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Environmental Law Institute Summer School

Cleanup & Liability for Hazardous Substance Sites: The Comprehensive Environmental Response, Compensation & Liability Act (CERCLA)

Steve C. Gold
Professor of Law
Rutgers Law School
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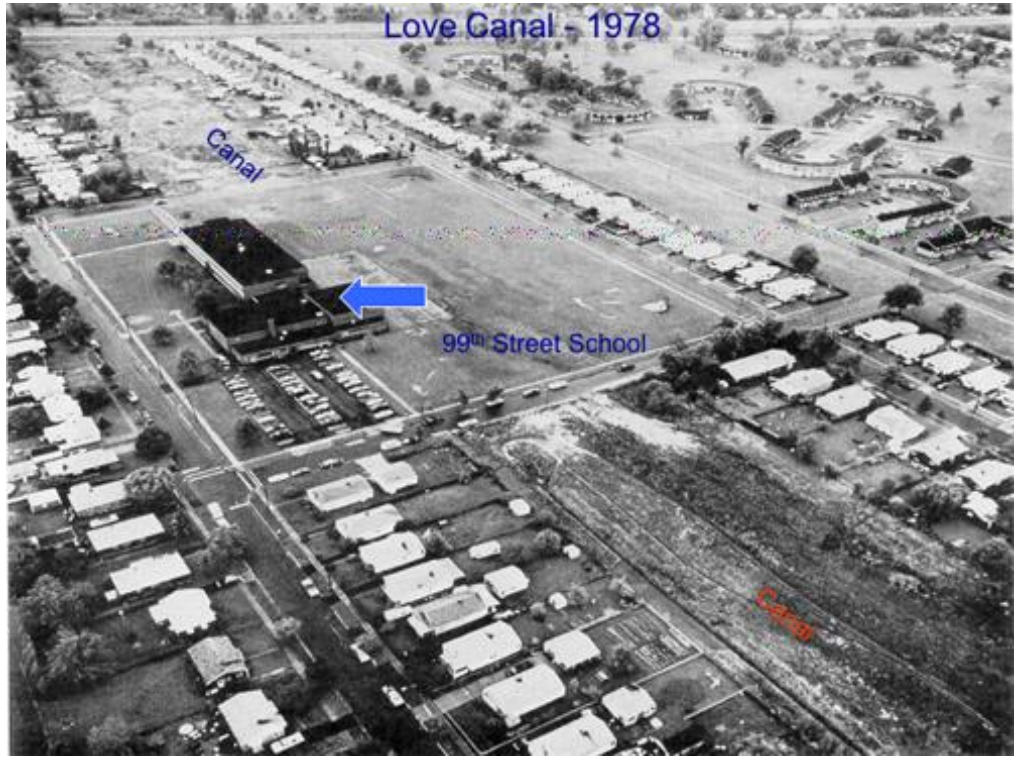
Why CERCLA?



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SHEET ____ OF ____ SHEETS

FEDERAL EMERGENCY MANAGEMENT AGENCY **PRELIMINARY DAMAGE ASSESSMENT SITE ESTIMATE**	DATE

PART I — APPLICANT INFORMATION

COUNTY	NAME OF APPLICANT	NAME OF LOCAL CONTACT	PHONE NO.

PART II — SITE INFORMATION

KEY FOR DAMAGE CATEGORY *(Use appropriate letters in the "category" blocks below)*

a. DEBRIS REMOVAL
b. PROTECTIVE MEASURES
c. ROADS AND BRIDGES
d. WATER CONTROL FACILITIES
e. PUBLIC BUILDINGS
f. PUBLIC UTILITIES
g. OTHER *(Parks, Recreational Facilities, etc.)*

SITE NO.	CATE-GORY	LOCATION *(Use map location, address, etc.)*	
DESCRIPTION OF DAMAGE			
IMPACT:		% COMPLETE	COST ESTIMATE

SITE NO.	CATE-GORY	LOCATION *(Use map location, address, etc.)*	
DESCRIPTION OF DAMAGE			
IMPACT:		% COMPLETE	COST ESTIMATE

