



The 2002 CERCLA Amendments

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Key CERCLA Sections

Section 103- Release Reporting

Section 104- Information and Response

Section 106- Injunctive Relief for Imminent and Substantial Endangerment

Section 107- Cost Recovery

Section 113- Contribution

Section 121- Cleanup Standards

Section 122- Settlement Procedures



Standard of Liability

- ◆ STRICT LIABILITY
- ◆ RETROACTIVE LIABILITY
- ◆ Joint (107 actions only)



CERCLA Liable Parties

- ◆ Current and Former Owners
 - Passive vs. Active Disposal
- ◆ Current and Past Operators
 - passive vs. active disposal
- ◆ Generators
 - Intent to Arrange
 - Sale of raw materials/useful product
 - Liable if transported to non-approved site
- ◆ Transporters



Secured Creditor Exemption

- ◆ Holder of Security Interest Not Owner if
 - Holds “indicia of ownership” primarily to protect security interest
 - Did Not “Participate in Management” of facility
- ◆ Post-Foreclosure Immunity if:
 - Takes commercially reasonable steps to sale property
 - Does not Cause or Exacerbate Release
- ◆ Beware of:
 - RCRA UST Secured Creditor Exemption
 - RCRA 7002 actions
 - Common Law Failure to Disclose



CERCLA Cause of Action

- ◆ Release
- ◆ Hazardous Substance
- ◆ Facility
- ◆ Response Costs Incurred Consistent with NCP
- ◆ PRP



107 Cost Recovery

- ◆ EPA
- ◆ State
 - Local Government not considered state for cost recovery
 - presumption of NCP compliance
- ◆ Innocent Party
- ◆ Implied Right of Contribution?



Contribution Actions

- ◆ 113(f)(1)- during or after civil action
- ◆ 113(f)(2)- contribution protection for “administrative or judicial settlements
- ◆ 113(f)(3)- “administrative” or judicial settlement
- ◆ Equitable Liability-Gore Factors



CERCLA Affirmative Defenses

- ◆ Act of God
- ◆ Act of War
- ◆ Third Party
- ◆ Innocent Landowner (ILO)
- ◆ Bona Fide Prospective Purchaser (BFPP)
- ◆ Contiguous Property Owner (CPO)



Third Party Defense

- ◆ Release solely caused by third party
- ◆ Without direct or indirect “contractual relationship”
- ◆ Exercised Due Care
- ◆ Took Precautions Against Foreseeable Acts of Third Parties



Innocent Landowner Defense

- ◆ Did Not Know or Had No Reason to Know of Release
- ◆ Perform Pre-Acquisition AAI
- ◆ Comply with Post-Acquisition Continuing Obligations
 - Cooperate and Provide Access for Persons Performing Response Actions
 - Comply With Land Use Controls (LUCs)
 - Provide Access to Persons Maintaining LUCs



BFPP

- ◆ Applies to transactions after January 11, 2002
- ◆ Applies to Purchasers and Tenants
- ◆ Applies to brownfield and NPL sites



Elements of BFPP Defense

◆ Threshold Criteria

- Conducted AAI
- Not PRP or affiliated with PRP by:
 - direct or indirect familial relationship
 - contractual or corporate relationship
 - Corporate Reorganization
- Disposal took place prior to acquisition



BFPP Defense Elements cont'd

◆ Continuing Obligations

- Complied with All Applicable Reporting Requirements
- Undertake “Appropriate Care”
- Cooperate and Provide Access to Persons Performing Response Actions
- Comply With LUCs Provide Access for Persons Maintaining LUCs
- Comply with EPA CERCLA Information Requests or Subpoenas



CERCLA §107 (1) Lien

- ◆ Full Costs Incurred By EPA
- ◆ Effective When Incurred or Notification, whichever later
- ◆ Notice Prior to Perfection
- ◆ Resolve Prior to Acquisition or EPA May Seek Cost Recovery
- ◆ Several States have Superliens



CERCLA §107(r) Windfall Lien

- ◆ EPA performs cleanup After BFPP Acquisition
- ◆ Lien Capped By Unrecovered Response Costs and FMV Increase Attributable to Cleanup
- ◆ Generally Effective When Costs Incurred Until Lien Satisfied by Sale or Cost Recovery (No SOL)
- ◆ Does Not Apply to Brownfield Grants or PA/SI
- ◆ EPA Will Not Usually Perfect for Residential Property or Public Use
- ◆ BFPP May Grant Lien on Other Property or Provide Other Assurances
- ◆ Guidance Suggests Could Perfect When Increased FMV Occurs Prior to BFPP Acquisition (e.g., noteholder forecloses after EPA cleanup)



