



# Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act

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## Summary

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA; P.L. 96-510) in response to a growing desire for the federal government to ensure the cleanup of the nation's most contaminated sites to protect the public from potential harm. The Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499, SARA) clarified the applicability of the statute's requirements to federal facilities, and modified various response, liability, and enforcement provisions. Several other laws also have amended CERCLA for specific purposes, including relief from cleanup liability for certain categories of parties, and the authorization of federal assistance for the cleanup of abandoned or idled "brownfields" where the presence or perception of contamination may impede economic redevelopment.

CERCLA authorizes cleanup and enforcement actions to respond to actual or threatened releases of hazardous substances into the environment, but generally excludes releases of petroleum and certain other materials covered by other federal laws. Considering the limitation of federal resources to address the many contaminated sites across the United States, CERCLA directs the Environmental Protection Agency (EPA) to maintain a National Priorities List (NPL) to identify the most hazardous sites for the purpose of prioritizing cleanup actions. The states and the public may participate in federal cleanup decisions at NPL sites. The states primarily are responsible for pursuing the cleanup of sites not listed on the NPL, with the federal role at these sites limited mainly to addressing emergency situations.

CERCLA established a broad liability scheme that holds past and current owners and operators of facilities from which a release occurs financially responsible for cleanup costs, natural resource damages, and the costs of federal public health studies. At waste disposal sites, generators of the wastes and transporters of the wastes who selected the site for disposal also are liable under CERCLA. The liability of these "potentially responsible parties" (PRPs) has been interpreted by the courts to be strict, joint and several, and retroactive. At contaminated federal facilities, federal agencies are subject to liability under CERCLA as the owners and operators of those facilities on behalf of the United States. Federal agencies also may be liable in instances in which an agency generated or transported waste for disposal at a non-federal facility.

CERCLA established the Hazardous Substance Superfund Trust Fund to pay for the cleanup of sites where the PRPs cannot be found or cannot pay. A combination of special taxes on industry and general taxpayer revenues originally financed the Superfund Trust Fund, but the authority to collect the industry taxes expired on December 31, 1995. Over time, Congress increased the contribution of general revenues to make up for the shortfall from the expired industry taxes. General revenues now provide most of the funding for the trust fund, but other monies continue to contribute some revenues (i.e., cost-recoveries from PRPs, fines and penalties for violations of cleanup requirements, and interest on the trust fund balance). The availability of these trust fund monies under the Superfund program is subject to appropriations by Congress. Private settlement funds deposited into site-specific Special Accounts within the Superfund Trust Fund also are available to EPA, but are not subject to discretionary appropriations.

Considering the liability of the federal government at its own facilities, the cleanup of federal facilities is not funded with Superfund Trust Fund monies under the Superfund program, but with other federal monies appropriated to the agencies responsible for administering the facilities. However, EPA and the states remain responsible for overseeing and enforcing the implementation of CERCLA at federal facilities to ensure that applicable cleanup requirements are met.

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## **Introduction**

By the end of the 1970s, Congress had enacted several environmental laws to regulate sources of pollution in the United States, but had not yet addressed responsibility for contamination resulting from releases of pollutants into the environment. In the late 1970s, the discovery of severely contaminated sites, such as “Love Canal” in New York and Times Beach in Missouri, raised questions as to whether there should be a federal role in cleaning up environmental contamination to protect the public from potential harm. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA; P.L. 96-510) to authorize the federal government to clean up contaminated sites in the United States and to make the “potentially responsible parties” connected to those sites financially liable for the cleanup costs. CERCLA created the Superfund program to carry out these authorities. The Environmental Protection Agency (EPA) administers the program. Subsequent amendments to CERCLA also authorized EPA to administer a separate grant program to support the cleanup of abandoned or idled “brownfields” properties to encourage their redevelopment.

