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## 1.0 Overview of CERCLA and PRP Searches

### 1.1 Overview of CERCLA



The objective of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) (see Chapter 1 References, p. 40) is to reduce or eliminate threats to human health and the environment posed by uncontrolled contaminated sites. To meet this objective, CERCLA created:

- a contaminated site response program; and
- a comprehensive liability scheme that authorizes the government to hold persons who caused or contributed to the release of hazardous substances liable for the cost or performance of cleanups.

In enacting CERCLA, Congress authorized the President or the delegated federal agency to respond to releases or threatened releases of hazardous substances using funds from annual appropriations, which include monies from the revolving trust fund called the Hazardous Substance Superfund (“Superfund,” “Trust Fund,” or “Fund”), supplemented by general revenues.<sup>1</sup>

CERCLA provides the U.S. Environmental Protection Agency (EPA or “the Agency”) with three basic options for cleaning up a hazardous waste site:

- Under CERCLA §§ 104 and 107, EPA can perform a response action at the site using Superfund money and recover response costs from potentially responsible parties (PRPs). A

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<sup>1</sup> The Superfund program is funded through annual appropriations from general revenues and the available balance in the Trust Fund. The Trust Fund balance includes revenues derived from cost recoveries, fines, penalties, and interest. Prior to 1996, it was also funded via a petroleum and chemical feed stocks tax and an environmental income tax, but the authority for levying those taxes expired at the end of 1995.

PRP is a person, including owners, operators, arrangers and transporters, for whom EPA has sufficient information to make a preliminary determination of liability under CERCLA § 107(a).

- Under CERCLA § 106, EPA can order, or ask a court to order, PRPs to clean up the site.
- Under CERCLA § 122, EPA can enter into settlement agreements with PRPs that require them to clean up sites or reimburse the United States for doing so under CERCLA § 107.

### 1.1.1 Overview of the Superfund Cleanup Process



CERCLA § 104(a) authorizes the President to respond to a release or substantial threat of release to the environment of a hazardous substance or a pollutant or contaminant by conducting removal and remedial response actions or requiring responsible parties to conduct them. (These terms are defined below and in Section 1.2.2.) By executive order, EPA and other federal agencies have been delegated authority to undertake these response actions. EPA also has responsibility for overseeing all response actions at sites on the National Priorities List (NPL), a list of the nation's most contaminated sites.

EPA may respond to a release or substantial threat of release into the environment of any hazardous substance. The Agency may also respond to a release or substantial threat of release into the environment of any pollutant or contaminant provided that the release may present an imminent and substantial danger to public health or welfare.

“Removal” is defined in CERCLA § 101(23) as “the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal

of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.” CERCLA § 104(c)(1), however, limits Fund-financed removal actions by both time and cost. Without a case-specific waiver, Trust Fund money may only be used to finance removal actions for up to one year and up to \$2 million. A waiver of the time or cost limits may be issued to abate an emergency or allow removal activity that is consistent with further remedial action at a site. Issuance of such “consistency” waivers requires that a site be proposed for or listed on the NPL.

“Remedial action” is defined in CERCLA § 101(24) as “those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.”

CERCLA § 104 limits the use of Superfund money for remedial actions to sites meeting the following three conditions:

- The site is listed on the NPL.
- The state in which the site is located either contributes or provides financial assurances for 10 percent of any remedial costs incurred by Superfund and all operation and maintenance (O&M).
- The remedial action is not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).

EPA may perform a removal, site investigation (SI), or remedial design (RD), or enforce a remedial action (RA) at a site not listed on the NPL. A site must be listed on the NPL, however, for EPA to

fund a remedial action. Also, if a state or subunit of a state owned or operated the site, the state must contribute at least 50 percent of the response costs incurred. CERCLA § 104(c)(3) exempts tribes from the requirement that states provide assurances regarding future maintenance and cost sharing at remedial action sites. CERCLA § 104(a)(3) limits EPA's authority to respond to a release or threat of release:

- of naturally occurring substances in their naturally occurring and unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;
- from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; or
- into public or private drinking water supply systems due to deterioration of the system through ordinary use.

### 1.1.2 Overview of CERCLA Enforcement



CERCLA § 104(a)(4) gives the President authority to respond notwithstanding the limitations in § 104(a)(3) provided that there is a determination that the release or threat of release is an emergency and no one else has the authority and ability to respond to it in a timely manner.

The NCP is the major regulation implementing CERCLA. (See Chapter 1 References, p. 40.) It establishes the framework for implementing Superfund response actions to address releases or threats of releases of hazardous substances, pollutants, or contaminants. The NCP was revised in 1994 to reflect the oil spill provisions of the Oil Pollution Act of 1990 (OPA) (see Chapter 1 References, p. 40) and is occasionally supplemented with regulations implementing amendments of CERCLA.

EPA has adopted an "enforcement first" policy for removal and remedial actions and remedial investigation/feasibility studies

(RI/FSSs) at CERCLA sites. This means that EPA will first seek to use its enforcement authorities to have PRPs conduct response activity, prior to turn to the use of appropriated Superfund monies. (See Chapter 1 References, p. 40, for policy and guidance on “enforcement first.”)

EPA may seek to obtain PRP participation through settlements, unilateral orders, or litigation. In addition, EPA may take the lead for cleanup activities and seek to recover its costs from PRPs. At 95 percent of non-federal facility Superfund sites where there are known viable, liable parties, the Agency endeavors either to reach a settlement or take an enforcement action before the start of a remedial action.

### 1.1.3 Objectives of the PRP Search

A PRP search seeks to establish evidence of liability by identifying PRPs and associating their waste type and volume with that found at a site. EPA identifies PRPs and collects evidence by collecting site documents, performing title searches, sending CERCLA § 104(e) information request letters, reviewing documents, conducting interviews, and performing research.

The information gathered during a PRP search should enable EPA to assess the nature of the party’s potential liability at the site as a current owner or operator, prior owner or operator at the time of disposal, arranger, or transporter who selected the disposal location as described in Section 1.2.4. The PRP search should gather information about a party’s potential defenses (*e.g.*, third-party defense, divisibility) or exemptions (*e.g.*, municipal solid waste, secured creditor). In addition, EPA should assess whether any of the PRPs may have a limited ability to pay (ATP) or is insolvent or defunct. Finally, the PRP search should assist in the early identification of contributors of relatively small quantities of hazardous substances (*i.e.*, *de minimis* and “*de micromis*” parties) and orphan shares.

One of the primary objectives of the PRP search is to identify the entire universe of PRPs. Thorough PRP searches enhance EPA’s

success in negotiating with PRPs to conduct the response activity under EPA's oversight. In addition, early identification of PRPs enables EPA to issue general notice letters (GNLs) promptly to parties to inform them of their potential liability at a site. These PRPs may then be able to help EPA locate other PRPs to share the cost of the response activity. When PRPs are identified and notified early in the remedial process, there is a greater likelihood that they will decide to undertake appropriate response actions.

Finally, the early identification of PRPs affords EPA the opportunity to settle with small volume contributors promptly, thereby minimizing their transaction costs. For example, CERCLA § 122(g) authorizes de minimis settlements with parties whose contribution is minimal in amount and toxicity if the settlement involves only a minor portion of the response costs. (See "Interim Guidance on the Ability to Pay and De Minimis Revisions to CERCLA § 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act" (May 17, 2004), Chapter 1 References, p. 41.)

## 1.2 CERCLA Liability

The liability scheme is an important component of CERCLA. This section discusses categories of PRPs, defenses to and exemptions from liability, and those circumstances in which EPA may use enforcement discretion in determining liability.