SITE NO.	CATE-GORY	LOCATION *(Use map location, address, etc.)*	
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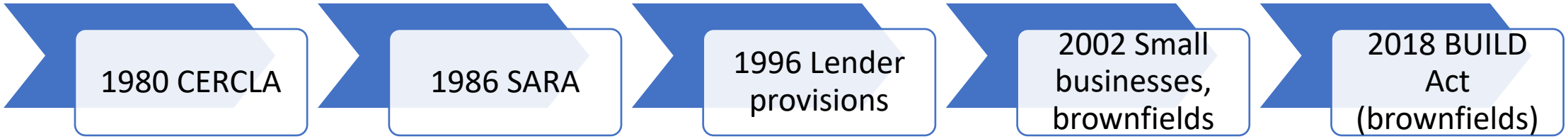
CERCLA Fills the Gap, Then Has Its Gaps Filled



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CERCLA's Two Fundamental Purposes

- Environmental Response and Restoration
  - Rather than regulation
  - Grants broad authority to the President
    - Delegated mostly to EPA; also Interior, Commerce
    - Other federal agencies responsible for contaminated sites
  - Goal: Protect Human Health & Environment
    - Restore contaminated land to productive use

- Accountability and "Internalizing Costs"
  - Creates a powerful liability scheme:
  - The polluter pays

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Response Authorities: Trigger

- Release or threatened release of
- Hazardous substance, pollutant or contaminant
- Into the environment

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Response Authorities: Trigger Definitions

- Section 101 (42 U.S.C. § 9601)
- Hazardous substance
  - "Hazardous" implies some kind of toxicity (or reactivity, flammability)
  - Defined mostly by importing lists of hazardous pollutants from other statutes
  - Key exclusions: Petroleum (incl. crude oil & fractions), natural gas, workplaces
  - Authority to designate new hazardous substances
    - Exercised once: PFOA, PFOS (May 8, 2024: 89 Fed. Reg. 39,124)
- Pollutant or contaminant
  - Defined functionally by harms or diseases caused

Response Actions (§ § 104, 105)

- § 104 authorizes two types of response actions
  - Removal actions
  - Remedial actions

- Government funding for response action comes from the Superfund
  - Originally (& again) funded by tax on certain chemicals, petroleum products

Removal Actions (§ 101(23))

- "Cleanup or removal of released hazardous substances"
- Also includes monitoring, various types of studies
- Dollar and time limits (§ 105) so
  - Usually *relatively* short-term
  - Usually *relatively* less expensive
  - But limits may be waived
- Includes emergency situations but removal actions are not always emergencies or even "time-critical"
- In practice defined by default: if it's not remedial action, it's removal

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Remedial Actions (§ 101(24))

- "Consistent with permanent remedy … instead of or in addition to removal actions"
- Usually relatively *long-term, expensive, and "permanent"*
- Require long-term monitoring if hazardous substances left on site (§ 121)
- Selection of remedial action subject to elaborate procedural requirements
  - Public (§ 117) and state involvement (but not state approval) (§ 121)
  - "How clean is clean" provisions (§ 121)
- States (§ 104) must pay 10% of construction costs + long term operation and maintenance

Where to Take What Kind of Response Action

- National Priorities List (NPL) (§ 105)
  - Created by notice-and-comment rulemaking (40 CFR Part 300 Appendix B)
  - Releases (usually called “sites”) added (or removed, after cleanup complete) by notice-and-comment rulemaking
  - Eligibility for listing determined mainly by score on Hazard Ranking System
- Government-funded remedial action available only if release on NPL
  - Listing not required for government-funded removal actions

How to Take Response Action: National Contingency Plan (NCP)

- Required by § 105
- A very long regulation (40 CFR Part 300) adopted by notice-and-comment rulemaking
- Essentially a *procedural* flow chart for selecting response actions (with some other provisions)
- *Many* guidance documents help EPA staff *implement* the NCP, make needed decisions for particular sites

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How to Choose and Perform Response Actions

- How bad is the problem?
- What's the best solution?
- Let's choose it
- Let's plan it
- Let's do it
- Let's make sure it worked

