



# SIDLEY

ELI Bootcamp  
November 16, 2023

## CERCLA Part I – Background, Key Concepts, Cleanup

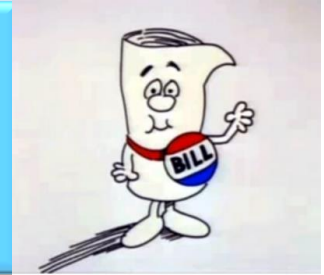
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# Agenda

- CERCLA History
- CERCLA Key Concepts
- CERCLA Cleanup Process
- Other CERCLA Matters

# Key Takeaways from Part I

CERCLA is not a regulatory program; it is a remedial statute



CERCLA is process heavy; there's guidance for everything



CERCLA is the forever statute; there's no real escape







# CERCLA HISTORY

# Passage of CERCLA in 1980

- Several years in the making, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act – CERCLA – in late 1980
- The moniker “Superfund” refers to the literal superfund of money established by appropriations, cost recovery actions, and a tax on industry – the Hazardous Substance Response Trust Fund
- Passage of CERCLA followed on the heels of other major statutes or amendments in the 1970’s, including the Clean Water Act, the Toxic Substances Control Act, the Resource Conservation and Recover Act, and the Clean Air Act
- Passage of CERCLA was spurred by several high profile matters, including Love Canal and others

1978

## State of Emergency at Niagara Falls, New York



President Carter declares a State of Emergency at Niagara Falls, New York, after a startling increase in skin rashes, miscarriages, and birth defects. Love Canal heightens public awareness

of the grave and imminent perils of unregulated hazardous waste dumping in communities.

<https://www.epa.gov/superfund/superfund-history>

1980

## Toxic waste bursts into flames at a waste storage facility in Elizabeth, New Jersey



Toxic waste bursts into flames at a waste storage facility in Elizabeth, New Jersey, sending a thick black plume of smoke and ash over a 15-mile area and raising fears of widespread chemical

contamination. The fire burns for 10 hours as State officials issue an environmental advisory closing schools and urging residents to close all doors and windows and remain indoors.

# CERCLA Amendments

- CERCLA has been amended many times, and even more attempts have been made; the most significant amendments have been:
  - 1986 – Superfund Amendments and Reauthorization Act (SARA)
    - Added the federal government as potentially liable party
    - Reinforced the joint and several liability
    - Added various response and enforcement provisions
    - Renewed authorization for appropriations for the Superfund
  - 1990 – extended authorization for appropriations
  - 1992 – addressed transfers of federal property
  - 1996 – added protections for financial institutions and fiduciaries
  - 1997 – addressed transfers of federal property again
  - 1999 – added some protections for scrap recyclers
  - 2002 – added innocent landowner, prospective purchaser, and brownfield provisions
  - 2018 – changes to brownfield elements and defenses
  - 2022 – Superfund tax reinstated





# CERCLA KEY CONCEPTS

# Key CERCLA Concepts

- **Unlike the CWA, TSCA, RCRA, and the CAA, CERCLA is not a regulatory statute per se**
  - It (largely) does not proscribe what can and cannot be done by the regulated community
  - It does not create a permitting regime
  - Rather, it is a remedial statute based on the “polluter pays” concept wherein liability is typically **strict, joint and several, and retroactive**.
  - It provides the framework for when cleanup is required – Section 104(a)

Whenever a hazardous substance...

Is released or there is a substantial threat of a release...

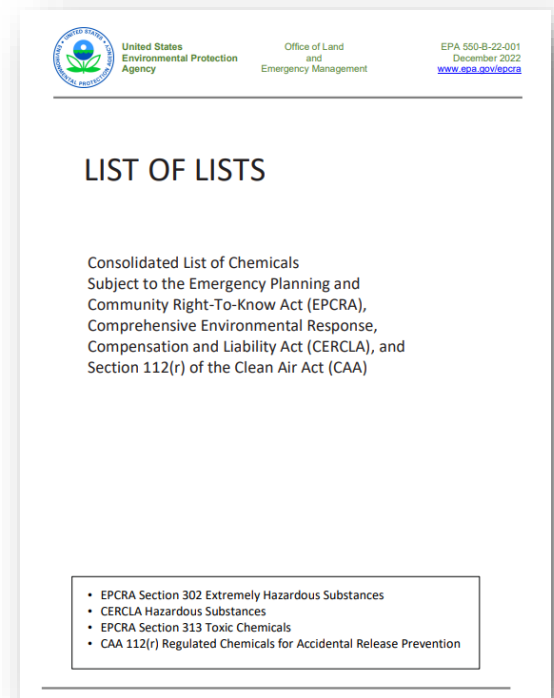
Into the environment...

