United States Environmental Protection Agency

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Facilities

CERLA as amended by the Superfund Amendments and Reauthorization Act (SARA)

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Summary

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, authorizes the President to respond to releases or threatened releases of hazardous substances into the environment. CERCLA authorities complement those of the Resource Conservation and Recovery Act, which primarily regulates ongoing hazardous waste handling and disposal.

Basics of CERCLA

In 1980, Congress enacted CERCLA, and amended it in 1986. CERCLA's major emphasis is on the cleanup of inactive hazardous waste sites and the liability for cleanup costs on arrangers and transporters of hazardous substances and on current and former owners of facilities where hazardous substances were disposed. CERCLA gives the President authority to clean up these sites under requirements generically referred to as "removal" or "remedial" provisions. The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) outlines CERCLA's implementing regulations. Agencies must follow the procedures and standards detailed in the NCP when remediating these sites.

CERCLA identifies the classes of parties liable under CERCLA for the cost of responding to releases of hazardous substances. In addition, CERCLA contains provisions specifying when Federal installations must report releases of hazardous substances and the cleanup procedures they must

follow. Executive Order No. 12580, Superfund Implementation, delegates response authorities to EPA and the Coast Guard. Generally, the head of the Federal agency has the delegated authority to address releases at Federal facilities in its jurisdiction. In addition, E.O. 12580 requires Federal agencies to assume certain duties, such as participating on national/regional response teams.

In 1996, E.O. 13016 amended E.O. 12580; this amendment delegated certain CERCLA abatement and settlement authorities to other Federal agencies. The statute can be found at 42 U.S.C. § 9601 et seq. The NCP addressing environmental cleanup and response are in 40 CFR Parts 300-311, 355, and 373. CERCLA's primary emphasis is the cleanup of hazardous substances releases. The major provisions of CERCLA response authority are under two general authorities:

- Enforcement
- Hazardous Substance Superfund (hereinafter known as, "Superfund" or "Fund").

Response Authorities

There are two basic ways to respond to a release: by a removal or a remedial action.

- CERCLA § 101(23), "removal" is defined to include a broad range of actions
- CERCLA § 101(24), "remedial" means actions consistent with permanent remedy taken instead of, or in addition to, removal actions.

Enforcement

EPA has three basic options under CERCLA when confronting a situation requiring a response. EPA

1. may conduct the response itself and seek to recover its costs from the Potentially Responsible Parties (PRPs) in a subsequent cost-recovery action;
2. can compel PRPs to perform the cleanup themselves through either administrative or judicial proceedings; or
3. can enter into a settlement with PRPs to perform all or portions of the work.

The following illustrates the central elements of CERCLA's enforcement scheme:

- Authority to permit government and private entities to recover their response costs.
- Authority to permit EPA to seek the following:
    - A judicial order requiring a PRP to abate an endangerment to public health, public welfare, or the environment
    - Administrative actions compelling private parties to undertake actions necessary to abate endangerments
    - Negotiated settlements with private parties to undertake actions necessary to abate endangerments

There also are authorities allowing private parties and States to bring "citizens suits" to enforce CERCLA's provisions and for natural resource trustees to bring actions for damages to natural resources.

Trust Fund

Another general area of CERCLA authority concerns the Hazardous Substance Superfund (the "Fund" or "Superfund"), which provides financing for cleanup and enforcement actions (including oversight). Although the goal is to have polluters pay all these expenses, EPA often must use Fund monies to clean up sites where there are no PRPs or to respond expeditiously to a release. The intention is to recover these expenditures later through cost-recovery actions. In addition, the Fund provides up-front funding to EPA, and in certain specified situations funds to reimburse private party expenses.

Application of CERCLA to Federal Facilities

CERCLA § 120 discusses CERCLA's applicability to Federally-owned or Federally-operated facilities. Section 120 states the general principle that Federal agencies must comply with substantive and procedural CERCLA requirements to the same extent as private entities and are subject to § 107 liability. These requirements are extensive, but the following sequence of events generally applies to all sites, both privately and Federally-owned or operated:

- Preliminary assessment
- Site investigation
- Listing on the National Priorities List (NPL)
- Remedial investigation
- Feasibility study
- Record of decision
- Remedial design
- Remedial action
- Long-term operation
- Maintenance

Another important CERCLA requirement is that a remedy selected at a Federal facility, as with private sites, must meet CERCLA's cleanup standards, including compliance with Federal and State Applicable or Relevant and Appropriate Requirements (ARARs), which is one of the nine remedy selection criteria required by the NCP.

In addition to making Federal facilities subject to the same CERCLA mandates that apply to private parties, CERCLA § 120 imposes additional requirements on Federal facilities. CERCLA also contains a waiver of sovereign immunity to permit individuals and States to bring "citizens suits" if an agency is not adhering to a CERCLA mandate.