CPO Defense

- ◆ Owner did not cause, contribute, or consent to release
- ◆ Conduct “Appropriate Inquiry”
- ◆ Exercise “Appropriate Care”
- ◆ Cooperate and Provide Access To Persons Performing Cleanups
- ◆ Comply With LUCs
- ◆ Provide Access To Persons Maintaining LUCs



CPO Defense cont'd

- ◆ Comply with all release reporting requirements
- ◆ Comply with EPA CERCLA Information Requests and Subpoenas
- ◆ Owner not a PRP or affiliated with PRP



New Due Diligence Requirements

- ◆ All Appropriate Inquiry (AAI) or ASTM E1527-05 after November 1, 2006
- ◆ ASTM E1528 Transaction Screen Not AAI



Due Diligence Standards Cont'd

- ◆ Non-Governmental or Non-Commercial Purchasers of Residential Property
 - Site Inspection
 - Title Search



AAI Does Not Apply To:

- ◆ Third Party Defense
- ◆ Secured Credit Exemption
- ◆ UST Sites (unless Brownfield Site)
- ◆ RCRA 7002 Actions
- ◆ RCRA Corrective Actions
- ◆ State Superfund Programs Unless Specifically Incorporated
- ◆ Common Law



EPA Policies to Resolve Liability

- ◆ CERCLA Administrative Settlements
- ◆ Federal Comfort Letters
- ◆ CERCLA and RCRA PPAs
- ◆ CERCLA PTAs
- ◆ Hybrid Comfort Letters
- ◆ Ready for Reuse Certificates
- ◆ RCRA Parceling
- ◆ Bankruptcy Settlements
- ◆ Federal Enforcement Deferrals



EPA “Brownfield” Sites

- ◆ Brownfield is a site where
 - Expansion, redevelopment or reuse complicated by
 - Presence or potential presence of a hazardous substance, pollutant, or contaminant (e.g. ACM, LBP)
- ◆ Excluded Sites
 - Planned or ongoing removal action under CERCLA
 - Included or proposed to included on NPL



Excluded Sites cont'd

- ◆ Subject to a CERCLA section 106 order, AOC or consent decree
- ◆ Permit under RCRA, CWA, TSCA or SDWA
- ◆ Corrective action under RCRA permit or 3008(h)
- ◆ Subject to RCRA closure
- ◆ Release of PCBs subject to remediation under TSCA



Excluded Sites cont'd

- ◆ Subject to the control of federal government except land held in trust for Indian tribe
- ◆ A response action has been funded from federal LUST Trust Fund



Deferral of NPL Sites

- ◆ EPA may defer listing eligible brownfield site for up to one year if:
 - State or a private party performing cleanup under qualified State Response Program
 - State is actively pursuing VCP agreement with person state believes is capable of conducting response action



NPL Deferral cont'd

- ◆ EPA may decline to defer or discontinue deferral if:
 - State is as an owner, operator or a significant contributor of hazardous substances at the site
 - Determines NCP criteria for issuance of a health advisory exists, or
 - other conditions for deferral are no longer met



Federal Enforcement Bar

- ◆ Applies to statutory and administrative brownfield sites
- ◆ Limited to federal CERCLA actions and not contribution actions
- ◆ Excluded Sites
 - NPL sites or sites proposed for NPL
 - Sites that pose a threat to a sole-source drinking water aquifer or a sensitive ecosystem
 - petroleum-contaminated sites



Enforcement Bar cont'd

- ◆ EPA may bring enforcement action if:
 - State requests EPA assistance
 - EPA determines that contamination has or will migrate across a state line and further response actions are necessary
 - Contamination has or will migrate onto property controlled by the federal government that will impact authorized use
 - imminent and substantial endangerment despite response action
 - New information indicates further remediation is necessary



Enforcement Bar

- ◆ EPA must notify state at least 48 hours before taking action
- ◆ State has 48 hours to notify EPA if action has been taken or is planned
- ◆ EPA may take immediate action if one of the exceptions apply