At / from a facility



# “Hazardous Substance” (Section 101(14))

- “Hazardous Substances” include a long list of individual chemicals and categories of compounds that are listed
  - By EPA pursuant to CERCLA
  - Or fall under various categories under the CWA, RCRA, TSCA, and the CAA
  - The list is promulgated at 40 C.F.R. Part 302
  - **Pro tip: EPA publishes a “List of Lists” that lists that includes CERCLA, EPCRA, and CAA chemicals**
- Important Notes
  - One molecule can be enough...but it has to be of the specifically listed hazardous substance
  - There is a much-litigated and heavily guided exception for petroleum



<https://www.epa.gov/epcra/consolidated-list-lists>

“The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).”

# “Hazardous Substance” Cont.

## Note

Although EPA’s authority to compel parties to perform cleanup work or reimburse EPA for response costs is limited to releases of hazardous substances, EPA’s own authority (i.e., using Superfund money to conduct a cleanup) is broader and extends to “pollutants” and “contaminants”

2001

## Anthrax Cleanup



On October 15, 2001, several office suites in the Hart Senate Office Building in Washington, DC, were maliciously contaminated with anthrax spores that were dispersed from a contaminated

letter mailed to Senate Majority Leader Tom Daschle. The building was closed two days later and remained closed until January 23, 2002, so that EPA could effectively decontaminate the building. Chlorine dioxide gas, which regularly is used to decontaminate drinking water systems, fruits, and vegetables, was used by EPA for the first time to fumigate office space and kill anthrax spores.

<https://www.epa.gov/superfund/superfund-history>

# “Release” (Section 101(8))

- “Release” is a very broad concept:

“The term ‘release’ means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)...”

- But it does not include:
  - Solely workplace exposure
  - Emissions from vehicles and the like
  - The normal application of fertilizer
  - Nuclear incidents
- Nor does liability extend to releases that are “Federally Permitted Releases” (Section 101(10))
  - E.g., a long list of releases that are covered by a federally enforceable permit or authorization under another program, such as CWA, CAA, RCRA, etc.
  - **But generally only to the extent in compliance with those other permits/authorizations**

But what is a “threat of release”? It’s not defined but courts construe it broadly consistent with CERCLA’s broad remedial purposes



# The “Environment” (Section 101(8))

- “Environment” means:

“... (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States...”

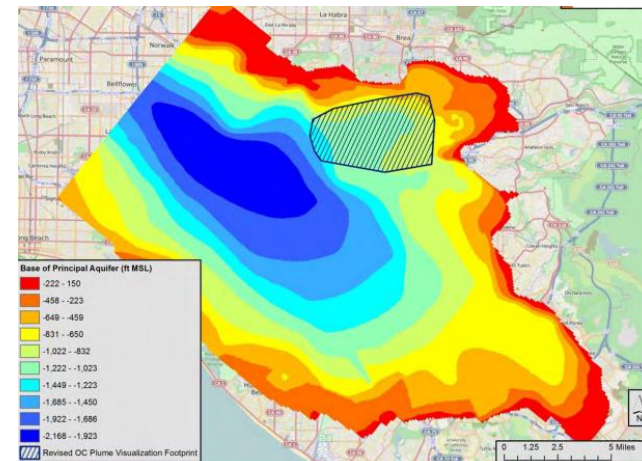
- It is generally not considered to include entirely contained areas such as indoors, secondary containment areas, and the like
- **The great majority of CERCLA sites involve contamination of soil, sediment, and groundwater and to a lesser extent surface water**

# “Facility” (Section 101(9))

- Although EPA and CERCLA practitioners use “Site” as a term of art in the Superfund program, it is used but not defined separately in the statute – instead, for response and enforcement authority, the statute uses “Facility”

“The term ‘facility’ means (A) 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 (B) 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.”

- As an adjunct, EPA has defined “on-Site” in the National Contingency Plan as “the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action”



<https://semsub.epa.gov/work/09/100004551.pdf>

# “Removal” versus “Remedial Action” (Sections 101(23) & (24))

- At any given site, EPA has a choice between a “Removal” and a “Remedial Action”
- The statute provides some help, but there’s not a fine line between two

“...‘remedy’ or ‘remedial action’ means 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...”