### 1.2.1 Categories of Potentially Responsible Parties

CERCLA § 107(a) imposes liability on four classes of person:

- current owners and operators of a facility;
- former owners and operators of a facility at the time of disposal;
- persons who arranged for treatment or disposal of hazardous substances; and
- transporters of hazardous substances who selected the disposal site.

Any person who falls within the definition of one of these classes may be held liable under CERCLA unless one of the statutory defenses or exemptions to liability applies. (See Sections 1.2.5 and 1.2.6.)



#### Current Owners and Operators of a Facility

CERCLA § 107(a)(1) imposes liability on the current owners and operators of a vessel or facility from which there has been a release of a hazardous substance, even if they did not own or operate the facility at the time of disposal of hazardous substances. The term “owner or operator” is defined in CERCLA § 101(20), and has been interpreted broadly by courts to include almost any person who has an ownership interest in or the ability to manage or control a business. The definition excludes, however, a person who holds indicia of ownership primarily to protect a security interest (e.g., a lender) if the person does not participate in the management of the facility. (See CERCLA § 101(20)(A) and the discussion of secured creditors in Section 1.2.6 for more details.) In addition, current owners who meet the statutory criteria of bona fide prospective purchasers in § 101(40) are not liable as owners or operators under CERCLA. (See CERCLA § 107(r) and Section 1.2.7.)

Courts have imposed owner/operator liability on officers and personnel of both a corporation that operated a facility and its parent corporation. In *United States v. Bestfoods*, 524 U.S. 51 (1998), the Supreme Court set forth the instances in which a parent corporation may incur “direct” liability as a CERCLA § 107(a)(2) operator. In *Bestfoods*, the Supreme Court held that a parent corporation is subject to direct operator liability where it “manage[s], direct[s], or conduct[s] operations specifically related to pollution, that is, operations having to do with leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” Courts have also applied the *Bestfoods* test for direct operator liability to corporate officers and shareholders.



In some instances, federal courts have applied traditional principles of corporate law to “pierce (or lift) the corporate veil” and hold such parties liable indirectly as CERCLA owners. In addition to setting forth the test for “direct” operator liability, *Bestfoods* also addressed conditions under which parent corporations may be “indirectly” liable as CERCLA “owners.” In *Bestfoods*, the Court distinguished indirect liability from direct liability by stating that although a parent corporation cannot be held directly liable as an owner of a polluting facility owned or operated by its subsidiary, the parent corporation’s corporate veil may be pierced – and the parent corporation may be held liable as an owner for the subsidiary corporation’s conduct – upon a finding that the corporate forum has been “misused to accomplish certain wrongful purposes, most notably fraud, on the [parent corporation’s] behalf.” *Bestfoods*, 524 U.S. at 62.

“Piercing (or lifting) of the corporate veil” is “the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for a corporation’s fraudulent or wrongful acts.” Black’s Law Dictionary, 3d Ed. In *Bestfoods*, the Court expressly declined to decide whether courts should apply veil-piercing standards arising from federal or state common law. *Bestfoods* at 63-64. (See Section 3.6.10.C for further discussion of the liability of parent corporations and corporate individuals.)

#### Former Owners and Operators of a Facility

CERCLA § 107(a)(2) imposes liability on any person who owned or operated a facility at the time any hazardous substance was disposed of there. Thus, unlike current owners and operators, a former owner or operator is liable only if disposal of hazardous substances occurred while the person owned or operated the facility. The term “disposal,” however, incorporates the broad definition under Section 3004 of the Resource Conservation and

Recovery Act (RCRA). It has been interpreted by some courts to include releases that occur long after the hazardous substance was initially disposed of at the facility.<sup>2</sup>

For example, if Party A owned the site and disposed of hazardous substances there during ownership and later sold the property to Party B, both parties could be held liable. Party A could be held liable because the disposal took place when it owned the property. Some courts have ruled in similar cases that Party B is liable if, for example, drums or tanks containing hazardous substances leaked at the facility during Party B's ownership even if Party B did not place the drums or tanks on the property and no longer owns the property.



#### Arrangers

CERCLA § 107(a)(3) imposes liability on a person who arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances at any facility owned or operated by another party and containing such hazardous substances. The term “generator” is often used interchangeably with “arranger.” Although it is common for arrangers also to be generators of materials containing hazardous substances, pollutants, or contaminants, the statute does not use the term “generator” and its use may be misleading as the Supreme Court has affirmed that liability is based not on generating such materials

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<sup>2</sup> Liability for “passive migration” is determined by the specific case law of the federal circuit where the site of the release is located, and federal circuits are divided on this issue. See, e.g., *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001) (gradual passive migration through soil which took place when prior owner had property was not a disposal); *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000) (liability for disposal based on passive migration requires human activity); *ABB Industrial Systems Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2nd Cir. 1997); *United States v. CDMG Realty*, 96 F.3d 706 (3rd Cir. 1996); *Joslyn Mfg. Co. v. Koppers Co. Inc.*, 40 F.3d 750 (5th Cir. 1994) (interpreting disposal to require active human conduct); but see also *Nurad, Inc. v. William Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) (upholding CERCLA liability for passive migration).

per se but on arranging for their disposal or treatment. (See discussion of *Burlington Northern & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870 (U.S. 2009) below.)

Arrangers may include corporations that entered into disposal contracts, waste brokers, or corporate officers who are involved in or responsible for disposal activities. A person may be held liable as an arranger even if that person did not select the disposal location. In addition, an arranger's liability may follow its waste from site to site. For example, if an arranger sends its waste to site A and site A's operator sends some of that waste to site B, the arranger may be liable for the cost of cleaning up both site A and site B. To establish arranger liability, EPA must demonstrate that there was a release or threatened release of a hazardous substance from a facility, but does not need to prove that the arranger's actual hazardous substance was released.

An arrangement for disposal or treatment may take a wide variety of forms, including a conventional oral or written contract, a "sham" sale agreement, or a toll-processing agreement where disposal of hazardous substances is inherent in the work to be performed under the agreement.

In *Burlington Northern & Santa Fe Railway Company v. United States*, the Supreme Court recognized that some situations plainly give rise to arranger liability. It said that, on one hand, liability will attach if the "sole purpose" is to discard a used and no longer useful hazardous substance. On the other, it said that there is no liability for merely "selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination."<sup>3</sup>

Specifically, the Supreme Court in *Burlington Northern* found that a party's knowledge of spills *alone* was insufficient to prove that the

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<sup>3</sup> *Burlington Northern & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870, 1878 (2009).

party “planned for” the disposal, “particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product” and the party took numerous steps to reduce the likelihood of spills. The Supreme Court found that to qualify as an arranger the party must have *intended* that “at least a portion of the product be disposed of.”<sup>4</sup>



### Transporters

CERCLA § 107(a)(4) imposes liability on a person who accepts a hazardous substance for transportation to a disposal or treatment facility or site selected by the transporter. The term “transportation” is defined to include the movement of a hazardous substance by any mode, including any stoppage in transit which is temporary and incidental to the transportation movement.

The key factor in establishing transporter liability is that the transporter must have selected the disposal site. Unless EPA can prove that the transporter chose the site, the transporter is not liable under CERCLA § 107(a)(4).

### 1.2.2 *Prima Facie* Case

*Prima facie* is not a CERCLA definition but a legal term meaning “legally sufficient to establish a fact or case unless disproved.” This term is used to describe the basic set of facts that EPA must be able to prove to establish that a person is liable under CERCLA:

- there was a release or threatened release;
- of a hazardous substance;
- from a facility;
- that caused the government to incur response costs; and
- the party is in at least one of the four classes of PRPs described in CERCLA § 107(a).

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<sup>4</sup>*Burlington Northern & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870, 1876 (2009).

