing
 - ▶ Remedial Investigation/Feasibility Study
 - ▶ Proposed Plan
 - ▶ Record of Decision
 - ▶ Remedial Design
 - ▶ Remedial Action
 - ▶ Operations & Maintenance
 - ▶ Delisting



Remedial Investigation/Feasibility Study

- ▶ Remedial investigation (RI)
 - ▶ characterize site conditions
 - ▶ determine the nature of the waste
 - ▶ assess risk to human health and the environment
 - ▶ conduct treatability testing to evaluate the potential performance and cost of the treatment technologies
- ▶ Feasibility study (FS)
 - ▶ development, screening, and detailed evaluation of alternative remedial actions



NPL Site Remedy Selection

- ▶ Threshold criteria
 - ▶ Overall protection of human health and the environment
 - ▶ Compliance with ARARs
- ▶ Balancing criteria
 - ▶ Long-term effectiveness and permanence
 - ▶ Reduction of toxicity, mobility, or volume through treatment
 - ▶ Short-term effectiveness
 - ▶ Implementability
 - ▶ Cost
- ▶ Modifying criteria
 - ▶ State (support agency) acceptance
 - ▶ Community acceptance



Protection of Human Health and Environment

- Established in Remedial Action Objectives (RAOs) based on sites specific risk assessment, which considers: sources, routes, & receptors
 - Identifies acceptable exposure levels across various scenarios
 - For carcinogens, levels corresponding to excess lifetime cancer risk between 10^{-4} and 10^{-6}
 - For other toxics: levels that do not cause adverse effects ($HI > 1$)
- Current and expected future land use is relevant to soil RAO
- Ecological risk also assessed.



Applicable, or Relevant and Appropriate Requirements

- ▶ Distinguish “applicable”, “relevant and appropriate”
- ▶ CERCLA cleanups must comply w/ the substantive federal and more stringent state environmental law cleanup standards
 - ▶ Chemical-specific
 - ▶ Action-specific
 - ▶ Location-specific
- ▶ Compliance w/ administrative procedures (i.e. permits) not required
- ▶ State is required to identify its ARARs to EPA
 - ▶ Must be discrete, formally adopted
 - ▶ Consistently applied statewide
- ▶ CERCLA allows EPA to waive an ARAR
 - ▶ Interim remedy; Technical impracticability; Fund balancing



Remedial Action, Construction, Long-term Activities

- After the Record of Decision – Remedial Design
 - Plans and specifications for the remedy
- Remedial Action
 - Implementation
- Construction Complete
- Operation & Maintenance
- Return to productive use



CERCLA Liability

Potentially Responsible Parties

- ▶ CERCLA § 107(a), 4 classes of PRPs:
 - ▶ Current owners or operators
 - ▶ Owners or operators at the time of disposal
 - ▶ Generators and parties that arrange or arranged for disposal
 - ▶ Transporters that select or selected disposal sites
- ▶ PRPs may perform work and/or reimburse EPA.
- ▶ PRP-conducted response actions subject to EPA oversight



CERCLA Liability

Standards of Liability

- ▶ CERCLA § 107(a) Direct claim
 - ▶ Strict
 - ▶ Joint & several
- ▶ CERCLA § 113 - Contribution claim among liable parties; equitable factors:
 - ▶ Distinguishable contribution to the release
 - ▶ Amount of hazardous substance involved
 - ▶ Degree of toxicity
 - ▶ Degree of involvement of the person in the handling of the hazardous substances
 - ▶ Degree of cooperation with government



CERCLA Statutory Liability Protection

- Innocent Landowner
- Contiguous Landowner
- Bona Fide Prospective Purchaser
- CERCLA § 107(b)(3) defenses
 - act of God
 - act of War
 - act or omission of a third party



State “superfund” Programs

- Mini superfunds
 - Often similar provisions to CERCLA
 - Typically exclude NPL sites or sites under RCRA Corrective Action
- Authority for emergency response actions and long term remediation
- Establishment of cleanup funds or financing mechanisms



State Voluntary Cleanup Programs

- Established to facilitate investigation and cleanup of contaminated sites
 - Protection from liability
 - Tax credits and other financial incentives
- Available to both Responsible Parties and innocent purchasers
 - Different sign-off and certainty
 - Determine your status before you become an owner
- What sites are generally eligible?
 - Not NPL sites or those under enforcement action
 - How dirty does the site need to be?



State Voluntary Cleanup Programs

- Application
 - Requires background information (Phase I/II) and proposed development plan
 - Relatively high application fees
 - Sometimes a bond is required for the proposed work
- Participant must prepare and have approved a detailed
 - CAP or RAP
 - Public participation



State Voluntary Cleanup Programs

- ▶ Multiple pathways to determining cleanup levels
 - ▶ Background
 - ▶ Site-specific risk assessment
 - ▶ Who/what are the receptors?
 - ▶ State-wide tables for different media
- ▶ Institutional and engineering controls and other closure requirements
 - ▶ Based on the use of the property
 - ▶ Environmental covenants as well
 - ▶ Some are negotiable, others not at all



State Voluntary Cleanup Program

- Sign-off
 - NFA/NFRD
 - COC
- What is your liability protection under a VCP?
 - What contaminants?
 - Contribution actions