- Some removal actions could have been remedial actions (less so the other way around)
- The key factors generally include
  - The scope of the Site (scale matters – 50 rusting barrels would generally result in a removal action while extensive groundwater contamination would generally be remedial action)
  - The duration of the work (less than a year or two is often removal and more is often remedial), but there are exceptions to both
- **Sites requiring remedial action often also have some removal action work performed first**
- **There are other consequences to EPA’s choices, including statute of limitations**

Both are considered “Response” actions





CERCLA SITE INVESTIGATION  
AND CLEANUP PROCESS

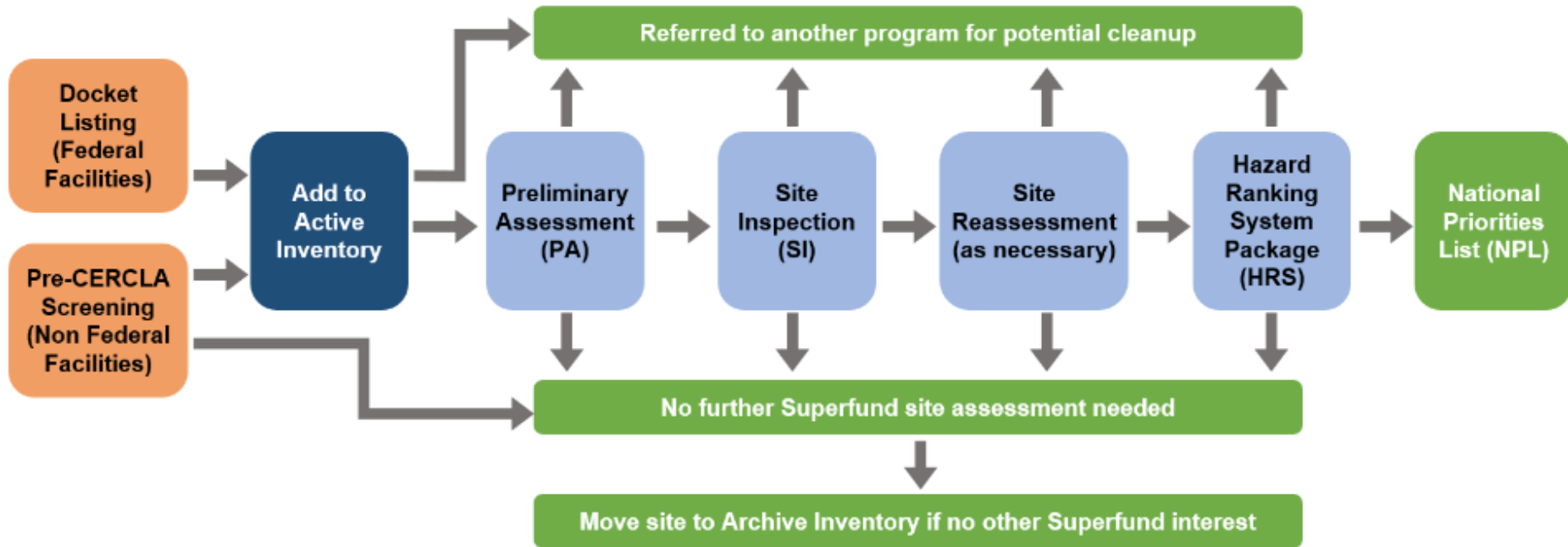
# CERCLA Cleanup Overview

The overall process includes:



- Identification of Site (release reports, etc.)
- Some form of Site investigation
- Consideration of the type of response action that may be warranted
- Consideration of NPL listing
- Formal analysis to propose the relevant removal or remedial action
- Formal decision document (and public participation for remedial action)
- The cleanup work itself
- Long-term operation and maintenance if required
- Period review thereafter for certain Sites

# Site Assessment

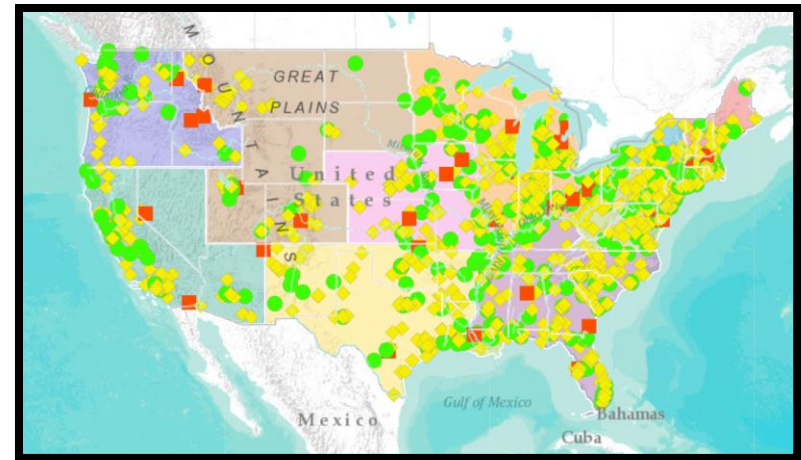


<https://www.epa.gov/superfund/superfund-site-assessment-process>



# To NPL or Not to NPL

- NPL is the National Priority List of Superfund Sites
- To be listed, a Site has to score over a certain value on the EPA Hazard Ranking System
- **Being listed is not required for removal or even remedial action; it's more about prioritization**
- **But once listed, it's hard to be de-listed**
- Pro tip: EPA generally has some information about all Sites – removal or remedial – Superfund Enterprise Management System Database (know to many as CERCLIS)