There are several key definitions associated with the elements listed above:

- “Person” is defined in CERCLA § 101(21) as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.
- “Release” is defined in CERCLA § 101(22) as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.”
- “Hazardous substance” is defined in CERCLA § 101(14) as any substance EPA has designated under specified provisions of the Clean Air Act, the Clean Water Act (CWA), the Toxic Substances Control Act (TSCA), and RCRA. (See Chapter 1 References, p. 41.) EPA also may designate additional substances as hazardous substances under CERCLA. EPA maintains and updates a list of CERCLA hazardous substances in 40 C.F.R. Part 302. (See Chapter 1 References, p. 41.) The term does not include petroleum, including crude oil, unless it is specifically listed or designated as a hazardous substance under one of those Acts, and does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel.<sup>5</sup>
- “Pollutant or contaminant” is defined in CERCLA § 101(33) as any other substance not on the list of hazardous substances which “will or may reasonably be anticipated to cause” adverse effects in organisms or their offspring.



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<sup>5</sup> CERCLA's petroleum exclusion has been held in the case law to apply to refined and unrefined petroleum products even though some of the indigenous components and additives added during refining are listed hazardous substances. The petroleum exclusion has been held not to apply, however, if (1) the indigenous components are found in amounts in excess of amounts which would have resulted from refining, or (2) the indigenous components are added to the petroleum product during or after use.

- “Facility” is defined in CERCLA § 101(9) as “any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.” The term “facility” has been interpreted to include the site of a hazardous waste disposal operation; ground upon which hazardous substances were deposited; and trucks from which hazardous substances were released into the environment, even though the trucks themselves were not the subject of a removal or remedial action.
- “Response” is defined in CERCLA § 101(25) as “remove, removal, remedy, and remedial action.” Response costs include, but are not limited to:
  - the costs of site investigations;
  - enforcement costs, including PRP search costs;
  - sampling;
  - remedial studies;
  - monitoring and testing (to identify the nature and extent of the release or threatened release, or the extent of the danger to public health, welfare, or the environment);
  - planning and implementation of a response action; and
  - the recovery of costs associated with these actions (including costs incurred by EPA and other entities, such as the Department of Justice (DOJ), Coast Guard, and the states).

- Response costs include direct as well as indirect costs (general EPA operating costs). Costs associated with the oversight of PRP response actions are also recoverable.

CERCLA § 104(a)(1) specifically provides for recovery of oversight costs for PRP-conducted RI/FS work. Response costs do not include civil penalties for violations of statute, but they do include interest on past expenditures.<sup>6</sup> Response costs incurred prior to CERCLA's enactment also may be recovered. Cost recovery actions may be filed at any time after response costs have been incurred; however, they must be initiated within the statute of limitations defined in CERCLA § 113(g)(2) and described in more detail in Section 4.9.

### 1.2.3 Strict Liability

CERCLA § 107(a) imposes strict liability on the four classes of parties described and listed in Section 1.2.1. Strict liability means that PRPs are liable even if:

- the problems caused by the hazardous substance release were unforeseeable;
- the PRP's actions were legal at the time they occurred; and
- state-of-the-art waste management practices were used at the time the materials were disposed of.

### 1.2.4 Joint and Several Liability

In addition, CERCLA liability is usually joint and several. This means that any one PRP can be held liable for the entire cost of site cleanup, regardless of the share of the waste contributed by that PRP. The PRP who pays the costs can then seek to recover costs from the non-paying PRPs. In general, however, EPA attempts to identify and notify the universe of PRPs at a site and negotiate with the largest manageable number of parties.

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<sup>6</sup> Comptroller Policy Announcement 87-17, "Interest Rates for Debts Recoverable Under the Superfund Amendments and Reauthorization Act of 1986," September 30, 1986. (See Appendix A.)

Joint and several liability is based on the legal concept of “indivisible harm.” A PRP may be able to defend against the application of the full extent of joint and several liability in a particular case if it can show that there are distinct harms or there is a reasonable basis for determining the contribution of each cause to a single harm.<sup>7</sup> A common method for attempting to demonstrate distinct harms is based on geographical considerations, for example, where there are separate and distinct plumes of ground water contamination. Methods for attempting to demonstrate a reasonable basis for determining contributions to single harm can be far more complex.

Where successful, this divisibility defense apportions liability to a defendant based on the amount of harm contributed (*e.g.*, if a defendant’s separate plume can be expertly modeled at causing 10% of the harm, the defendant might be found responsible for 10% of the response costs). Not all harms are capable of apportionment, and the burden of demonstrating divisibility is on the defendant.<sup>8</sup> Furthermore, “when two or more causes produce a single, indivisible harm, ‘courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.’”<sup>9</sup>

Where hazardous substances are commingled following disposal at a site, PRPs face a particularly difficult challenge to prove that the harm is divisible. The divisibility defense requires a fact-intensive analysis, and the defendant bears a heavy burden of proof. The defendant must demonstrate that the hazardous substances it sent

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<sup>7</sup> Restatement (Second) of Torts § 881; *Burlington Northern & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870, 1881 (2009), citing *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D.Ohio 1983).

<sup>8</sup> Restatement (Second) of Torts § 433B.

<sup>9</sup> *Burlington Northern*, 129 S.Ct. at 1881, citing Restatement (Second) of Torts § 433A, Comment *i*.



to a site caused an environmental harm divisible from other environmental harm at the site.<sup>10</sup>

Divisibility issues typically are raised by PRPs who bring information to EPA's attention that they wish to be considered in the context of a settlement. EPA carefully reviews the information provided, which will likely include the PRPs' belief regarding the specific contribution of each PRP to the release of hazardous substances that resulted in the contamination at the site or as to why the harm is distinct. A reasonable basis for such determinations should be well documented. (See *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013) and *United States v. Hercules*, 247 F.3d 706 (6th Cir. 2001) for good discussions of the divisibility defense to joint and several liability.)

1.2.5  
Statutory  
Defenses to  
CERCLA Liability

A person identified as a PRP may claim a statutory defense to liability based on CERCLA § 107(b), which provides that a party is not liable if a release was caused solely by:

- an act of God, as defined in CERCLA § 101(1)<sup>11</sup>;
- an act of war<sup>12</sup>; or
- an act or omission of a third party other than an employee or agent of the defendant or one in a contractual relationship with the defendant (commonly referred to as the "third-party" defense).

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<sup>10</sup> See, e.g., *United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001) (holding that the evidence proffered must be "concrete and specific").

<sup>11</sup> See, e.g., *U.S. v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987) (heavy rainfalls are not the kind of exceptional natural phenomena to which the narrow act of God defense applies).

<sup>12</sup> See, e.g., *Cedar & Washington Associates, LLC v. Port Authority of New York & New Jersey, et al.*, 931 F. Supp.2d 496 (S.D. N.Y. 2013) (the owner of the World Trade Center had an act of war defense to CERCLA liability for the 9/11 release of contaminated dust).

### Third-Party Defense

In order to establish a third-party defense under § 107(b)(3), a person has the burden of proving that the act or omission was conducted by someone other than the person claiming the defense and with whom the person has no contractual relationship. In addition, it must be established that the person exercised due care with respect to hazardous substances and took precautions against foreseeable acts or omissions of the third party and any consequences thereof. The defense is not available to a person who has actual knowledge of a release or threatened release while an owner and subsequently transfers the property without disclosing the release or threatened release. In addition, the person may not have caused or contributed to the contamination.

CERCLA § 101(35)(A) defines “contractual relationship” to include land contracts, deeds, or other instruments conveying interests in land. A contractual relationship does not exist – and the defense still applies – if the property was acquired after the disposal or placement of the hazardous substances and one or more of the following circumstances is established:

- The person had no knowledge or reason to know that there was a release of hazardous substances at the property at the time of acquisition and that, prior to acquisition, the person made all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice.
- The person is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain.
- The person acquired the property by inheritance or bequest.