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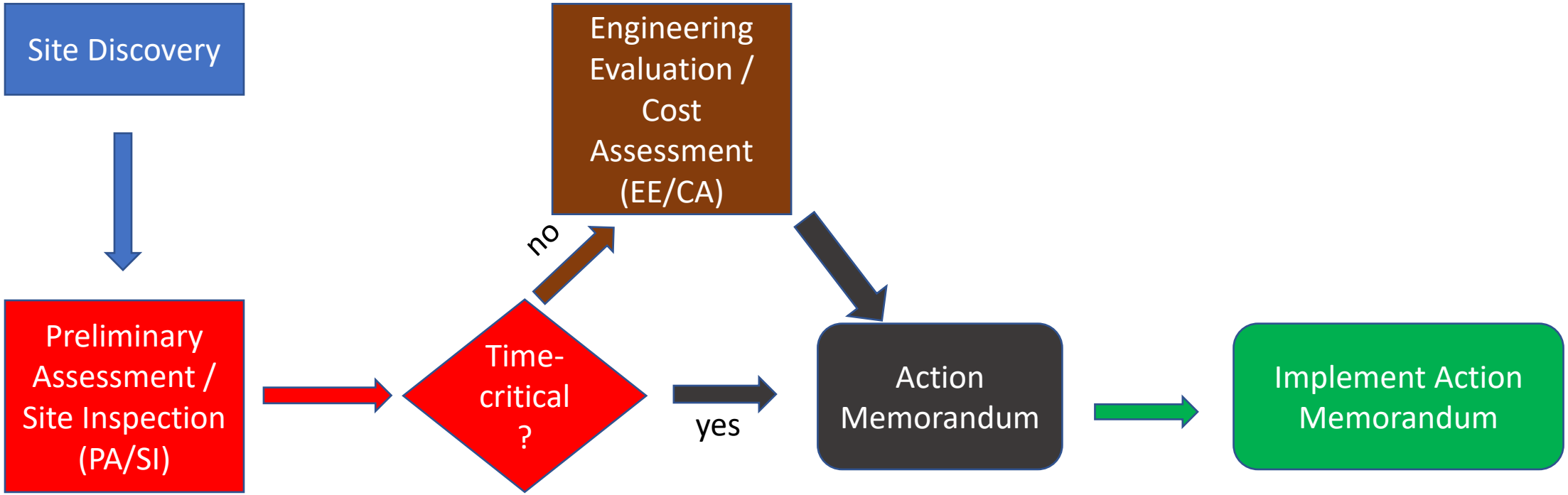
Non-Emergency Removal Action Process



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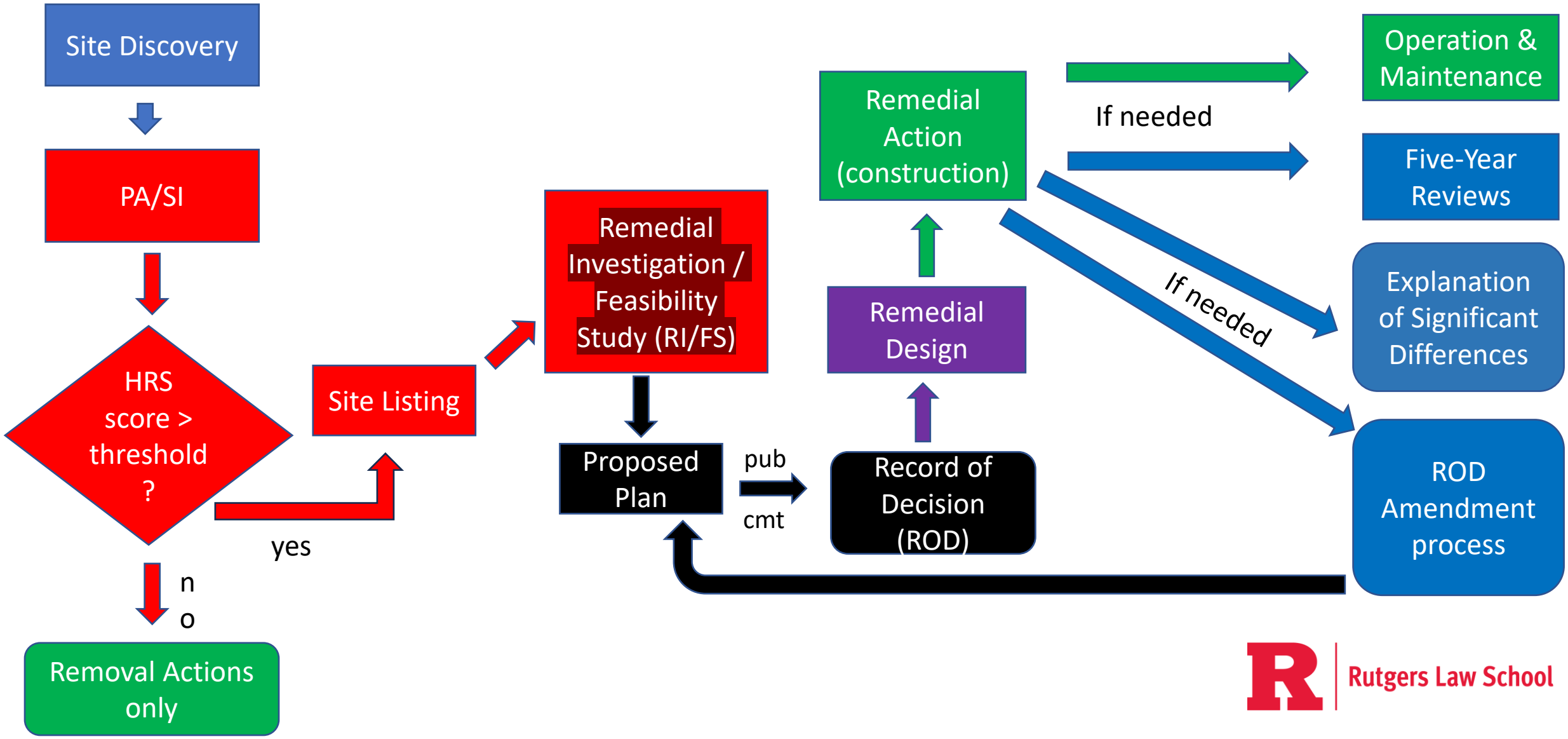
Remedial Action Process