<https://www.epa.gov/superfund/superfund-national-priorities-list-npl>

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## Superfund Site: LOVE CANAL NIAGARA FALLS, NY

**Announcements and Key Topics**

EPA completed its fourth Five-Year Review report for the Love Canal Superfund site in 2019. The review confirmed that the cleanup actions taken at the Love Canal site continue to protect people's health and the environment. EPA regularly reviews cleanups every five years to ensure they remain effective. The next review will begin in 2024.

- [EPA's fourth five-year review](#)

**Site Contacts**

**Community Involvement Coordinator**  
[Michael Basile](#)  
 (716) 551-4410

**Remedial Project Manager**  
[Damian Duda](#)  
 (212) 637-4269

[Contact Us](#)

<https://cumulis.epa.gov/supercpad/CurSites/csitinfo.cfm?id=0201290&msspp=med>

Status	Non-Federal (General)	Federal	Total
<a href="#">Proposed NPL Sites</a>	39	2	41
<a href="#">NPL Sites</a>	1178	158	1336
<a href="#">Deleted NPL Sites</a>	439	17	456

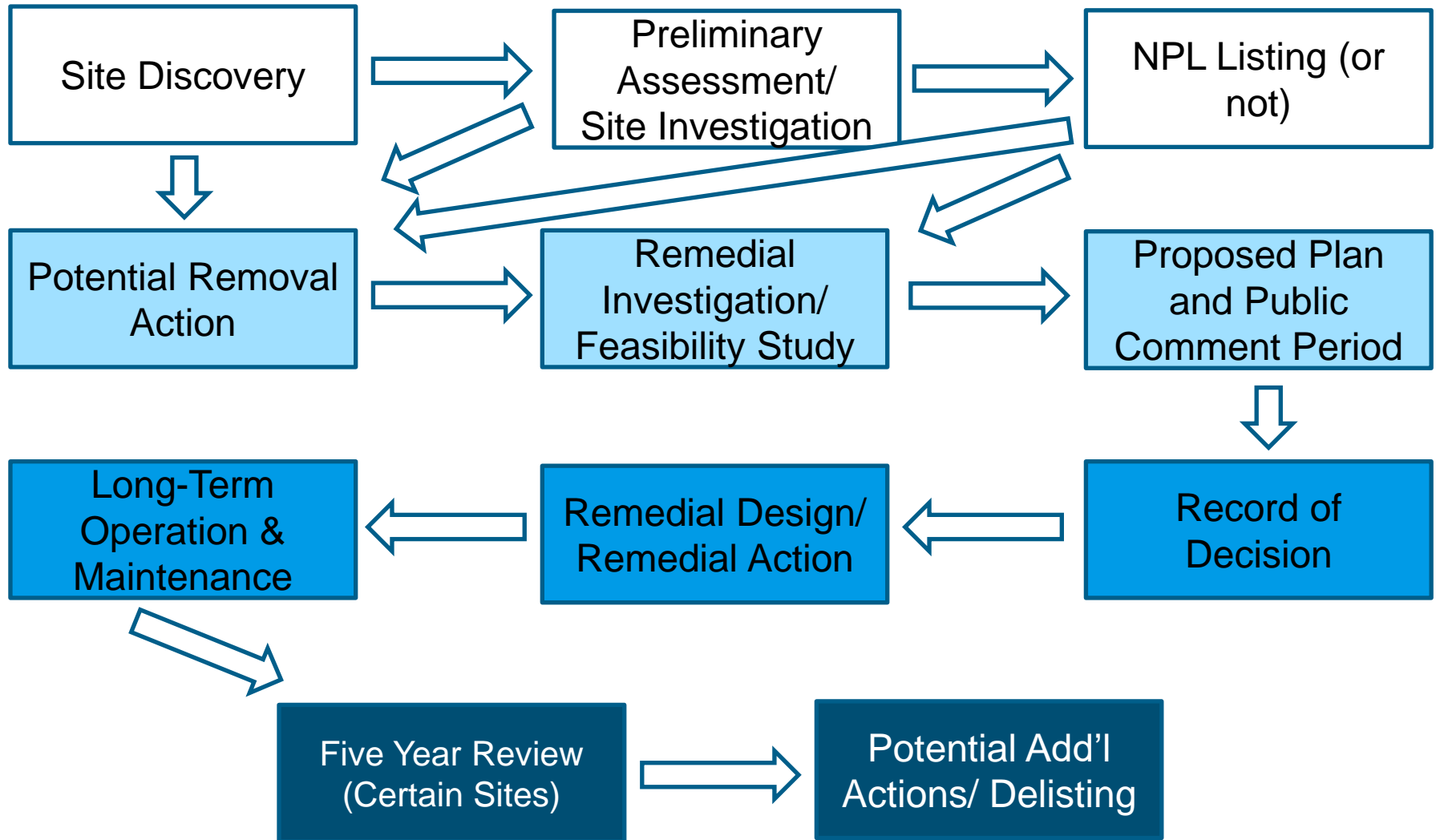
  

Milestone	Non-Federal (General)	Federal	Total
<a href="#">Partial Deletions at NPL Sites</a>	116	34	150*
<a href="#">Construction Completions at NPL Sites</a>	1161	81	1242**

Sites that have achieved these milestones are included in one of the three NPL status categories.

<https://www.epa.gov/superfund/superfund-national-priorities-list-npl>

# The CERCLA Remedial Process



# CERCLA Tools: National Contingency Plan (NCP)

“The National Oil and Hazardous Substances Pollution Contingency Plan, more commonly called the National Contingency Plan or NCP, is the federal government's blueprint for responding to both oil spills and hazardous substance releases...”

- The NCP is a set of regulations promulgated by EPA that provide the core procedural structure for CERCLA actions (they also cover oil spills)
  - Amended many times, most recently in 2023
  - Unlike guidance, NCP provisions must be followed
- Establishes National Response Center for reports of reportable releases
- Provides procedural backbone for removal and remedial actions
- **The NCP is inextricably linked to the CERCLA liability provisions, because liability for cost recovery and contribution only attaches where the costs at issue are not inconsistent with, or are consistent with, the NCP – depending on the type of action**