This third-party defense is often referred to as the “innocent landowner” defense.

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 (“Brownfields Amendments”) (see Chapter 1 References, p. 41) clarified the “all appropriate inquiries” into the previous ownership and uses of the property required by the statute. For purchasers of residential property, CERCLA § 101(35)(B) provides that a facility inspection and title search are sufficient. For all other purchasers, the determination is based on the date of purchase. For property purchased prior to May 31, 1997, § 101(35)(B) prescribes a narrative standard directing courts to consider a list of factors, including specialized knowledge of the defendant, the obviousness of the contamination, and the relationship of the purchase price to the value of the property if it were not contaminated. For property purchased on or after May 31, 1997, § 101(35)(B) directs EPA to establish standards and practices for satisfying the all appropriate inquiries requirement. EPA issued a regulation establishing such standards and practices, and subsequently made available a detailed fact sheet on their implementation.<sup>13</sup>

The amendments also require that “innocent landowners” can maintain this defense only by complying with certain continuing obligations. A purchaser must take reasonable steps to stop any continuing release, to prevent any threatened new release, and to prevent or limit any human, environmental, or natural resource exposure to hazardous substances. All innocent landowners must provide cooperation, assistance, and access to persons conducting response actions at the facility, and comply with and maintain land use restrictions and institutional controls.

1.2.6  
Statutory  
Exemptions and  
Protections from  
CERCLA Liability

In addition to the statutory defenses to CERCLA liability, CERCLA provides statutory exemptions and protections from liability for certain parties.

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<sup>13</sup> “Fact Sheet on All Appropriate Inquiries Final Rule,” EPA 560-F-05-240, November 2005. (See Chapter 1 References, p. 41.)

### “De Micromis” Parties

The Brownfields Amendments added CERCLA § 107(o), which provides a qualified statutory exemption from liability for response costs for “de micromis” arrangers and transporters where (1) the total amount of material containing hazardous substances contributed by the party to a site was less than 110 gallons of liquid materials or less than 200 pounds of solid materials, (2) the site is listed on the NPL, and (3) all or part of the party’s disposal, treatment, or transport occurred before April 1, 2001.

The exemption does not apply, however, if the President determines that (1) the person sent materials that contributed or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration; (2) the person has failed to comply with an information request or administrative subpoena; (3) the person has impeded, through action or inaction, a response action or natural resource restoration; or (4) the person has been convicted of a criminal violation for conduct related to the exemption. (See also Section 1.2.7 for discussion of EPA’s enforcement discretion policy toward non-exempt “de micromis” parties.)



### Municipal Solid Waste Exemption

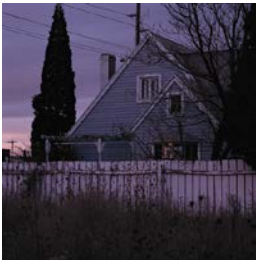
CERCLA § 107(p), also added by the Brownfields Amendments, conditionally exempts three categories of parties from liability for response costs incurred with respect to municipal solid waste (MSW) disposed of at a facility on the NPL:

- an owner, operator, or lessee of residential property;
- a business entity (including a parent, subsidiary, or affiliate of the entity) that, during the three years preceding written notice of its potential liability, employed on average not more than 100 full-time individuals, or the equivalent

thereof, and is a small business concern from which was generated all of the MSW attributable to the entity with respect to the facility; and

- an organization described in § 501(c)(3) of the Internal Revenue Code (IRC) of 1986 (see Chapter 1 References, p. 41) and exempt from tax under IRC § 501(a) that during the tax year preceding written notice of liability employed 100 or fewer paid individuals at the location from which all MSW was generated.

The conditional exemption does not apply to parties liable as owners or operators under CERCLA § 107(a)(1) or (2) or as transporters under CERCLA § 107(a)(4). (See Section 1.2.7 for discussion of EPA's enforcement discretion policies related to MSW.)



#### Contiguous Property Owners

Another liability protection established by the Brownfields Amendments is CERCLA § 107(q), which protects from owner or operator liability persons who own land contaminated solely by a release from contiguous property, or similarly situated property, owned by someone else, if the owner:

- is not a PRP or affiliated with a PRP;
- did not cause, contribute, or consent to the release of hazardous substances; and
- conducts "all appropriate inquiries" prior to purchase and demonstrates that it did not know or have reason to know of contamination. (See Section 1.2.5 for discussion of the "all appropriate inquiries" requirement.)

In order to maintain the liability protection, the owner must:

- take reasonable steps to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to hazardous substance release;
- provide cooperation, assistance, and access;
- comply with and maintain land use restrictions and institutional controls;
- comply with CERCLA information requests and administrative subpoenas; and
- provide legally required notices.

(See “Contiguous Property Owner Guidance Reference Sheet” (February 5, 2004), Chapter 1 References, p. 42 and Section 1.2.7 for discussions of EPA’s enforcement discretion policy toward contiguous property owners.)

#### Bona Fide Prospective Purchasers

The Brownfields Amendments to CERCLA now enable a person to acquire contaminated property without thereby being considered a PRP as the present owner of a Superfund site. By following the statutory requirements of CERCLA § 101(40), such a person now may become a bona fide prospective purchaser (BFPP).

CERCLA § 107(r) protects a BFPP whose potential liability is based solely on the purchaser’s being an owner or operator of a facility so long as the purchaser does not impede the performance of a CERCLA response action. CERCLA § 101(40) defines a BFPP as a person, or tenant of that person, who acquires ownership of a facility after January 11, 2002, and:

- establishes that disposal at the facility occurred prior to acquisition;
- is not a PRP or affiliated with a PRP;
- made all appropriate inquiries into previous ownership and uses of the facility in accordance with generally accepted practices and new standards contained in CERCLA § 101(35)(B);
- takes reasonable steps to stop any continuing releases, prevent any threatened future releases, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance; and
- provides cooperation, assistance, and access, complies with and maintains land use restrictions and institutional controls, complies with information requests and administrative subpoenas, and provides legally required notices.

A critical distinction between the BFPP provision and the innocent landowner and contiguous property owner (CPO) provisions is that the BFPP can purchase with knowledge of the contamination and still have CERCLA liability protection. CERCLA § 107(r) provides, however, that a BFPP may be subject to a “windfall lien” for unrecovered response costs incurred by the United States at a facility where the response action increases the fair market value of the facility. The lien is limited to the lesser of the increase in the fair market value attributable to EPA’s response action or the unrecovered response costs. (See Section 1.2.7 for discussion of EPA’s enforcement discretion policies toward prospective purchasers.)



### Scrap Recyclers

CERCLA § 127 exempts from the arranger and transporter liability provisions of CERCLA certain arrangers and transporters who “arranged for recycling of recyclable materials.” Owners and

operators of sites are ineligible for the exemption, as are arrangers and transporters of non-recyclable materials or arrangers and transporters of recyclable materials that fail to meet the criteria necessary for the exemption.

A PRP's liability should be carefully examined in order to determine the applicability of SREA. If the region determines that a party is a PRP, then the region may evaluate whether the PRP is exempt under SREA. Regions should not presume that a party is eligible for the exemption absent either a demonstration of proof by the party that it was recycling consistent with CERCLA § 127 or other site-specific information that suggests that the party is eligible for the exemption.

Recyclable materials defined under SREA include scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, spent lead-acid batteries, spent nickel-cadmium batteries, and other spent batteries. (See CERCLA § 127 for more detail on SREA.)