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How to get response action done

- EPA can do a response action itself, using Superfund money (§ 104)
  - then sue to recover its costs from liable parties (§ 107)

- EPA can get a "responsible party" (someone who would be liable) to perform the response action
  - Authority to issue Administrative Orders (§ 106)
    - Severe penalties if unjustified non-compliance (§§ 106, 107)
  - Authority to seek judicial injunction (§ 106)
  - Often achieved by agreement (§§ 104, 106, 122)

CERCLA Liability: § 107(a)

- **Notwithstanding any other provision or rule of law**, and **subject only to the defenses** set forth in subsection (b) of this section--
- **(1)** the owner and operator of a vessel or a **facility**,
- **(2)** any person who at the time of disposal of any hazardous substance owned or operated any **facility** at which such hazardous substances were disposed of,
- **(3)** any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any **facility** or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- **(4)** any person who accepts or accepted any hazardous substances for transport to disposal or treatment **facilities**, incineration vessels or sites selected by such person,
- from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, **shall be liable** for--
- **(A)** all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- **(B)** any other necessary costs of response incurred by any other person consistent with the national contingency plan;
- **(C)** damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
- **(D)** the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Parsing § 107(a)

4

- "Common elements" of liability
- Categories of "responsible persons"
- Categories of money that can be recovered

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CERCLA Liability: § 107(a)

- a facility
- from which there is a release, or a threatened release
- which causes the incurrence of response costs,
- of a hazardous substance, **shall be liable** for—

- These are the "common elements" of CERCLA liability that must be established before a person in **any** of the four categories can be held liable.

CERCLA Liability: § 107(a)

- **(1)** the owner and operator of a vessel or a facility,
- **(2)** any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- **(3)** any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- **(4)** any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person,

- These are the four categories of “responsible” (i.e. liable) persons.

CERCLA Liability: § 107(a)

- **shall be liable** for--
- **(A)** all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- **(B)** any other necessary costs of response incurred by any other person consistent with the national contingency plan;
- **(C)** damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
- **(D)** the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

- These are the four categories of money that can be recovered. All but (B) are recoverable only by the government.

Elements of CERCLA Liability

- Facility AND
  - Release or threatened release which
  - Causes incurrence of response costs AND
- Hazardous substances AND
- Defendant is in a status listed in 107(a)(1-4) AND
- Plaintiff incurred at least one listed category of costs or damages

Big Questions About the CERCLA Liability Scheme

- What if allegedly liable persons did not violate the law and were not negligent (at fault)?
- What if the trigger for liability occurred before the statute's enactment?
- What causal connection is required between the liability trigger and the response action?
- What if multiple parties are liable?
- What defenses are available?