Statutory authorities and requirements that relate to Federal facilities

The headings for this summary of §120 do not strictly follow the subtitles found in the statute.

§ 120(a): General Application of CERCLA Authority to the Federal Government

With certain exceptions specified in § 120(a), each Federal agency shall be subject to CERCLA to the same extent as a private entity, including liability. Subject to the exceptions specified in § 120(a)(3),

such as bonding, insurance or financial responsibility, Federal agencies shall comply with all guidelines, rules, regulations, and criteria related to removal and remedial actions and shall not adopt guidelines inconsistent with those established by the EPA Administrator. When a Federal facility is not on the NPL, State laws concerning removal and remedial actions, including State laws regarding enforcement, apply to Federal facility actions as long as the State law is not more stringent for Federal facilities than for private facilities.

§ 120(b): Notice of Contamination That Affects Adjacent Property

Each Federal agency shall add to the Solid Waste Disposal Act § 3016(a) (3) inventory information on Federal facility contamination that affects contiguous or adjacent property. Information added to the inventory shall include a description of the monitoring data obtained.

§ 120(c): Federal Agency Hazardous Waste Compliance Docket

EPA shall establish a docket listing facilities that manage hazardous wastes or have potential hazardous waste problems. Also, EPA shall publish in the Federal Register (FR) a list of Federal facilities that have been added to the docket since EPA last published the list.

§ 120(d): Assessment and Evaluation of Federal Facilities on the Docket

EPA shall take steps to assure that for each Federal Facility on the docket, the associated Federal agency will conduct a Preliminary Assessment (PA). Executive Order 12580 delegates the authority to carry out PAs to Executive Branch agencies for facilities under their jurisdiction, custody, or control. EPA believes that 18 months normally should be enough time to complete the PA. After the PA, the Federal agency may, if warranted, perform a Site Investigation (SI) to gather sampling data. Following the PA and SI, EPA, where appropriate, shall evaluate facilities for inclusion on the NPL. In determining what sites will be placed on the NPL, EPA shall use the same criteria used for private sites. EPA also may consider whether the facility has an arrangement with EPA or the state to clean up the facility under a non-CERCLA authority. In some circumstances, NPL-caliber sites are not listed on the NPL but are instead addressed through Other Cleanup Activities such as state-lead cleanups or federal facility-lead cleanups.

EPA shall evaluate any facility on the docket that is the subject of a petition from the Governor of a State (Read more: The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing and Deletion Policy for Federal Facilities)

§ 120(e): Steps Required for Remedial Actions at Federal Facilities Listed on the NPL

Within 6 months of inclusion on the NPL the Federal agency must commence a Remedial Investigation/ Feasibility Study (RI/FS) to determine the nature and extent of contamination. Within 180 days after review of the RI/FS, the agency head shall enter into an interagency agreement (IAG) with EPA that includes a review of alternative remedial actions and selection of the remedial action by head of the relevant department and EPA. However, if the Administrator is unable to reach an

agreement, the agency head shall schedule the expeditious completion of all necessary remedial actions at the Federal facility and arrangements for long-term operation and maintenance.

All IAGs shall comply with the public participation requirements of CERCLA § 117. If EPA determines, in consultation with the head of the affected agency, that an RI/FS or remedial action will be done properly and in a timely manner by a PRP other than the Federal agency, EPA may enter into a settlement agreement with that PRP under CERCLA § 122 (relating to settlements).

§ 120(f): State and Local Participation

EPA and each agency, department, and instrumentality shall provide State and local officials with an opportunity to participate in the planning and selection of a remedial action. State and local participation shall include review of applicable data as it becomes available and the development of studies, reports, and action plans.

§120(g): Transfer of EPA's Authority to Federal Agencies

Except for authorities delegated by the EPA Administrator to an officer or employee of EPA, authorities vested in EPA by § 120 cannot be transferred to other U.S. officials or to any other person.

§ 120(h): Property Transferred by Federal Agencies

Under CERCLA § 120(h)(1), any contract for the sale or other transfer (e.g., leases) of property owned by the United States on which any hazardous substance was stored for 1 year or more, known to have been released, or disposed of, shall include a notice of the type and quantity of any hazardous substances on the property and notice of the time at which hazardous substances were stored, released, or disposed on the property.