#### Secured Creditors

CERCLA § 101(20)(A) and (E) exempt from owner/operator liability any person who, without participating in the management of a facility, holds indicia of ownership primarily to protect the person's security interest in the facility. Holding a security interest means having a legal claim of ownership in order to secure a loan, equipment, or other debt. This exemption protects from CERCLA § 107 owner/operator liability those persons, such as private and governmental lending institutions (*e.g.*, banks) who maintain a right of ownership in, or guarantee loans for, facilities that become contaminated with hazardous substances.



Under CERCLA § 101(20)(F), which was added to CERCLA by amendment in 1996, a lender “participates in management” and will not be protected by the secured creditor exemption if it either:

- exercises decision-making control over environmental compliance related to the facility, such that the lender has undertaken responsibility for hazardous substance handling or disposal practices; or
- exercises control at a level comparable to that of a manager of the facility, such that the lender has assumed or manifested responsibility with respect to (1) day-to-day decision making regarding environmental compliance, or (2) all, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.

The term "participate in management" does not include certain activities, provided those activities do not rise to the level of participation in management as defined in CERCLA § 101(20)(F), such as:

- inspecting the facility;
- requiring a response action or other lawful means to address a release or threatened release;
- conducting a response action under CERCLA § 107(d)(1) or under the direction of an on-scene coordinator (OSC);
- providing financial or advisory support of an effort to prevent or cure default; or
- restructuring or renegotiating the terms of the security interest.

With respect to post-foreclosure activities, a lender that did not participate in management prior to foreclosure, did not contribute to or cause a release, and seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, is not an "owner or operator" if it:

- sells, re-leases (in the case of a lease-finance transaction), or liquidates the facility;
- maintains business activities or winds up operations;
- undertakes a response action under CERCLA § 107(d)(1) or under the direction of an OSC; or
- takes any other measure to preserve, protect, or prepare the facility for sale or disposition.

#### Fiduciaries

CERCLA § 107(n) limits the CERCLA liability of fiduciaries. The term "fiduciary" means a person acting for the benefit of another party as a bona fide trustee, executor, or administrator, among other things. It does not include a person who either:

- acts as a fiduciary with respect to a for-profit trust or other for-profit fiduciary estate, unless the trust or estate was created because of the incapacity of a natural person, or as part of, or to facilitate, an estate plan; or
- acquires ownership or control of a facility for the objective purpose of avoiding liability of that person or another person.

Under CERCLA § 107(n), fiduciary liability under any provision of CERCLA cannot exceed the assets held in the fiduciary capacity. In addition, a fiduciary will not be liable in its personal capacity for certain actions, such as:

- undertaking or requiring another person to undertake any lawful means of addressing a release of a hazardous substance;
- enforcing environmental compliance terms of the fiduciary agreement; or
- administering a facility that was contaminated before the fiduciary relationship began.

The liability limitation described above does not limit the liability of a fiduciary whose negligence causes or contributes to a release or threatened release.



#### Service Station Dealers

Service station dealers may be eligible under CERCLA § 114(c) for an exemption from liability as an arranger or transporter of hazardous substances under CERCLA § 107(a)(3) or (4) if the dealer accepted from the public used oil for recycling which is:

- not mixed with any other hazardous substance; and
- stored, treated, transported or otherwise managed in compliance with regulations or standards promulgated pursuant to Section 3014 of the Solid Waste Disposal Act and other applicable authorities.

The exemption applies only to recycling transactions that occur after the effective date of EPA's "Standards for the Management of Used Oil" (May 3, 1993). (See Chapter 1 References, p. 42.) A service station dealer still may be held liable under CERCLA § 107(a)(1) and (2) as an owner or operator. Moreover, this exemption does not affect potential liability under the underground storage tank program.



## State and Local Governments

CERCLA § 107(d)(2) provides that, except for gross negligence or intentional misconduct, state and local governments are not liable for costs or damages resulting from an emergency response to a hazardous substance release or threatened release. Under CERCLA § 107(d)(1), a person rendering care or assistance in accordance with the NCP, including but not limited to state and local governments, cannot be held liable under CERCLA for costs or damages resulting from such care unless the care or assistance is rendered in a negligent manner. Liability for costs or damages may result from such a person's negligence.

CERCLA § 101(20)(A) exempts from owner/operator liability units of state and local government that "involuntarily" acquire CERCLA facilities, provided they did not cause or contribute to the contamination. Governmental entities may also be protected from liability resulting from involuntary acquisition by the third-party defense of CERCLA § 107(b)(3) as discussed in Section 1.2.5. Examples of involuntary acquisition include those made by a government entity that is:

- acquiring property following abandonment or tax delinquency;
- acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority (such as acquiring the security interests or properties of failed private lending or depository institutions);
- undertaking foreclosure or its equivalent while administering a governmental loan, loan guarantee, or loan insurance program; or
- acting pursuant to seizure or forfeiture authority.

## Federally Permitted Releases

CERCLA § 107(j) excludes from CERCLA liability response costs resulting from a "federally permitted release." CERCLA § 101(10) defines releases that qualify as federally permitted releases (*e.g.*, the discharge of pollutants in compliance with a National Pollutant Discharge Elimination System permit under the CWA). Although it has full authority under CERCLA to respond to federally permitted releases, EPA must pursue recovery of response costs under the statute governing the permit.



## Application of a Registered Pesticide

CERCLA § 107(i) excludes from CERCLA liability response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). (See Chapter 1 References, p. 42.)

### 1.2.7 EPA Enforcement Discretion Policies

The Agency may exercise its discretion in deciding whether to pursue certain parties who fall within a category of liable parties under CERCLA § 107(a). EPA has issued several policies concerning the exercise of its enforcement discretion. Because they are discretionary, these policies are not legally binding on any party, including EPA. When identifying and classifying PRPs at a site, the Agency's discretionary enforcement policies and guidance should be considered.

### "De Micromis" Parties

In November 2002, EPA and DOJ jointly issued "Revised Settlement Policy and Contribution Waiver Language Regarding Exempt "De Micromis" and Non-Exempt "De Micromis" Parties" (November 6, 2002). (See Chapter 1 References, p. 42.) As discussed above, CERCLA § 107(o) provides a statutory exemption for certain "de

micromis” parties. This settlement policy addresses the United States’ position regarding those parties that fall within the statutory definition of “de micromis” (“exempt “de micromis” parties”), and those parties that fall outside the statutory definition, but who may be deserving of similar treatment based on case-specific factors (“non-exempt “de micromis” parties”). As a matter of national policy, EPA intends to use its enforcement discretion, as necessary, to achieve settlements that provide appropriate relief for those non-exempt “de micromis” parties that are being sued in contribution or threatened with a suit by other responsible parties.



### Municipal Solid Waste Exemption

Prior to the Brownfields Amendments, EPA utilized its MSW policies to inform decisions related to MSW parties and owners/operators of co-disposal sites. In 1989, EPA issued the “Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes” (December 6, 1989) (“1989 MSW Policy”). (See Chapter 1 References, p. 42.) The 1989 MSW Policy sets forth the criteria by which EPA generally determines whether to exercise enforcement discretion to pursue MSW arrangers or transporters as PRPs under CERCLA. The 1989 MSW Policy provides that EPA generally will not identify an arranger or transporter of MSW as a PRP unless there is site-specific evidence that the MSW disposed of by that party contained hazardous substances derived from a commercial, institutional, or industrial process or activity. The 1989 MSW Policy also addresses certain provisions that may be appropriate in settlements with municipal owners or operators.

Building on the 1989 MSW Policy, EPA issued the “Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites” (February 5, 1998) (“1998 MSW Policy”). (See Chapter 1 References, p. 42.) The 1998 MSW Policy states that EPA will continue its policy of generally not identifying arrangers and transporters of MSW as PRPs at NPL sites.

In an effort to reduce contribution litigation by third parties, the 1998 MSW Policy also identifies a methodology for settlements with arrangers and transporters of MSW at NPL sites who request a settlement with the United States. Finally, the 1998 MSW Policy identifies a presumptive settlement range for municipal owners and operators of co-disposal sites on the NPL.