38280	Federal Register / Vol. 88, No. 112 / Monday, June 12, 2023 / Rules and Regulations	
<b>ENVIRONMENTAL PROTECTION AGENCY</b> <b>40 CFR Parts 110 and 300</b> <b>[EPA-HQ-OPA-2006-0096; FRL-4526-01-OLEM]</b> <b>RIN 2050-AE87</b> <b>National Oil and Hazardous Substances Pollution Contingency Plan; Product Schedule Listing and Authorization of Use Requirements</b> <b>AGENCY:</b> Environmental Protection Agency (EPA). <b>ACTION:</b> Final rule. <b>SUMMARY:</b> The Environmental Protection Agency (EPA or the Agency) is amending the requirements in Subpart J of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) that governs the use of dispersants, other chemicals and other spill mitigating substances when responding to oil discharges into jurisdictional waters of the United States. This action addresses the efficacy and toxicity of dispersants and other chemical and biological agents, as well as public, state, local, and federal officials' concerns regarding their use. Specifically, the Agency is amending the Subpart J regulatory requirements for the NCP Product Schedule in two distinct ways. First, the Agency is adding new listing criteria, revising the efficacy and toxicity testing protocols, and clarifying the evaluation criteria for removing products from the NCP Product Schedule. Second, the Agency is amending requirements for the authorities, notifications, and data reporting when using chemical or biological agents in response to oil discharges to Clean Water Act (CWA) section 311 jurisdictional waters and adjoining shorelines. These requirements are anticipated to encourage the development of safer and more effective spill mitigating products and better target the use of these products to reduce the risks of oil discharges and response technologies to human health and the environment. Further, the amendments are intended to ensure that On-Scene Coordinators (OSCs), Regional Response Teams (RRTs), and Area Committees (ACs) have sufficient information to support agent authorization of use decisions. <b>DATES:</b> This final rule is effective on December 11, 2023. <b>ADDRESSES:</b> The EPA has established a docket for this action under Docket ID No. EPA-HQ-OPA-2006-0096. All documents in the docket are listed on the <a href="http://www.regulations.gov">http://www.regulations.gov</a> website.	Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <a href="http://www.regulations.gov">http://www.regulations.gov</a> . <b>FOR FURTHER INFORMATION CONTACT:</b> For general information, contact the Superfund, TRI, EPCRA, RMP, and Oil Information Center at 800-424-9346 or TDD at 800-553-7672 (hearing impaired). In the Washington, DC metropolitan area, contact the Superfund, TRI, EPCRA, RMP, and Oil Information Center at 703-412-9810 or TDD 703-412-3323. For more detailed information on this final rule contact Gregory Wilson at 202-564-7989 ( <a href="mailto:wilsoag.gregory@epa.gov">wilsoag.gregory@epa.gov</a> ) or Vanessa Prince at 202-564-7913 ( <a href="mailto:prince.vanessa@epa.gov">prince.vanessa@epa.gov</a> ). The contact address is U.S. Environmental Protection Agency, Office of Emergency Management, Regulations Implementation Division, 1200 Pennsylvania Avenue NW, Washington, DC 20460-0002, Mail Code S104A, or visit the Office of Emergency Management website at <a href="http://www.epa.gov/oeam/">http://www.epa.gov/oeam/</a> . <b>SUPPLEMENTARY INFORMATION:</b> The contents of this preamble are: I. General Information II. Statutory Authority and Delegation of Authority III. Background IV. Discharge of Oil V. Subpart J—Introduction A. Definitions B. Subpart J—Use of Dispersants, and Other Chemical and Biological Agents 1. General 2. Authorization for Agent Use 3. Data and Information Requirements for Listing on the NCP Product Schedule or Sorbent Product List 4. Submission of Proprietary Business Information (PBI) 5. Addition of a Product to