Under CERCLA §120(h)(3), deeds that transfer U.S. property to another person or entity must include the following:

- A notice of the type and quantity of such hazardous substances
- Notice of the time at which such storage, release or disposal took place
- A description of any remedial action taken
- A covenant warranting that all remedial action necessary to protect human health and the environment with respect to hazardous substances remaining on the property has been taken prior to the date of transfer and any additional remedial action found to be necessary after the date of transfer shall be conducted by the United States. Under § 120(h)(3), a remedial action "has been taken" when the construction and installation of an approved remedial design has been completed, and the remedy has been demonstrated to EPA to be operating properly and successfully. Thus, long-term pumping or treating, or operation and maintenance after a remedy has been demonstrated to be operating properly and successfully, do not preclude the transfer of such property
- A clause granting the United States access to the property in the event that any additional remedial or corrective action is found to be necessary after the date of transfer

The covenant described above shall not be required if the Federal agency is transferring the property to another potentially responsible person (PRP) with respect to such property.

Under certain circumstances, conveying the deed of a contaminated property may take place before completion of remedial actions. CERCLA § 120(h)(3)(C) sets forth the conditions under which the EPA Administrator (with the concurrence of the Governor for property on the NPL) or the Governor (for property not on the NPL) may defer the requirement of providing a covenant that all necessary remedial action has been taken prior to the date of transfer. In such cases, once the United States has completed all remedial action, it must issue a warranty that satisfies that covenant requirement. A transferee of property conveyed under § 120(h)(3)(C) also receives assurances at the time of transfer that all necessary remedial action will be taken in the future.

CERCLA § 120(h)(4) requires that for any property on which Federal operations will be terminated and at bases that are closing or realigning, the Federal agency shall:

- Conduct an investigation to identify property on which there were no known releases or disposal of hazardous substances, petroleum products, or their derivatives.
- Obtain the concurrence of EPA (for property at NPL sites) or the State (for non-NPL sites) that such property is uncontaminated.
- Enter a covenant requiring the United States to conduct any response action or corrective action that may be required on the property subsequent to the sale or transfer
- Retain access rights to the property for purposes of conducting required response action or corrective action.

The purpose of the investigation is to determine or discover the presence or likely presence of hazardous substances or petroleum products or their derivatives. At a minimum, it must include:

- Detailed search of Federal government records
- Examination of recorded chain-of-title documents
- Review of aerial photographs
- Visual inspection of the property and of adjacent property
- Physical inspection of adjacent property
- Review of Federal, State, and local government records on adjacent facilities where there has been a release
- Interviews with current or former employees
- Sampling, when appropriate

The Federal agency must immediately provide the results of the investigation to EPA, State, and local government officials. The Federal agency also must make the results available to the public. The investigation is not complete until the Federal agency obtains appropriate regulatory concurrence.

Under CERCLA § 120(h)(5), The Federal agency must provide notice of the lease to the state in which the property is located under the following conditions:

- Property where hazardous substances or petroleum products or their derivatives have been stored for 1 year or more
- Known to have been released or disposed of, and on which the Federal government plans to terminate operations

- Enter into a lease that will encumber the property beyond the date of termination of operations

It is important to note that the covenant requirements of § 120(h)(3)(A)(ii) do not apply to transfers by lease.

In § 330 of the National Defense Authorization Act of FY 1993, Congress provided that the Secretary of Defense shall hold harmless and indemnify persons from any claim for personal injury or property damage resulting from the following:

- Ownership or control of any facility at a military installation that is closing pursuant to a base closure law
- Release or threatened release of hazardous substances as a result of Department of Defense (DoD) activities

In addition, § 1002 of the National Defense Authorization Act of FY 1994 expanded this provision by including releases of petroleum within the indemnification.

§ 111(e)(3): Uses of the Fund for Federal Facilities

No money in the Superfund shall be available for remedial actions at Federal facilities with limited exceptions.

One exception is that Fund monies are available to provide alternative water supplies in any case involving groundwater contamination outside the boundaries of a Federal facility where the Federal facility is not the sole PRP.

CERCLA also allows the Fund to be used to finance Federal facility oversight and removal actions (including general investigation and enforcement) that may affect Federal facilities and other Superfund sites. However, Section 9(i) of E.O. 12580 requires Federal facilities to reimburse the Fund for removals at that facility.

§ 107: Natural Resources Damages

CERCLA and E.O. 12580 (as amended by E.O. 13016), give Federal agencies significant authority over natural resources. CERCLA § 107(a)(4)(C) provides liability for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." The NCP designates as natural resource trustees the Secretaries of the Departments of Commerce, Interior, Agriculture, Defense, and Energy and any other Federal Land Managing Agency. Additionally, the States, and Tribal chairpersons may be natural resource trustees. (Read more: Frequently Asked Questions on Natural Resources Damages)

§ 106: Order Authority for Natural Resource Damages, etc.

