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IN FOCUS

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Liability Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. §§ 9601 *et seq.*) establishes a framework to remediate certain types of contaminated sites and to hold the parties connected to those sites responsible for cleanup costs. CERCLA authorizes the U.S. Environmental Protection Agency (EPA) to clean up contaminated sites subject to annual appropriations, and to compel entities that bear responsibility for all or part of the contamination at a site to perform or pay for cleanup activities. Additionally, parties that incur cleanup costs may seek to recoup those costs from other parties or from the Superfund Trust Fund. This In Focus provides an overview of the legal structures governing CERCLA liability in enforcement actions and suits by private parties.

Response Actions

Section 104(a) of CERCLA authorizes the President to respond to a release (or substantial threat of a release) of a hazardous substance into the environment, or of a pollutant or contaminant that may present an "imminent and substantial danger to the public health or welfare." The President has delegated CERCLA's response authority to EPA and other agencies that administer federal facilities. The definitions in Section 101 of "release," "hazardous substance," and "pollutant or contaminant"—and, by extension, EPA's response authority and the parties' liability—exclude multiple types of releases and substances, including petroleum and natural gas.

CERCLA response actions fall into two categories for the purposes of cleanup. Removal actions are generally shorter-term actions taken to address immediate risks. Remedial actions are generally longer-term actions to address contamination more permanently, but may involve long-term containment of wastes in place.

Who Is Liable Under CERCLA

Although EPA cleans up some sites itself, it may also compel "potentially responsible parties" (PRPs) to perform or pay for the cleanup. Private parties and federal, state, and local governmental entities can be liable as PRPs. Section 107 of CERCLA establishes financial liability for four categories of PRPs:

- any current owner or operator of a vessel or facility;
- any person who owned or operated a facility at the time hazardous substances were disposed of there;
- any person who arranged for the disposal or treatment of hazardous substances at a facility or incineration vessel, or who arranged for transport for disposal or treatment of hazardous substances; and
- any person who transported hazardous substances for disposal or treatment at facilities, incineration vessels, or sites selected by such person.

Scope of Liability

PRPs in the listed categories are liable if there has been (1) an actual or threatened release (2) of a hazardous substance (not a pollutant or contaminant) that (3) causes the incurrence of response costs. Liability is retroactive (parties may be liable for the release of hazardous substances prior to CERCLA's enactment in 1980), strict (regardless of a party's negligence), and joint and several (a party may be liable for all cleanup costs at a site, even if other parties also contributed to the contamination).

PRPs in the listed categories are also liable for injury to natural resources, meaning that they must either restore natural resources that are injured as a result of a release, or pay compensation for restoring or replacing the injured or lost natural resources. Unlike claims for cleanup costs, claims for natural resource damages may be brought only by federal, state, or tribal trustees. Finally, PRPs may be liable for the cost of natural resource damage assessments and federal public health studies at release sites conducted under Section 104(i).

The scope of liability does not include product liability, liability for personal injury or property damages, or health effects or medical costs resulting from a release.

Federal Enforcement Mechanisms

CERCLA establishes three mechanisms that EPA may use to enforce liability under the statute. It also authorizes fines and punitive damages for noncompliance.

Section 106 Orders

Section 106(a) authorizes EPA to issue a unilateral administrative or judicial order requiring a PRP to take actions to address "imminent and substantial endangerment to the public health or welfare or the environment" resulting from a release or threatened release of a hazardous substance. If a party complies with an order and can establish that it is not liable under CERCLA or that the required cleanup actions were arbitrary and capricious, it may seek reimbursement from the Superfund Trust Fund. (Alternatively, a liable party may seek to recover response costs from other PRPs, as explained below.)

Cost Recovery Actions

When the United States, states, or tribes perform cleanup work and incur costs, Section 107(a) authorizes them to recover those costs from PRPs. EPA typically pursues cost recovery after a removal action or one of its phases is completed. Cleanup actions must be "not inconsistent" with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) for the costs to be recoverable by the United States, states, or tribes. EPA's policy is to send a written demand letter to a PRP before seeking cost recovery in court, and negotiations regarding a PRP's liability may sometimes result in a settlement agreement.