CERCLA established a broad liability scheme that holds both past and current owners and operators of contaminated facilities financially responsible for the costs of cleanup. At waste disposal sites, generators of the waste sent to the site for disposal, and transporters of the waste who selected the site for disposal, also are responsible for the cleanup costs. If these potentially responsible parties cannot be found or cannot pay for the cleanup, CERCLA authorizes the federal government to finance the cleanup to ensure the protection of human health and the environment. These costs borne by the federal government are referred to as “orphan shares.” The broad liability scheme of CERCLA is intended to capture all parties that may have had some involvement in the actions that resulted in contamination of the environment, in order to minimize the burden of the costs of cleanup on the general taxpayer who had no involvement. This approach to liability is based on the principle that polluters should be required to pay for the environmental damage that they cause, often referred to as the “polluter pays principle.”

CERCLA established the Hazardous Substance Superfund Trust Fund to finance cleanup actions taken by the federal government at contaminated sites where the potentially responsible parties cannot pay or cannot be found. A combination of special taxes on industry and revenues from the General Fund of the U.S. Treasury initially financed the Superfund Trust Fund, but the authority to collect the industry taxes expired at the end of 1995. As the remaining revenues were expended over time, Congress increased the contribution of general Treasury revenues in an effort to make up for the shortfall from the expired industry taxes. The availability of Superfund Trust Fund monies to finance the cleanup of contaminated sites is subject to appropriations by Congress.

Considering the liability of the federal government as a potentially responsible party at its own facilities, the cleanup of federal facilities is not funded with Superfund Trust Fund monies under the Superfund program, but with other federal monies appropriated for other programs administered by the agencies responsible for these facilities. The Department of Defense (DOD) and the Department of Energy (DOE) administer the cleanup of most contaminated federal facilities. EPA and the states are responsible for overseeing and enforcing the implementation of CERCLA at federal facilities to ensure that applicable requirements are met.

To prioritize cleanup actions, CERCLA directed EPA to establish and maintain a National Priorities List (NPL) of the most contaminated sites in the United States which present the greatest risks to human health and the environment. The NPL includes both non-federal sites and federal facilities that are deemed to present a sufficient level of risk to warrant listing. EPA may require the potentially responsible parties to directly perform or pay for cleanup actions themselves. Alternatively, EPA may clean up a contaminated site up-front with appropriated Superfund monies and later recover those funds from the potentially responsible parties (with the exception of the cleanup of federal facilities which must be funded up-front by the administering agencies). In the event that the potentially responsible parties cannot pay or cannot be found, appropriated Superfund monies may be used to pay the orphan shares of cleanup costs at a site, under a cost-sharing agreement with the state in which the site is located.

The following sections of this report summarize the major cleanup authorities of CERCLA and other relevant provisions of the act. The topics discussed herein include the overall scope and reach of these statutory authorities, the process under which cleanup actions are selected and carried out at individual sites, the financial liability of potentially responsible parties for the costs of cleanup actions, the Superfund Trust Fund that may pay for cleanup actions when the potentially responsible parties cannot pay or cannot be found, enforcement of cleanup liability against the potentially responsible parties to minimize the need for federal tax revenues to finance the cleanup of contaminated sites, the applicability of CERCLA to federal facilities, and federal assistance for the cleanup of brownfields properties. A briefer summary of these topics is presented in CRS Report RL30798, *Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency*.

It should be emphasized that how and to what degree a specific contaminant at an individual site must be cleaned up under CERCLA are not specified in the law itself. The specific actions that are required to clean up contaminants at individual sites are determined on a site-by-site basis. Although CERCLA established a general process for making cleanup decisions, more specific direction is provided in EPA regulation and agency guidance. Other federal agencies that administer the cleanup of federal facilities under CERCLA have developed additional guidance documents that apply to their own respective facilities. Although the statutory authorities upon which federal agencies have based their cleanup regulations and guidance are discussed in this report, the content of these regulations and guidance is not examined here.