Key Features of CERCLA Liability (*U.S. v. Monsanto*, 858 F.2d 150; many others)

- Strict (no fault)
- Retroactive
- Without threshold
- Regardless of causation (if release & response)
- Subject only to difficult statutory defenses
- (Typically) joint and several

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Common Elements

- Facility from which
  - Facility very broadly defined
- Release or Threatened Release
  - Release very broadly defined: active or passive
- of Hazardous Substances
  - Long list borrowed from other statutes, plus additions
- which Causes Incurrence of Response Costs
  - Causation requirement minimal: release → expense

Categories of “Responsible Persons”

(1) owner and operator of a facility

(2) person who owned or operated a facility at the time of disposal of h.s. at the facility

(3) person who arranged for disposal or treatment • by someone else • of h.s. that the person owned or possessed • at a facility owned or operated by someone else • containing such h.s.

(4) person who accepted h.s. for transport • to a disposal or treatment facility • selected by the transporter

§ 107(a)(1): Owners and Operators

- § 107(a)(1): "the owner and operator of a facility"
  - Usually called "current" o/o
  - Understood to be as of the time of discovery of release/threatened release of hazardous substances, or perhaps at time of complaint filing
  - "and" here has been held to be disjunctive or conjunctive:
    - a party does not have to be both "the owner and operator"
    - if the owner and the operator are two separate persons, *both* are liable

§ 107(a)(2): Owners and Operators at Time of Disposal

- § 107(a)(2): "person who owned or operated facility at the time of disposal of h.s."
  - Often called "past" o/o but better understood as o/o "at time of disposal"
  - "Or" here is clearly disjunctive, but also held to apply conjunctively:
    - a person who both owned *and* operated facility at time of disposal of h.s. is still liable

Who's an Owner?

- CERCLA's definition is circular
- Title holder is obviously an owner
  - Some tenants in possession may be "owners"
- What about mortgage holder, especially in case of foreclosure?
  - CERCLA protects even foreclosing lenders who do not "participate in management" of the facility
  - Also protects governments that acquire contaminated property for tax default
- CERCLA protects "innocent" landowners through a complex defense
  - Acquired after h.s. placement
  - No reason to know (all appropriate inquiries)
  - Due care
- CERCLA protects owners of land contaminated from adjacent property

Who's an Operator?

- Even if the "owner" of a facility is a corporate entity, the "operator" can include the human being whose corporate role puts him/her "in charge of" the facility.
- U.S. Supreme Court held (*United States v. Bestfoods*) that making *pollution-related decisions* about the *facility* is what makes an entity an operator.
  - Important re: corporate parents, shareholders
- Two routes to shareholder liability, both difficult:
  - "Direct" liability
  - Derivative liability by piercing the corporate veil

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§ 107(a)(3): Arrangers

- Often (*e.g. Monsanto*) called “generators” but that’s not accurate
- any person who
  - by contract, agreement, or otherwise
  - arranged for
  - disposal or treatment,
    - or arranged with a transporter
    - for transport for disposal or treatment,
  - of hazardous substances
  - owned or possessed by such person,
  - by any other party or entity,
  - at any facility or incineration vessel
  - owned or operated by another party or entity
  - and containing such hazardous substances

Arranger Liability Issues

- “Arranged for disposal” is often easy to prove
- But “disposal” is very broadly defined (§ 101(29)): “discharge, deposit, injection, dumping, spilling, leaking, or placing”
- Raising the issue: what does it mean to *arrange* for disposal?

Arranger Liability Issues

- Hypo: X Co. sells sodium hypochlorite (drain cleaner) to consumers
  - Knowing that it will be put in the environment
  - Knowing that some of it will be discarded
  - Did X Co. arrange for disposal of a hazardous substance?
  - What if X Co. did not know that some of the chemical would be discarded and put in the environment?
- Government alleged that various transactions that inevitably resulted in disposal of hazardous substances were “arrangements for disposal” by parties on both ends of the transaction

Burlington Northern & Santa Fe R.R. v. U.S. 556 U.S. 599 (2009)

- Facts: Shell sells pesticides to B&B, knowing that manner of delivery will lead to spills, knowing B&B is careless, anticipating loss during transfer
- Did Shell "arrange for disposal" of the pesticides that leaked / spilled?
- Majority, focusing on "arranged," held that *intent* of alleged arranger matters and requires fact-intensive inquiry
- Ginsburg, dissenting, focused on "disposal" and argued that Shell's control of a delivery method that led to leaks meant Shell "arranged for disposal"
- *Burlington Northern* makes it harder, but not impossible, to hold "non-traditional" arrangers liable