Settlement Agreements

Before employing either of these two enforcement mechanisms, EPA's policy is to seek to resolve liability through voluntary settlement agreements. All settlement agreements under CERCLA must be in the public interest and consistent with the NCP. For short-term removal actions and the planning stages of a remedial action, EPA primarily uses administrative settlement agreements and consent orders. For remedial actions and recovery of cleanup costs, EPA ordinarily uses consent decrees, which must be approved by a federal district court and are subject to an opportunity for public comment prior to entry.

Under Section 122, voluntary settlement agreements may include a covenant not to sue, which limits a PRP's future liability to the United States related to the release or threatened release. Additionally, parties to voluntary settlement agreements receive protection from other types of CERCLA lawsuits, as described below. A settlement does not preclude EPA from taking action under Sections 106 or 107 with respect to other PRPs.

Suits by Private Parties

CERCLA allows private parties to recoup their cleanup costs from other PRPs. When a private party incurs costs, it may sue under CERCLA Section 107(a) to recover from another PRP *all* costs that are necessary and incurred consistent with the NCP. When a private party is sued under Section 106 or Section 107(a) or has resolved its liability to the government for some or all of a response action, it may then assert a claim or counterclaim under Section 113(f) to require other PRPs to bear an *equitable share* of the response costs.

Section 113(f) also protects a party that has resolved its liability to the United States or a state in a settlement. Such a party cannot be held liable for contribution claims by other PRPs regarding matters addressed in that settlement, but the party may sue other PRPs to obtain an equitable allocation of costs.

An equitable allocation under Section 113(f) is based upon factors that a court determines are appropriate. The most commonly considered factors relate to the degree to which the contamination and cleanup costs are attributable to each party's actions, the nature and amount of the hazardous substance(s) involved, the extent of each party's culpability, and the degree to which each party benefitted from the disposal.

Cost recovery and contribution actions are mutually exclusive. If a party *may* bring a contribution action, it *must* proceed under Section 113(f), and cannot bring a cost recovery action under Section 107(a). Taken together, these two provisions work in tandem to encourage parties to bring all PRPs into an action so that an equitable allocation of response costs can be reached.

Finally, Section 310 provides a right of action for citizens to challenge the adequacy of a CERCLA cleanup. Section 113(h) limits the filing of a citizen suit until after a cleanup is completed, and persons may not challenge a removal action at a site where a remedial action is planned.

Defenses to and Limitations on Liability

Section 107(b) of CERCLA provides defenses to liability where an otherwise liable party can establish that a release or threat of release and resulting damages were caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party with whom the defendant has no contractual relationship, where the defendant exercised due care and took precautions against the third party's foreseeable acts or omissions and their consequences; or (4) any combination of the three circumstances listed above.

The statute also provides exemptions and protections for other categories of parties who meet certain criteria, including municipal solid waste generators, recyclers, service station dealers, cleanup contractors, landowners or purchasers, lenders and fiduciaries, and parties that are not responsible for contamination but volunteer to help with cleanup. Additionally, parties that can establish a limited ability to pay or whose contributions to contamination are relatively minimal may face reduced financial liability.

State and local governments are not liable (absent gross negligence or intentional misconduct) for costs resulting from an emergency response to a release or threatened release. Under certain circumstances, they may not be liable for preexisting contamination on properties they have acquired.

The statute of limitations provides another defense. Cost-recovery actions under Section 107(a) generally must be brought within three years after completion of a short-term removal action, or six years after the initiation of a remedial action. For contribution actions under Section 113(f), the statute of limitations period is three years from the date of judgment or entry of an administrative order or judicially approved settlement regarding the costs. Additionally, the retroactive liability for natural resource damages extends only to the date of CERCLA's 1980 enactment.

For more information on CERCLA, see CRS Report R41039, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act*, by David M. Bearden.

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