As such, this report summarizes selected statutory provisions of CERCLA, but does not discuss agency regulations and guidance that may provide more detailed direction for carrying out cleanup actions at individual sites.

## **Major Amendments**

Congress has amended CERCLA on numerous occasions to clarify the applicability of the cleanup authorities of the statute, and to provide relief from liability for certain categories of parties who may not have been involved in actions that led to contamination, or who may have contributed only certain quantities or types of waste to a site. Congress also has amended the statute to authorize federal assistance for the cleanup of abandoned or idled “brownfields” properties to encourage their redevelopment. Further, certain amendments have addressed unique cleanup challenges at federal facilities, such as the cleanup of unexploded ordnance on decommissioned military training ranges in the United States, and responsibility for the cleanup of contaminated federal property when it is transferred out of federal ownership.

The Superfund Amendments and Reauthorization Act of 1986 (SARA; P.L. 99-499) clarified that federal facilities are subject to the cleanup requirements of CERCLA to the same extent as non-federal entities, and amended various response, liability, and enforcement provisions of the law. The 1986 amendments also renewed the authorization of appropriations for EPA's Superfund program through FY1991, and established a separate Defense Environmental Restoration Program within the Department of Defense (DOD) to address contamination at active and decommissioned military facilities in the United States.

Title VI of the Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508) extended the authorization of appropriations for EPA's Superfund program through FY1994, and Title XI of that statute extended the authority to collect the special Superfund taxes on industry through December 31, 1995. Although reauthorizing legislation has been introduced in various Congresses, the taxing authority for the Superfund Trust Fund has not been renewed to date, nor has the authorization of appropriations for EPA's Superfund program been extended. Instead, Congress has continued to fund the Superfund program primarily with general Treasury revenues through the annual appropriations process. Congress has annually authorized and appropriated funding for the Defense Environmental Restoration Program each year since its establishment. Most of this funding is supported with general Treasury revenues, with the exception of some revenues generated from the sale or lease of closed military bases which help fund their cleanup.

In 1992, the Community Environmental Response Facilitation Act (P.L. 102-426) amended the federal facility provisions of CERCLA to facilitate the transfer of uncontaminated parcels of surplus federal property on which hazardous substances or petroleum products were not released. Section 334 of the National Defense Authorization Act for FY1997 (P.L. 104-201) further amended CERCLA to allow the transfer of contaminated surplus federal property before cleanup is complete, if assurances are provided to guarantee that the property will be cleaned up to a level that would be suitable for its intended use after transfer.

Other amendments have attempted to address the fairness of the liability scheme of CERCLA, either by limiting or eliminating the liability of certain categories of parties. In 1996, the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act (Subtitle E, Title II, Division A of P.L. 104-208) amended CERCLA to protect certain fiduciaries and financial lenders from liability. In 1999, the Superfund Recycling Equity Act (Title VI, Appendix I of P.L. 106-113) exempted generators and transporters of recyclable scrap materials from cleanup liability under CERCLA, if the person who received the materials disposed of them instead and the disposal resulted in contamination. There had been some concern that the potential liability of generators and transporters under CERCLA could be a deterrent to recycling.

In 2002, the Small Business Liability Relief and Brownfields Revitalization Act (P.L. 107-118) provided relief from cleanup liability for (1) persons who contributed very small quantities of waste or only municipal solid (i.e. non-hazardous) waste to a site, (2) owners of property that became contaminated merely as a result of migration from a contiguous property owned by another person, and (3) "bona fide" prospective purchasers who otherwise may be hesitant to acquire a contaminated property because of potential cleanup liability once acquiring ownership. The 2002 act also established more specific criteria for exempting "innocent" owners of contaminated property from cleanup liability, if they purchased the property without knowledge of the existing contamination and they had no involvement in actions that led to contamination.