The “Passive Disposal” Problem

- Hazardous substances move!
- And “disposal” includes “discharge,” “spilling,” “leaking”
- Is movement after original h.s. placement liability-creating disposal?
- Matters to alleged arrangers but also (more?) to owners / operators
- Circuit courts generally say no but with varied approaches
  - Nurad v. William Hooper & Sons (4th 1992); U.S. v. CDMG Realty (3d 1996); ABB Indus. Systs. v. Prime Tech. (2d 1997); Bob’s Beverage v. Acme (6th 2001); Carson Harbor Village v. Unocal (9th 2001)
- But movement by human agency can be disposal even without intent

§ 107(a)(4): Transporters

- any person who
  - accepts or accepted
  - any hazardous substances
  - for transport
  - to disposal or treatment facilities, incineration vessels or sites
  - selected by such person
- “Selected by such person” can be important

Liability for What? § 107(a)(4)(A-D)

- Government Response Costs
- Other Person's Response Costs
- Damages for Injury, etc. to Natural Resources
- Health Assessment & Related Costs

Government Response Costs

- § 107(a)(4)(A): “cost recovery” (not damages)
- all costs
- of removal or remedial action
- incurred
- by the United States Government or a State or an Indian tribe
- not inconsistent with the national contingency plan

Analyzing § 107(a)(4)(A)

- all costs
  - "all" includes "indirect" (overhead) costs
  - "all" means not limited to "reasonable" costs; no quibbling
  - but govt. must prove amounts
- of removal or remedial action
  - govt. must prove $ was spent on response action
- incurred
  - only amounts *actually* spent are recoverable
- by the United States Government or a State or an Indian tribe
- not inconsistent with the national contingency plan
  - "not inconsistent" means defendants bear burden of proving inconsistency; rebuttable presumption of consistency
  - test: is *response action* inconsistent with NCP under arbitrary & capricious standard
  - Inconsistency disqualifies "demonstrable excess costs" that result

Other Persons' Response Costs

- § 107(a)(4)(B): often called "private cost recovery"
- any other costs
- of response action
- incurred
- by any other person
- consistent with the national contingency plan

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Analyzing § 107(a)(4)(B)

- any other costs / by any other person
  - presumably, as distinguished from govt. costs
- of response action
  - plaintiff must prove $ spent on response action
- incurred
  - only $ actually spent; plaintiff must prove amounts
- consistent with the national contingency plan
  - "consistent with" means plaintiff has burden of proving its response action was consistent with NCP
  - "substantial" NCP compliance ok

Damages for Injury, Loss, Destruction (to) (of) Natural Resouces

- § 107(a)(4)(C): usually called “Natural Resource Damages” (NRD)
- damages for
- injury to, destruction of, or loss of
- natural resources,
- including
- the reasonable costs
- of assessing such injury, destruction, or loss
- resulting from such a release

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Analyzing § 107(a)(4)(C)

- NRD distinguished from response costs
  - An additional type of recovery
  - For harm *not fixed by* response action
- Examples
  - Interim
  - Post-response
  - Includes both lost use (market) and non-use and non-market values

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Analyzing § 107(a)(4)(C)

- damages for injury to, destruction of, or loss of
  - Damages, *not* cost recovery
  - Difficult to quantify / prove
    - Regulation provides method for assessing NRD; rebuttable presumption
- natural resources,
  - common trust resources, e.g. wildlife, air, water, wetlands….
  - this claim belongs to *sovereigns* who hold resources *in trust* for people
- including the reasonable costs
  - *reasonable* limitation
- of assessing such injury, destruction, or loss
  - assessing includes biological/physical & economic components
- resulting from such a release
  - a causation requirement

Health Assessment and Health Effects Study Costs

- § 107(a)(4)(D): sometimes called “ATSDR costs”
- the costs of any health assessment or health effects study carried out under [§ 104(i)]
- CERCLA § 104(i) established ATSDR (within CDC)
  - health assessment required for each NPL h.s. release
  - health effects study if warranted by health assessment

Defenses: § 107(b)

- ONLY available affirmative defenses
  - Although later amendments “snuck in” others
- Burden of Proof on defendant
- Release caused solely by
  - Act of God
  - Act of War
  - Act of Third Party

Third-Party Defense: § 107(b)(3)