the NCP Product Schedule or Sorbent Product List 6. Mandatory Product Disclaimer 7. Removal of a Product From the NCP Product Schedule or the Sorbent Product List 8. Appendix C to Part 300 9. Appendix E to Part 300 VI. Summary of Final Rule Provisions VII. Statutory and Executive Order Reviews A. Executive Order 12866: Regulatory Planning and Review, Executive Order 13563: Improving Regulation and	Regulatory Review; and Executive Order 14176: Modernizing Regulatory Review B. Paperwork Reduction Act C. Regulatory Flexibility Act (RFA) D. Unfunded Mandates Reform Act E. Executive Order 13132: Federalism F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use I. National Technology Transfer and Advancement Act J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations K. Congressional Review Act Part 110—Discharge of Oil Part 300—National Oil and Hazardous Substances Pollution Contingency Plan <b>I. General Information</b> In April 2010, the Deepwater Horizon underwater oil well blowout discharged significant quantities of oil into the Gulf of Mexico and raised questions about efficacy, toxicity, environmental tradeoffs, and the challenges of making dispersant use decisions in response operations for certain atypical dispersant use situations. In this final action, EPA is establishing new agent testing, listing, and authorization of use requirements under Subpart J of the NCP to address these challenges. These revisions to Subpart J address the use of dispersants and other chemical and biological agents to respond to oil discharges into jurisdictional waters and their adjoining shorelines as provided under section 311 (b)(3) of the CWA. Specifically, the Agency is adding, amending, or removing certain regulatory definitions and updating requirements associated with the authorization of agent use (including presubmission plan development, approval, and review; prohibited agent storage; agent use; recovery; and reporting of use); testing of products (including efficacy and toxicity testing protocols); and listing on the NCP Product Schedule (including data and information requirements and the use of toxicity data to determine listing eligibility; processes for listing and delisting, including transitioning products to the new NCP Product Schedule; and proprietary business information (PBI)). The revisions include improved laboratory protocols for dispersant and bioremediation efficacy and toxicity, and will increase the overall scientific soundness of the data collected. These amendments to Subpart J will help to ensure that only

# CERCLA Tools: Deep History of CERCLA Guidance

## Superfund Policy, Guidance and Laws

### Policy and Guidance

#### By cleanup phase

- [Site assessment](#)
- [Hazard Ranking System Toolbox](#)
- [Site characterization](#)
- [Remedy decisions](#)
- [Remedial Design/Remedial Action](#)
- [Post construction completion](#)
- [Institutional controls](#)
- [Deletion](#)
- [Superfund redevelopment](#)

#### By type of media

- [Air remedy guidance](#)
- [Ground water guidance and reports | remedy guidance](#)
- [Sediments guidance and policy | remedy guidance](#)
- [Soil screening guidance | remedy guidance](#)
- [Abandoned mine lands guidance and policy | remedy guidance](#)

#### By contaminant

- [Asbestos policy directives | remedy guidance](#)
- [Dioxin guidance | remedy guidance](#)
- [Lead guidance | remedy guidance](#)
- [Polychlorinated Biphenyls \(PCBs\) remedy guidance](#)
- [Radiation guidance | remedy guidance](#)
- [Soil bioavailability guidance](#)

#### Additional policy or guidance

- [Community involvement tools, guides and resources](#)
- [Superfund Program Implementation Manual](#)
- [Superfund Special Accounts](#)
- [Superfund reauthorization principles](#)
- [Superfund relocation information](#)
- [Superfund Program Review](#)
- [Cleanup enforcement policy & guidance, models, and publications](#)