After the Brownfields Amendments added CERCLA § 107(p), EPA and DOJ jointly issued the “Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA § 107(p)” (August 20, 2003) (“2003 Interim Guidance”). (See Chapter 1 References, p. 42.) The 2003 Interim Guidance discusses the statutory exemption and identifies some factors to be considered in the exercise of enforcement discretion under the exemption. In addition, the 2003 Interim Guidance provides that the 1989 and 1998 MSW policies remain in effect and should be applied where appropriate.

#### Contiguous Property Owners

In 1995, EPA issued the “Policy Towards Owners of Property Containing Contaminated Aquifers” (May 24, 1995). (See Chapter 1 References, p. 42.) Although the 1995 policy is similar to the exemption in favor of contiguous property owners (CPOs) in CERCLA § 107(q), in some ways the 1995 policy is broader, and may apply to parties that do not qualify for the CERCLA § 107(q) exemption. Under the 1995 policy, where hazardous substances come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources other than the affected property, EPA will not take an enforcement action against the owner of such property to require the performance of response actions or the payment of response costs. The following conditions apply:

- The landowner did not cause, contribute to, or exacerbate the release or threat of release of any hazardous substances through any act or omission. The failure to take affirmative steps to mitigate or address ground water contamination, such as conducting ground water investigations or installing ground water remediation systems, will not, in the absence of exceptional circumstances, constitute an omission by the landowner within the meaning of this condition.
- The person who caused the release is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner. In cases where the landowner acquired the property, directly or indirectly, from a person who caused the original release, application of the policy will require an analysis of whether, at the time the property was acquired, the landowner knew or had reason to know of the disposal of hazardous substances that gave rise to the contamination in the aquifer.
- There is no alternative basis for the landowner's liability for the contaminated aquifer, such as liability as an arranger or transporter under CERCLA § 107(a)(3) or (4), or liability as an owner by reason of the existence of a source of contamination on the landowner's property other than the contamination that migrated in an aquifer from a source outside the property.

#### Bona Fide Prospective Purchasers

Prior to the change in the CERCLA liability scheme discussed in Section 1.2.6, EPA negotiated agreements that provided a covenant not to sue for certain prospective purchasers of contaminated property prior to their acquisition of the property in order to resolve the potential liability due to ownership of such property. These



agreements are known as prospective purchaser agreements (PPAs). As discussed in Section 1.2.6, CERCLA now limits the liability of persons who qualify as BFPPs. EPA guidance describes when, primarily because of significant public benefit, EPA may consider providing a prospective purchaser with a covenant not to sue. (See “Bona Fide Prospective Purchasers and the New Amendments” (May 31, 2002), Chapter 1 References, p. 43.)

On July 16, 2003, EPA and DOJ issued the joint “Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under § 107(r) of CERCLA.” The “windfall lien” policy explains when EPA generally will, and will not, seek compensation for increasing a property's market value through a Superfund response action. Under § 107(r), BFPPs are not liable as owner/operators for CERCLA response costs. While a BFPP may not be liable, the property acquired may be subject to a windfall lien if an EPA response action has increased its fair market value. The interim policy explains that, absent a Superfund response action at a site, the United States has no windfall lien on that property. For properties that have been the subject of an EPA response action, the policy sets forth factors that may lead EPA and DOJ to assert a windfall lien; provides examples of a number of situations where EPA will generally not pursue a windfall lien; describes EPA's and DOJ's general approach to settling windfall liens; and discusses letters and agreements that EPA may provide to prospective purchasers to address any windfall lien concerns. (See Chapter 1 References, p. 43, for the policy, related attachments and frequently asked questions, and “Windfall Lien Administrative Procedures” (January 8, 2008).)

CERCLA § 101(40) defines a BFPP as “a person (or a tenant of a person) that acquires ownership of a facility” after January 11, 2002 and satisfies the other BFPP requirements. In other words, a tenant may derive BFPP status from an owner who satisfies the

BFPP criteria. EPA may exercise its enforcement discretion in favor of tenants who leased contaminated or formerly contaminated property. In such cases, EPA will treat tenants as having acquired ownership if their lease agreements were executed after January 11, 2002 and the tenant meets the BFPP provisions in CERCLA §§ 101(40) and 107(r). The guidance was developed as part of EPA's RE-Powering America's Land Initiative to encourage lessees of contaminated properties to reuse them for renewable energy development, but it applies across all industries. (See "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision" and Model Comfort/Status Letters for Lessees of Renewable Energy Projects (December 5, 2012), Chapter 1 References, p. 43.)

### **Non-Affiliation**

CERCLA imposes a "non-affiliation" requirement on persons seeking protection from liability as BFPPs or CPOs under CERCLA §§ 101(40)(H) or 107(q)(1)(A), respectively. In either case, the person seeking liability protection may not be "affiliated with any other person that is potentially liable" for response costs at the facility through direct or indirect familial relationship; contractual, corporate, or financial relationship; or as the result of reorganization of a potentially responsible business entity. Recognizing the "uncertainty regarding the potential liability of certain parties" under these provisions, EPA issued "Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections" (September 21, 2011) (see Chapter 1 References, p. 43.) for applying the non-affiliation criteria in favor of persons who satisfy the other requirements of the BFPP or CPO provisions except the requirement prohibiting parties from being "affiliated with any other person that is potentially liable."



### Residential Homeowners

In 1991, EPA issued its “Policy Towards Owners of Residential Property at Superfund Sites” (July 3, 1991). (See Chapter 1 References, p. 43.) Under this policy, EPA will not require residential owners of property to undertake response actions or pay response costs unless the residential homeowner’s activities lead to a release or threatened release of hazardous substances resulting in a response action. The policy applies to properties that are owned and used exclusively for single-family residences of one to four units. Furthermore, the owner’s knowledge of the presence of contamination on the property at the time of purchase or sale does not affect this enforcement discretion policy. However, if the residential owner’s activities lead to a release or threatened release resulting in a response action, the enforcement discretion policy will not apply. The policy also does not apply if the owner of the property refuses to provide access to the residential property when requested or interferes with response activities conducted on the residential property.

### Good Samaritans at Orphan Mine Sites

EPA’s Good Samaritan Initiative is an Agency-wide effort to facilitate the cleanup of certain watersheds affected by orphan mine sites by encouraging the efforts of certain non-liable parties (“Good Samaritans”) who are willing to voluntarily clean up some of these sites. Concerns about incurring potential liability under CERCLA and the CWA as a result of performing cleanup work at orphan mines have long discouraged voluntary cleanups at many of these sites. The Good Samaritan Initiative’s principal purpose is to use the federal government’s authority to provide greater legal certainty to Good Samaritans and resolve to the extent possible the threat of potential federal liabilities so that voluntary cleanups at these sites can proceed. (See “Interim Guiding Principles for Good Samaritan Projects at Orphan Mine Sites and Transmittal of CERCLA Administrative Tools for Good Samaritans” (June 6, 2007), Chapter 1 References, p. 43.)

### 1.3 PRP Notification of Potential Liability

When PRPs have been identified, EPA's general policy is to notify them of their potential liability, advise them of the intended response action, and afford them the opportunity to pay for or conduct response actions. Where circumstances require, EPA may issue concurrently to each PRP a notice of potential liability (general notice letter) and/or a notice of opportunity to negotiate to conduct the response action (special notice letter). EPA uses different notice letters for different recipients, each with a different tone as well as content. These include the general notice letter (GNL); special notice letter (SNL) for RI/FS; SNL for remedial design and remedial action (RD/RA), which usually also includes a demand for past costs; notice of decision not to use an SNL; combined GNL/CERCLA § 104(e) letter; and combined GNL/demand letter.