- D must prove
  - Release caused solely by act or omission of a third party
    - Who is not D's agent or employee
    - Whose act/omission not in connection w/ direct or indirect contractual relationship w/ D
  - D used due care w/r/t h.s. involved
  - D took precautions against third party's foreseeable acts or omissions and their consequences
- "Contractual relationship" becomes especially important to
  - Landowners (chain of title is a series of contracts)
  - Lenders (mortgages, security interests are contracts)

The Problem of Multiple Liable Parties: Joint and Several Liability and Contribution

- CERCLA does not explicitly address the scope of liability of multiple parties liable for the same release
- *U.S. v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983)
  - Used analogy from Restatement (Second) of Torts
  - Widely followed even *after* publication of Third Restatement of Torts, which acknowledged many state tort reform statutes that changed J&S law
- Approved & applied by Supreme Court in *Burlington Northern*

Scope of CERCLA Liability

- 1. How many "harms"?
  - If multiple harms, liability determined separately for each.
- 2. Is the harm "indivisible"?
  - i.e., not "theoretically capable of apportionment"?
  - Indivisible harms → joint and several liability
- 3. If harm "divisible" ("theoretically capable of apportionment"), is there "a reasonable basis for division according to the contribution of each" (i.e., "a reasonable basis for apportionment")?
- 4. If deft. proves harm is divisible *and* the reasonable basis for apportionment, deft. is severally liable only for its apportioned share
  - Based on *causal* contribution to harm, not on equitable considerations

Burlington Northern: Facts

- B&B owned property where it spilled h.s.
- Railroads owned adjacent property, leased it to B&B; B&B spilled h.s. on RR property too
- Much greater volume of spillage on B&B land
- RR property
  - Was much smaller than B&B land (19%)
  - Was used by B&B for shorter period of time (45%)
  - Was only contaminated by 2 of 3 h.s. spilled (66%)
- District court sua sponte used these factors to apportion to Railroads 9% liability [(19% * 45% * 66%) * 1.5 “error factor”] rounded up

Burlington Northern: Holding

- Affirmed district court's apportionment
- Theoretically capable of apportionment?
  - Yes, based on RRs' [owners] estimated contribution to h.s. *relative to* total h.s. (contributed by owner/operator B&B)
- Reasonable basis for apportionment?
  - Yes, based on % of land (19%) times % of years (45%)
  - Additional discount for 2 out of 3 chemicals was error
  - But offset by 50% "uncertainty" increase (also error?)

Burlington Northern: Effects

- Some predicted that *Burlington Northern* would lead to much more apportionment, much less joint and several liability
- *Burlington Northern* has not resulted in much more apportionment
  - Did not change burden of proof or legal test for J&S
  - Approach works best if basis for all Ds' liability is commensurate
  - For arrangers, works best if all Ds contributed same h.s. or set of h.s.
  - Multiple h.s. raise questions of interaction, synergy, mobility
  - In multi-arranger cases, adequate volumetric estimates often lacking
  - Opinion issued late in the CERCLA game

Ameliorating Disproportionate Liability: Contribution

- J&S liability: P may collect full amount of liability from any D
- Contribution claim, borrowed from tort law, allows a liable party that has paid *more than its share* of a joint liability to recover *the excess* from other liable party(ies)
  - Not mentioned in 1980 CERCLA, but many courts implied a right to seek contribution
  - SARA added § 113(f), expressly granting liable parties right to seek contribution
- Contribution is an *equitable* doctrine: culpability matters, including factors such as
  - type, volume, and effects of each D's h.s.
  - relative role in creating the release
  - culpability of conduct or degree of care
  - degree of cooperation with govt cleanup
  - ability to pay

Timing and Nature of Claims by Responsible Parties Against Each Other

- Common situations:
  - US cleans up site, sues PRPs for cost recovery, obtains J&S judgment, paying liable defendants sue others for contribution
  - PRP settles with US, agrees to perform future response action & pay US past costs, sues other PRPs
  - US orders PRP to do cleanup, PRP complies with order & sues other PRPs
  - PRP voluntarily cleans up site, sues other PRPs
- Supreme Court
  - CERCLA precludes contribution action before § 106 or 107 enforcement action (*Cooper Inds. v. Aviall Servs.,* 542 U.S. 157 (2004))
  - But responsible parties may sue other PRPs for cost recovery (§ 107(a)(4)(B) or (A)) (*U.S. v. Atlantic Research*, 551 U.S. 128 (2007))