#### Preliminary Assessment/Site Inspection (PA/SI)

- [Preliminary Assessment Petition \(PDF\)](#) (4 pp, 463 K, [About PDF](#))
- [Guidance for Performing Preliminary Assessments Under CERCLA \(PDF\)](#) (293 pp, 7.8 MB, [About PDF](#))
- [Improving Site Assessment: Abbreviated Preliminary Assessments](#)
  - [Fillable Abbreviated Preliminary Assessment Checklist \(PDF\)](#) (4 pp, 104 K, [About PDF](#))
- [Guidance for Performing Site Inspections Under CERCLA](#)
- [Improving Site Assessment: Combined PA/SI Assessments](#)
- [Improving Site Assessment: Integrating Removal and Remedial Site Evaluations](#)
- [Integrating Removal and Remedial Site Assessment Investigations \(PDF\)](#) (8 pp, 318 K, [About PDF](#))

## Contaminant, Media, and Site Type-Specific Remedy Guidance

On this page:

- [Contaminant specific](#)
  - [Asbestos](#)
  - [Lead](#)
  - [Dioxin](#)
  - [Lead](#)
  - [Mercury](#)
  - [Metals](#)
  - [Methane](#)
  - [MTBE](#)
  - [Pesticides](#)
  - [PCBs](#)
  - [Radiation](#)
  - [VOCs](#)
- [Media Specific](#)
  - [Air Contamination](#)
  - [Groundwater Contamination](#)
  - [Sediments Contamination](#)
  - [Soil Contamination](#)
- [Site Type-Specific](#)
  - [Building Contamination](#)
  - [Landfills](#)
  - [Mining Operations](#)
  - [Wetlands](#)
  - [Wood Treating Facilities](#)

#### RA Project Completion and Construction Completion

- [Basic information about remedial action project and construction completion](#)
- [Close out procedures](#)
- [Search for Construction Completions](#)

#### Operation and Maintenance and Long-Term Response Actions

- [Basic information about O&M and LTRA](#)
- [Post construction guidance and documents](#)

#### Institutional Controls

- [Basic information about institutional controls](#)
- [Guidance and policy](#)

#### Five-Year Reviews

- [Basic information about Five-Year Reviews](#)
- [Writing FYRs](#)

<https://www.epa.gov/superfund/superfund-policy-guidance-and-laws>



# Remedy Selection Criteria

- Framework for setting appropriate cleanup level at a particular site
- Nine criteria for all remedies (Section 121; 40 CFR § 300.340(a)(9)(iii)(A-I))
  - Threshold criteria – must be met (unless waiver)
    - Overall protection of human health and the environment
    - Compliance with ARARs—applicable or relevant and appropriate requirements
  - Balancing/modifying
    - Long-term effectiveness and permanence
    - Reduction of toxicity, mobility, or volume
    - Short-term effectiveness
    - Implementability
    - Cost
    - State acceptance
    - Community acceptance



- Many types of CERCLA remedies
- On-site disposal (e.g., capping, encapsulation)
  - On-site treatment (e.g., groundwater pump and treat/remove)
  - Off-site disposal (hazardous waste landfill)
  - On or off-site destruction (e.g., incineration)
  - Risk reduction through institutional controls (e.g., deed restrictions, physical changes)

# How Clean is Clean?

- **CERCLA has no fixed list of cleanup levels**
  - There are screening levels but no cleanup standards
  - CERCLA generally follows a risk range approach:
    - Cancer risks between  $10E-4$  and  $10E-6$
    - Noncancer risks  $HI \leq 1$
- Thus, Site-specific risk assessment is an important element of CERCLA practice
  - Characterize current and potential risks to human health and the environment
- RODs must meet ARARs – “applicable or relevant and appropriate requirements”
  - Unique creature of CERCLA -- defined by NCP / EPA guidance
  - “Applicable” – a legal requirement applies to the substance, action, location or circumstance at the site
  - “Relevant and appropriate” – not legally required, but well suited and so should a cleanup should satisfy
  - Goal is to line up remedy with other laws (federal and state) and technical analogues
  - Often, the State heavily involved
  - Site specific



<https://www.epa.gov/superfund/superfund-cleanup-process>

# PFAS, Chemical Updates, and Zombie Sites

Chemical regulatory developments create the potential for zombie sites

- IRIS changes
- New listings (e.g., PFAS)
- Other developments

Sites that are moribund for years may be reopened

Five year review process ensures EPA the opportunity for another look at certain Sites