As required by the statute, persons seeking an exemption from liability as a “bona fide” prospective purchaser, contiguous property owner, or “innocent” landowner must have performed “all appropriate inquiry” into the prior uses of the property *before* acquiring ownership, and must take “reasonable steps” *after* acquiring ownership to prevent potentially harmful exposure to environmental contamination. Because of these requirements, such persons still may bear some responsibility for managing contamination on their properties, even though they may be exempt from liability for more extensive cleanup actions that may be taken under CERCLA.

In addition to providing relief from liability for certain categories of parties, P.L. 107-118 authorized federal grants to assist in the cleanup of “brownfields” properties. Brownfields properties typically are abandoned, underutilized, or idled sites where the known or suspected presence of contamination, and the potential for cleanup liability, could be viewed as a deterrent to purchase the property for redevelopment. Brownfields properties tend to be less contaminated than sites listed on the NPL, but may need some cleanup to make them suitable for reuse. EPA originally had established a program in 1993 to provide federal assistance for the cleanup of brownfields properties using the general cleanup authorities of CERCLA as the legal basis for this assistance. P.L. 107-118 provided explicit statutory authority for this purpose, and established a separate Brownfields grant program within EPA, apart from the Superfund program.

**Table 1** lists CERCLA as enacted in 1980 and the major amendments to the law noted above.

**Table I. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Major Amendments to the Statute**

Year	Title of Statute	Public Law Number
1980	Comprehensive Environmental Response, Compensation, and Liability Act of 1980	P.L. 96-510
1986	Superfund Amendments and Reauthorization Act of 1986	P.L. 99-499
1990	Omnibus Budget Reconciliation Act of 1990	P.L. 101-508, Title VI, § 6301, Title XI, Subtitle B, Part IV, § 11231
1992	Community Environmental Response Facilitation Act	P.L. 102-426
1996	Asset Conservation, Lender Liability, and Deposit Insurance Protection Act	P.L. 104-208, Division A, Title II, Subtitle E
1996	National Defense Authorization Act for Fiscal Year 1997	P.L. 104-201, § 334
1999	Superfund Recycling Equity Act	P.L. 106-113, Appendix I, Title VI
2002	Small Business Liability Relief and Brownfields Revitalization Act	P.L. 107-118



## Federal Response Authorities

Section 104(a) of CERCLA specifically 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 which may present an “imminent and substantial danger to the public health or welfare.”<sup>1</sup> As authorized by Section 115 of CERCLA,<sup>2</sup> the President delegated the response authorities of CERCLA to EPA and other federal agencies by Executive Order.<sup>3</sup> EPA may respond to releases on the land, and the U.S. Coast Guard may respond to releases into inland river ports and harbors, the Great Lakes, and U.S. coastal waters. If a release were to occur at a federal facility, the agency that administers that facility is authorized to take response actions, subject to oversight and enforcement by EPA and the states in which those facilities are located. Federal funding to carry out response actions under CERCLA is subject to appropriations by Congress.

Notification of a release of a hazardous substance is the action that may trigger a federal response under CERCLA. Section 103(a) requires the party responsible for a release to notify the National Response Center if the quantity of the release exceeds the regulatory limit established for that particular substance.<sup>4</sup> These limits are referred to as “reportable quantities,” which are specified in federal regulation.<sup>5</sup> State or local officials, or members of the public, who observe or suspect a release of a hazardous substance also may report the incident. Once a release is reported, the National Response Center is to notify the appropriate federal agency that would be responsible for carrying out the President’s response authorities under Section 104(a), and for taking any federal enforcement actions that may be necessary against the parties responsible for the release.

Response actions taken under CERCLA most often entail cleanup activities involving the containment, removal, or treatment of environmental contamination to prevent potentially harmful exposure, but may include the temporary or permanent relocation of potentially exposed individuals if warranted. Congress has excluded certain types of environmental contamination from the response authorities of CERCLA, which may be addressed under other federal environmental laws. These exclusions are provided within the statutory definitions of key terms upon which the response authorities of CERCLA hinge, including the terms “hazardous substance,” “pollutant or contaminant,” and “release.” In addition to these exclusions, Congress has placed general limitations on the extent to which response actions may be taken under CERCLA to address releases of hazardous substances, pollutants, or contaminants in certain situations. In effect, these exclusions and limitations may restrict the applicability or scope of the response authorities of CERCLA at a particular contaminated site.