#### 1.3.1 General Notice Letters



A GNL is a notice that informs PRPs of their potential liability for past and future response costs. GNLs generally contain the following information:

- notification of potential liability under CERCLA §§ 106 and 107(a), including notification that:
  - CERCLA § 107 authorizes the Agency to initiate cost recovery actions to recover all costs not inconsistent with the NCP incurred in responding to the release or threatened release of hazardous substances;
  - CERCLA § 106 authorizes the Agency to issue administrative orders or take judicial action compelling the PRP to implement the response selected by EPA to abate an imminent and substantial danger caused by the release or threatened release of hazardous substances; and
  - The Agency encourages PRPs to agree to perform or finance those response activities that EPA determines to be necessary at the site;

- to the extent practical, information that supports the PRP designation, such as the dates of ownership of real site property or the period of time that the company operated the facility;
- information about the general opportunity to discuss any selected response action and opportunities to undertake the selected response action, including;
  - discussion of any planned response measures,
  - the merits of forming a PRP steering committee,
  - the deadline for the PRPs to respond, in writing, indicating their willingness to participate in the response action at the site,
  - the name and phone number of the EPA contact for PRPs or their attorneys,
  - information about development of the AR pursuant to the NCP, and
  - a demand for reimbursement of EPA costs.

GNLs usually encourage PRPs to undertake response actions. Although EPA is not required to do so, providing as much information as possible to PRPs concurrently with the GNL often yields the best results, including identification of additional PRPs, better responses to § 104(e) information requests, and, ultimately, more productive negotiations with PRPs for performance of the work under a settlement agreement.

### 1.3.2 Special Notice Letters



The SNL, authorized under CERCLA § 122(e)(1), is a written notice to PRPs that triggers an enforcement moratorium -- a period in which EPA postpones Fund-lead response actions and withholds any enforcement action in order that EPA and the PRPs may negotiate a settlement concerning response actions at the site. The SNL contains the following:

- information about the Agency's discretionary authority under § 122(e) to formally negotiate the terms of settlements pursuant to special notice procedures if EPA determines that such procedures would facilitate an agreement and would expedite a response action at the site;
- information on the recipient's potential liability;
- conditions of the enforcement moratorium;
- description of a good faith offer;
- description of future response actions, if known;
- statement of work to be performed;
- additional information, including information on other PRPs, site fact sheets, volumetric ranking if available;
- demand for past costs; and
- for RD/RA and non-time-critical removal SNLs, a statement whether the site is eligible for orphan share compensation under the "Orphan Share Policy" (June 3, 1996) (see Chapter 1 References, p. 44) and, if so, the maximum amount appropriate for compensation.

EPA may, in its discretion, choose not to follow special notice procedures. It may instead send a letter to PRPs stating that it is not going to use special notice procedures because, for instance, negotiations are already underway, and outlining EPA's plans for the negotiations. Due to the urgency of emergency and time-critical removals, § 122 does not require EPA to follow special notice procedures when conducting them, but a decision to follow special notice procedures does not preclude EPA from taking emergency or time-critical removal action, if necessary. Although it is common practice to issue SNLs to all PRPs at a site, EPA is not required to do so. If the Agency decides not to issue SNLs to all PRPs, it will send a letter to PRPs whom it is not inviting into negotiations to explain why they are not being included. For procedures applicable to removals, refer to the "Superfund Removal Procedures Removal Enforcement Guidance for On-Scene Coordinators" (April 1992). This volume is one of a ten-volume series of removal guidance documents collectively titled Superfund Removal Procedures. (See Chapter 1 References, p. 44.)

### 1.3.3 Types of Settlements



EPA sets forth settlements in legal documents that describe the requirements of the response action. If the response action is a removal, RI/FS, or RD, EPA usually requests that the PRPs enter into an administrative settlement agreement and order on consent (ASAOC). An ASAOC is a legally binding administrative settlement and order that EPA and the PRPs agree to and sign.

A consent decree (CD) is required for an RA; it is similar to an ASAOC in that negotiations are bilateral. A CD, however, is a judicial action that must be approved by DOJ and a federal judge before it becomes final. It is generally filed in federal court with or shortly after a complaint. Approval by DOJ is also required for an ASAOC under CERCLA § 122(h) if total site response costs exceed \$500,000.

These settlement documents are discussed in more detail in the “Addendum to the Interim CERCLA Settlement Policy.” (See Chapter 1 References, p. 44.)

EPA maintains an online collection of sample notice and demand letters and model settlement documents, including GNLs, SNLs, ASAOs, and CDs, in its Cleanup Enforcement Model Language and Sample Documents database (see Chapter 1 References, p. 44). The database makes sample and model documents available for downloading in Word format and provides links to relevant policy and guidance documents on their appropriate use.

A number of activities take place in preparation for negotiations for removals, RI/FS, and RD/RA, including substantial completion of the PRP search. It is important that sufficient attention be given to the PRP search before these negotiations commence. PRP search activities may be initiated at the preliminary assessment and site investigation (PA/SI) phase of the enforcement timeline.



Chapter 1 References		
Name	Section	Location
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9601 et seq.	1.1	<a href="https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act">https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act</a>
National Oil and Hazardous Substances Pollution Contingency Plan	1.1.1	<a href="https://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol28/pdf/CFR-2011-title40-vol28-part300.pdf">https://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol28/pdf/CFR-2011-title40-vol28-part300.pdf</a>
Oil Pollution Act of 1990	1.1.1	<a href="https://www.epa.gov/laws-regulations/summary-oil-pollution-act">https://www.epa.gov/laws-regulations/summary-oil-pollution-act</a>
Enforcement First for Remedial Action at Superfund Sites (September 20, 2002)	1.1.2	<a href="https://www.epa.gov/enforcement/guidance-enforcement-first-remedial-action-superfund-sites">https://www.epa.gov/enforcement/guidance-enforcement-first-remedial-action-superfund-sites</a>
Enforcement First at Superfund Sites: Negotiation and Enforcement Strategies for Remedial Investigation/Feasibility Studies (RI/FSs) (August 9, 2005)	1.1.2	<a href="https://www.epa.gov/enforcement/guidance-enforcement-first-superfund-sites-negotiation-and-enforcement-strategies-rifs">https://www.epa.gov/enforcement/guidance-enforcement-first-superfund-sites-negotiation-and-enforcement-strategies-rifs</a>
Enforcement First to Ensure Effective Institutional Controls at Superfund Sites (March 17, 2006)	1.1.2	<a href="https://www.epa.gov/enforcement/guidance-enforcement-first-policy-superfund-institutional-controls">https://www.epa.gov/enforcement/guidance-enforcement-first-policy-superfund-institutional-controls</a>
Enforcement First for Removal Actions (August 4, 2011)	1.1.2	<a href="https://www.epa.gov/enforcement/guidance-enforcement-first-removal-actions">https://www.epa.gov/enforcement/guidance-enforcement-first-removal-actions</a>
Promoting Enforcement First for Remedial Investigation/Feasibility Studies at Superfund Sites (March 20, 2012)	1.1.2	<a href="https://www.epa.gov/enforcement/guidance-promoting-enforcement-first-rifs-superfund-sites">https://www.epa.gov/enforcement/guidance-promoting-enforcement-first-rifs-superfund-sites</a>