Credit: Missouri Department of Conservation

# States and Others

- EPA is the lead federal agency for CERCLA response actions
  - Other agencies may take the lead as potentially responsible parties (PRPs) at their own contaminated Sites
  - EPA sometimes contracts with other federal agencies for support (e.g., Army Corps of Engineers)
- CERCLA mandates a role for states in remedial actions
- **In any event, many states have their own “mini Superfund” statutes they can invoke even if EPA does not itself invoke CERCLA**
  - EPA can “defer” to state action
  - To a certain extent states can invoke their own authorities in addition to CERCLA, but they cannot action that is inconsistent with EPA’s selected remedy
- Private parties can even conduct their own cleanups consistent with CERCLA if no other agency has stepped in



## Why Lawyers?

- Long history of lawyers being involved in CERCLA cleanup processes and not just the more classical law-intensive aspects of CERCLA covered in Part II (enforcement, litigation, NRD)
- Many legal issues arise in the cleanup phases that require legal interpretation due to the process heavy nature of CERCLA
- PRPs must also be careful to perfect their legal rights and avoid noncompliance
- Lawyers also provide a channel for communicating with the agency, often on behalf of a group of PRPs

But lawyers contribute to driving up the cost of CERCLA



## OTHER CERCLA ISSUES

# Access and Information Collection (Section 104(e))

- Where EPA has “a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant” –

## Information

- EPA can demand upon reasonable notice information about:
  - Nature and quantity of materials generated, treated or disposed at a Site
  - Nature and extent of releases at a Site
  - The ability of a person to pay for or perform a cleanup
- Such requests are in the nature of administrative subpoenas and, under Supreme Court case law, must only be consistent with the statutory authority granted to the agency and reasonable
- Similar in some regards to discovery requests; can be very time-consuming and burdensome

## Access

- EPA can demand to enter at reasonable times any vessel, facility, establishment, or other place or property :
  - Where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from.
  - Where a hazardous substance or pollutant or contaminant has been or may have been released.
  - Where such release is or may be threatened.
  - Where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.

**Noncompliance is subject to civil penalties!**

# Order Authority (Sections 104 and 106)

- Part II will cover liability, but it is worth noting here that EPA has broad order authority in the event PRPs are not cooperative
- Section 106(a) provides:

“...when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, ...The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.”

- The president has delegated this authority to EPA
- **The use of “may be” and “threatened” make this authority easy to use**
- **In combination with another provision that bars pre-enforcement review of EPA’s remedial decisions, the order authority is very potent**



# CERCLA Reform

- There have been many public and private criticisms of CERCLA and many efforts at administrative reforms (and legislative changes too) over the years.
- The most recent was started in 2017 and was fairly successful at identifying consensus recommendations focusing on
  - Expediting cleanup and remediation;
  - Reinvigorating responsible-party cleanup and reuse;
  - Encouraging private investment;
  - Promoting redevelopment and community revitalization; and
  - Engaging partners and stakeholders
- EPA has been working on various aspects of implementation, although the momentum dwindled with the change in administration



## SUPERFUND TASK FORCE RECOMMENDATIONS

*Recommendations in response to Administrator Scott Pruitt's request on May 22, 2017. The recommendations address: expediting cleanup and remediation process; reducing financial burden on all parties involved in the entire cleanup process; encouraging private investment; promoting redevelopment and community revitalization; and, building and strengthening partnerships.*

<https://www.epa.gov/superfund/superfund-task-force-recommendations>

# The One CERCLA Regulatory Program – Release Reporting

- **This is important Environmental Law 101 – every environmental lawyer should understand the basis of emergency release reporting**
- Under CERCLA Section 103:

“Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center...”

- The NRC is staffed by the Coast Guard and notifies other agencies of releases, as applicable

# CERCLA Release Reporting (Cont.)

- CERCLA release reporting applies broadly not to owners and operators but to persons in charge
- EPA has interpreted immediately to mean just that – and generally no later than 15-60 minutes
- EPA takes the position that knowledge cannot be shielded by ignorance; if there is a release, there is an obligation to understand how much was released
- The reportable quantities (RQs) can be very low; see the regulations or the “List of Lists”
- Often there can be complicated interpretive issues, including Federal Permitted Release issue
- There are civil and criminal penalties for noncompliance
- EPA has promulgated detailed reporting regulations at 40 C.F.R. Part 355

**EPCRA has an analogous program and releases should always be considered under EPCRA and CERCLA together; also, there are release reporting provisions under other statutes (e.g., CWA) to be considered as well**

## Many Other CERCLA Issues...

- Brownfields and redevelopment
- Risk assessment
- Climate change impacts
- Greener technologies
- Environmental Justice
- Community Involvement
- PFAS and other chemicals
- Financial responsibility
- Etc.





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