Under E.O. 12580, as amended by E.O. 13016, delegates to the Secretaries of Interior, Agriculture, Commerce, Defense and Energy the authority to issue unilateral administrative cleanup orders under CERCLA § 106. Under the amended Executive Order, where a release or threatened release may

present an imminent and substantial threat to public health or welfare or the environment affecting natural resources under their trusteeship or a facility/vessel under their jurisdiction, custody or control, the applicable Secretary has the authority under § 106 to issue administrative orders to seek relief. However, E.O. 12580 requires the Departments to obtain EPA or Coast Guard concurrence before each exercise of § 106 authority.

EPA Enforcement

EPA's primary enforcement authorities are set forth in §§ 104 and 106 of CERCLA. CERCLA § 104 authorizes EPA to collect information from, and obtain access to, Federal facilities. Such authority includes the issuance of orders compelling access and information. CERCLA §106 authorizes EPA to issue administrative orders and enter settlements for abatement actions. However, EPA abatement, access, or information gathering orders issued to Executive agencies require the concurrence of the U.S. Attorney General due to E.O. No. 12580.

In addition to EPA's § 104 order authority, with respect to a vessel or facility subject to their custody, jurisdiction, or control, Executive Branch agencies may issue § 104(e)(5)(A) orders regarding information gathering or access with the concurrence of the Attorney General. States, Tribes, and citizens also can enforce CERCLA provisions as discussed below in Sections d, e, and f.

Interagency Agreement/Criminal Sanctions

CERCLA § 120 requires EPA to enter an interagency agreement with Federal agencies to ensure protective and timely cleanups under CERCLA at NPL Federal facility sites. An interagency agreement provides the technical, legal, and management necessary for a Federal facility to respond to an inquiry. In particular, an interagency agreement specifies milestones for the Federal facility to complete remedial activities, stipulates penalties for missing milestones, and includes arrangements for long-term operation and maintenance at the facility.

Regarding criminal authority, individual employees of Federal agencies who commit criminal violations of CERLA may be subject to sanctions. Criminal fines may be imposed either under CERCLA § 103 or 18 U.S.C. § 3571, the Alternative Fines Act. Enforcement of criminal violations is authorized under CERCLA § 103 for knowing violations and the falsification or destruction of records.

- **§ 103(b)(3)** - Any person who fails to notify the appropriate agency of the U.S. government immediately of a hazardous substance release is subject to a fine in accordance with the applicable provisions of Title 18 of the United States Code (U.S.C.) or imprisoned for not more than 3 years, or both. The conditions under which this applies would be a hazardous substance release that exceeds a reportable quantity or any person who submits in such notification any information that the person knows to be false or misleading.
- **§ 103(c)** - Any person who knowingly fails to notify the EPA Administrator of the existence of a hazardous substance treatment, storage, and disposal facility that does not have either a RCRA permit or RCRA interim status shall be fined not more than $10,000 and/or imprisoned for not more than 1 year.

- **§ 103(d)(2)** - Any person who knowingly destroys, mutilates, erases, conceals, or falsifies records shall be fined in accordance with the applicable provisions of Title 18 of the U.S.C. or imprisoned for not more than 3 years (or not more than 5 years in the case of a conviction), or both.

Emergency Authority

Other than EPA, only the Coast Guard and the Departments of Defense and Energy possess emergency response authority under CERCLA. Therefore, EPA and these agencies may, perform response actions when there is an emergency.

State Enforcement

States may file a citizen suit against a Federal agency to enforce IAGs under CERCLA § 310.

Tribal Enforcement

Section 126 of CERCLA requires that EPA afford Indian Tribes substantially the same treatment as a State with respect to certain provisions of CERCLA.

Citizen Enforcement

CERCLA § 310(a) allows citizens to file a civil action (civil suit) against any person, including a Federal agency, that is alleged to be in violation of any CERCLA standard, regulation, condition, requirement, order, or IAG. In addition, CERCLA § 310(a) allows citizens to file a civil action against the President or any other officer of the United States (including the EPA Administrator and the Administrator of the Agency for Toxic Substances and Disease Registry) for alleged failure to perform any non-discretionary act or duty.

CERCLA § 310(d) excludes citizens from filing a civil action if the President has commenced and is diligently prosecuting an action under CERCLA or the Resource Conservation and Recovery Act to require compliance with a standard, regulation, condition, requirement, order, or IAG. In addition, CERCLA § 310(d) precludes citizens from filing a suit until notification is given to the President, the State in which the alleged violation occurred, and the facility alleged to be in violation of a standard, regulation, condition, requirement, order, or IAG. Additional conditions and requirements pertaining to citizen suits are set forth in CERCLA § 310(a) through (i).

EPA CERCLA Regulations

CERCLA's implementing regulations are found in the National Contingency Plan (NCP).

EPA CERCLA Policies and Guidance

- Base Closures
- Munitions / Unexploded Ordnance
- Contaminants of Concern at Federal Facilities
- Uniform Federal Policy for Quality Assurance Project Plans - Training Materials

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