

ELI Summer School

CERCLA: An Overview of the “Superfund” Program

July 17, 2018

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Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund)

*as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA),
the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996,
and the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Brownfields Act)*

Roadmap

- History
- Purpose
- The Superfund Process
- Liability + Defenses
- Response Authorities
- Unresolved Issues
- Recent Example

Love Canal, New York (1978)



Elizabeth, New Jersey chemical explosion (1980)



History: Why CERCLA?

- Public outcry about industrial waste
- Limited legal framework for government response; common law damage claims
- CERCLA → comprehensive federal statute to provide funds + governmental response authorities to address releases and threatened releases of hazardous substances
 - Note: Petroleum exclusion

CERCLA Today

- 1300 listed Superfund sites
- ~200 cleanups
- Similar state-level programs

Purpose

1. Offers compensation for response costs
 - *Superfund*
 - *Response costs recoverable* – 107(a)
 - *Contribution actions* – 113(f)
2. Governmental response authorities
 - *EPA*
 - *Coast Guard, DoD, etc.*

Purpose

3. Provides a framework for prioritizing and evaluating risks posed by hazardous substances
 - National Priorities List
 - Agency for Toxic Substances and Disease Registry
4. Places burden on landowners and operators to assess and address contamination risks on their property

Key Supreme Court Cases

- *Burlington Northern & Santa Fe Railway v. U.S.*, 556 U.S. 599 (2009)
- *Cooper Industries, Inc. v. Aviall Services Inc.*, 543 U.S. 157 (2004)
- *U.S. v. Bestfoods*, 524 U.S. 51 (1998)
- *Key Tronic Corp. v. U.S.*, 511 U.S. 809 (1994)

The Superfund Process

1. Site identified
2. Preliminary Investigation
3. Search for Responsible Parties
4. Remedial Investigation
5. Feasibility Study
6. Proposed Plan/Public Review
7. Record of Decision
8. Remedial Design
9. Remedy
10. Monitoring and Maintenance

Scope of Liability

- Liability triggered by “releases” or “substantial threat” of release of a hazardous substance into the environment, or of any pollutant or contaminant that may present an imminent and substantial danger to public health or welfare

Scope of Liability

- Four categories of “potentially responsible parties” (PRPs)
 - Current owners and operators
 - Past owners and operators at the time of disposal
 - Persons who “arrange for disposal or treatment of” hazardous substances
 - Transporters of hazardous substances

Liability Scheme

- Strict Liability
- Joint and Several Liability
 - Divisibility
 - Orphan Shares
- Retroactive Liability

Defenses and Limits on Liability

- Third Party Defenses
 - *Innocent Landowner* – SARA
 - *Bona Fide Prospective Purchaser* – Brownfields Act
 - *Contiguous Property Owner* – Brownfields Act
- Defenses to Joint and Several Liability
 - Divisibility/Appportionment – *Burlington Northern* 556 U.S. 599 (2009)
 - Equitable Allocation of Liability

EPA Authorities

- Conduct cleanup using Superfund \$ and seek to recover costs from PRPs
 - PRP search
 - General Notice Letters
 - Special Notice Letters
- Compel cleanup through administrative or judicial proceedings
- Settlement agreements with PRPs – require them to clean or pay
 - *De Minimis / De Micromis* settlements

Unresolved Issues

- 107 v. 113 claims – unclear divide
 - PRPs prefer reimbursement under 107 claim (more favorable statute of limitations and joint and several liability standard)
- Natural resource damages joint and several liability/causation
 - PRPs may “allocate” their NRD liability
 - High stakes litigation – \$\$\$

EPA Site Listing

- EPA removal actions
- Private party cleanups
- Pros and cons to EPA listing:
 - Federal resources
 - Stigma
 - Longer cleanup process than state supervision
 - EPA enforcement and stringency
 - Expenses

Remedial Investigation (RI)

- To characterize releases and site conditions
 - Site history
 - Breadth and depth of contamination
 - Contaminants and potential migration
 - Risk assessments
 - Sampling + studies

Feasibility Study (FS)

- Identify remedial technologies and actions
- Key attributes of remedies:
 - Protectiveness
 - Permanence
 - Preference for treatment
 - \$\$\$

Local Example

The Intelligencer

EPA confirms Horsham water contamination meeting set for July

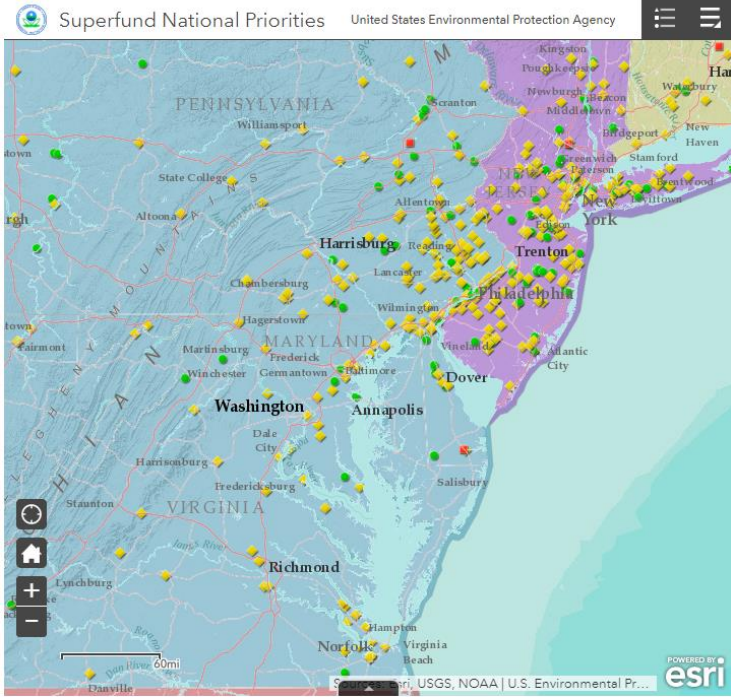
By Kyle Bagenstose
Posted Jun 27, 2018 at 1:52 PM
Updated Jun 27, 2018 at 1:57 PM

High-ranking EPA officials will visit Horsham on July 25 to hear concerns over PFAS water contamination.

An Environmental Protection Agency press release confirmed Wednesday that officials from the agency will host a meeting in Horsham next month regarding local drinking water contamination.

As reported earlier, the meeting would be held July 25 at Hatboro-Horsham High School. EPA press secretary Molly Block confirmed that date in a news release sent Wednesday, which also announced other communities across the country the EPA will visit this summer. The events are part of an effort by the EPA to address growing concerns regarding perfluorinated compounds, which are unregulated chemicals showing up in the water supplies of millions of Americans.

Superfund National Priorities List (NPL) Where You Live Map





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- A partner in Kirkland's Environmental Transactional Practice Group, Toby has successfully managed the environmental aspects of hundreds of corporate and real estate transactions spanning a diverse range of businesses, industries and properties in the U.S. and internationally.
- Recognized for Environment: Transactional in *The Legal 500 United States* in 2018
- Rated AV Preeminent in Martindale-Hubbell
- Recognized as a leading lawyer in *Who's Who Legal: Environment*
- Kirkland's environmental group was named "Environmental Law Group of the Year" in 2010, 2011 and 2013 by *Law360*