Chapter 1 References		
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Interim Guidance on the Ability to Pay and De Minimis Revisions to CERCLA § 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act (May 17, 2004)	1.1.3	<a href="https://www.epa.gov/enforcement/guidance-ability-pay-and-de-minimis-revisions-cercla-section-122g-2002-brownfield">https://www.epa.gov/enforcement/guidance-ability-pay-and-de-minimis-revisions-cercla-section-122g-2002-brownfield</a>
Clean Air Act	1.2.2	42 U.S.C. § 7401 et seq. <a href="https://www.epa.gov/laws-regulations/summary-clean-air-act">https://www.epa.gov/laws-regulations/summary-clean-air-act</a>
Clean Water Act	1.2.2	33 U.S.C. § 1251 et seq. <a href="https://www.epa.gov/laws-regulations/summary-clean-water-act">https://www.epa.gov/laws-regulations/summary-clean-water-act</a>
Toxic Substances Control Act	1.2.2	15 U.S.C. § 2601 et seq. <a href="https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act">https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act</a>
Resource Conservation and Recovery Act	1.2.2	42 U.S.C. § 6901 et seq. <a href="https://www.epa.gov/epawaste/index.htm">https://www.epa.gov/epawaste/index.htm</a>
CERCLA Hazardous Substances	1.2.2	40 C.F.R. Part 302 <a href="https://www.epa.gov/laws-regulations/regulations">https://www.epa.gov/laws-regulations/regulations</a>
Small Business Liability Relief and Brownfields Revitalization Act of 2002	1.2.5	<a href="https://www.epa.gov/brownfields/brownfields-laws-and-regulations">https://www.epa.gov/brownfields/brownfields-laws-and-regulations</a>
Standards and Practices for All Appropriate Inquiries, 40 C.F.R. Part 312 (November 1, 2005)	1.2.5	<a href="https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries">https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries</a>
Fact Sheet on All Appropriate Inquiries Final Rule (October 2005)	1.2.5	<a href="https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries-final-rule-october-2005">https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries-final-rule-october-2005</a>
Internal Revenue Code of 1986	1.2.6	26 U.S.C. <a href="http://uscode.house.gov/view.xhtml?path=/prelim@title26&amp;edition=prelim">http://uscode.house.gov/view.xhtml?path=/prelim@title26&amp;edition=prelim</a>

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Contiguous Property Owner Guidance Reference Sheet (February 5, 2004)	1.2.6	<a href="https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-regarding-contiguous-property-owners">https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-regarding-contiguous-property-owners</a>
Superfund Recycling Equity Act (CERCLA § 127)	1.2.6	42 U.S.C. § 9627 <a href="https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act">https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act</a>
Standards for the Management of Used Oil	1.2.6	40 C.F.R. Part 279 <a href="http://www.access.gpo.gov/nara/cfr/waisidx_08/40cfr279_08.html">http://www.access.gpo.gov/nara/cfr/waisidx_08/40cfr279_08.html</a>
Federal Insecticide, Fungicide, and Rodenticide Act	1.2.6	7 U.S.C. § 136 et seq. <a href="https://www.epa.gov/laws-regulations/summary-federal-insecticide-and-rodenticide-act">https://www.epa.gov/laws-regulations/summary-federal-insecticide-and-rodenticide-act</a>
Revised Settlement Policy and Contribution Waiver Language Regarding Exempt “De micromis” and Non-Exempt “De micromis” Parties (November 6, 2002)	1.2.7	<a href="https://www.epa.gov/enforcement/guidance-settlement-policy-contribution-waiver-language-regarding-de-micromis-parties">https://www.epa.gov/enforcement/guidance-settlement-policy-contribution-waiver-language-regarding-de-micromis-parties</a>
Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes (December 6, 1989)	1.2.7	<a href="https://www.epa.gov/enforcement/guidance-interim-municipal-settlement-policy">https://www.epa.gov/enforcement/guidance-interim-municipal-settlement-policy</a>
Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites (February 5, 1998)	1.2.7	<a href="https://www.epa.gov/enforcement/guidance-policy-municipality-and-msw-cercla-settlements-npl-co-disposal-sites">https://www.epa.gov/enforcement/guidance-policy-municipality-and-msw-cercla-settlements-npl-co-disposal-sites</a>
Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA § 107(p) (August 20, 2003)	1.2.7	<a href="https://www.epa.gov/enforcement/guidance-policy-municipality-and-msw-cercla-settlements-npl-co-disposal-sites">https://www.epa.gov/enforcement/guidance-policy-municipality-and-msw-cercla-settlements-npl-co-disposal-sites</a>
Policy Toward Owners of Property Containing Contaminated Aquifers (May 24, 1995)	1.2.7	<a href="https://www.epa.gov/enforcement/guidance-owners-property-containing-contaminated-aquifers">https://www.epa.gov/enforcement/guidance-owners-property-containing-contaminated-aquifers</a>

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Bona Fide Prospective Purchasers and the New Amendments (May 31, 2002)	1.2.7	<a href="https://www.epa.gov/enforcement/guidance-bfpps-and-new-amendments-cercla">https://www.epa.gov/enforcement/guidance-bfpps-and-new-amendments-cercla</a>
Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under § 107(r) of CERCLA (July 16, 2003)	1.2.7	<a href="https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r">https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r</a>
Windfall Lien Administrative Procedures (January 8, 2008)	1.2.7	<a href="https://www.epa.gov/enforcement/guidance-windfall-lien-administrative-procedures-107r-lien-and-model-letter-providing">https://www.epa.gov/enforcement/guidance-windfall-lien-administrative-procedures-107r-lien-and-model-letter-providing</a>
Transmittal of "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision" and Model Comfort/Status Letters for Lessees at Renewable Energy Projects (December 5, 2012)	1.2.7	<a href="https://www.epa.gov/enforcement/guidance-treatment-tenants-under-cerclas-bona-fide-prospective-purchaser-bfpp-provision">https://www.epa.gov/enforcement/guidance-treatment-tenants-under-cerclas-bona-fide-prospective-purchaser-bfpp-provision</a>
Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections (September 21, 2011)	1.2.7	<a href="https://www.epa.gov/enforcement/guidance-affiliation-language-cerclas-bfpp-and-cpo-liability-protections">https://www.epa.gov/enforcement/guidance-affiliation-language-cerclas-bfpp-and-cpo-liability-protections</a>
Policy Towards Owners of Residential Property at Superfund Sites (July 3, 1991)	1.2.7	<a href="https://www.epa.gov/enforcement/guidance-owners-residential-property-superfund-sites">https://www.epa.gov/enforcement/guidance-owners-residential-property-superfund-sites</a>
Interim Guiding Principles for Good Samaritan Projects at Orphan Mine Sites and Transmittal of CERCLA Administrative Tools for Good Samaritans (June 6, 2007)	1.2.7	<a href="https://www.epa.gov/enforcement/interim-guidance-cercla-administrative-tools-good-samaritans-orphan-mine-sites">https://www.epa.gov/enforcement/interim-guidance-cercla-administrative-tools-good-samaritans-orphan-mine-sites</a>

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Orphan Share Policy (June 3, 1996)	1.3.2	<a href="https://www.epa.gov/enforcement/guidance-orphan-share-compensation-rdra-and-non-time-critical-removal-settlers">https://www.epa.gov/enforcement/guidance-orphan-share-compensation-rdra-and-non-time-critical-removal-settlers</a>
Superfund Removal Procedures - Removal Enforcement Guidance for On-Scene Coordinators (April 1992)	1.3.2	<a href="https://ntrl.ntis.gov/NTRL">https://ntrl.ntis.gov/NTRL</a>
Addendum to the Interim CERCLA Settlement Policy Issued on December 5, 1984 (September 30, 1997)	1.3.3	<a href="https://www.epa.gov/enforcement/guidance-cercla-settlement-policy-interim">https://www.epa.gov/enforcement/guidance-cercla-settlement-policy-interim</a>
Cleanup Enforcement Model Language and Sample Documents	1.3.3	<a href="https://cfpub.epa.gov/compliance/models">https://cfpub.epa.gov/compliance/models</a>