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<sup>1</sup> 42 U.S.C. § 9604(a).

<sup>2</sup> 42 U.S.C. § 9615.

<sup>3</sup> Executive Order 12580, Superfund Implementation, January 23, 1987, 52 *Federal Register* 2923. Hereinafter, references to Presidential authorities under CERCLA refer to those that have been delegated to EPA and other federal agencies, unless noted otherwise.

<sup>4</sup> 42 U.S.C. § 9603(a).

<sup>5</sup> 40 C.F.R. § 302.4.

## Petroleum Exclusion

The response authorities of CERCLA do not extend to releases of petroleum. Section 101(14) of CERCLA generally excludes releases of petroleum, including crude oil and any fraction thereof, from the definition of a “hazardous substance” for the purposes of the statute.<sup>6</sup> Section 101(33) does the same for the definition of “pollutant or contaminant.”<sup>7</sup> Petroleum releases are covered instead by other statutes. The Oil Pollution Act of 1990 (P.L. 101-380) is the primary federal law that addresses releases of petroleum.<sup>8</sup> Other federal laws also provide authorities to respond to petroleum releases in specific situations. For example, Section 311(c) of the Clean Water Act authorizes the federal actions to respond to releases of petroleum into or on the navigable waters of the United States and adjoining shorelines.<sup>9</sup> Section 9003(h) of the Solid Waste Disposal Act provides federal response authorities for petroleum leaked from underground tanks.<sup>10</sup> In practice, CERCLA has been applied to the cleanup of some wastes containing petroleum only if the wastes also contained hazardous substances that were not part of the petroleum product itself.<sup>11</sup>

## Other Exclusions

Section 101(22) of CERCLA also excludes certain types of releases from the definition of the term “release,” thereby removing such releases from the statute’s reach.<sup>12</sup> A specific category of nuclear materials is excluded from the definition of release, including “source, byproduct, or special nuclear material” released from a nuclear incident or at certain processing sites. The disposal and cleanup of these materials are subject to the Atomic Energy Act. With the exception of these specific nuclear materials, CERCLA generally applies to the release of radionuclides. In federal regulation, EPA has designated several hundred radionuclides as hazardous substances that are subject to the authorities of CERCLA.<sup>13</sup> Section 101(22) also excludes three other types of releases from the response authorities of CERCLA: (1) a release that would result in exposure solely within the workplace; (2) emissions from engine exhaust of a motor vehicle, train, aircraft, vessel, or power pumping station; and (3) the “normal” application of fertilizer. There also are certain situations identified in CERCLA in which a party would not be subject to liability, such as the proper application of a registered pesticide product<sup>14</sup> or a federally permitted release of a hazardous substance.<sup>15</sup> However, response authority under the statute generally would remain available to EPA in these two instances, just not the enforcement of liability.

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<sup>6</sup> 42 U.S.C. § 9601(14).

<sup>7</sup> 42 U.S.C. § 9601(33).

<sup>8</sup> 33 U.S.C. § 2701 et. seq.

<sup>9</sup> 33 U.S.C. § 1321(e).

<sup>10</sup> 42 U.S.C. § 6991b(h).

<sup>11</sup> For EPA’s interpretation of the statutory exclusion of releases of petroleum from the cleanup authorities of CERCLA, see Environmental Protection Agency, Office of General Counsel, *Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)*, July 31, 1987. Please note that Section 104(a)(2) of CERCLA, as originally enacted in 1980, defined the term “pollutant or contaminant.” Section 101(f) of the Superfund Amendments and Reauthorization Act of 1986 re-designated the definition of this term in Section 101(33) of CERCLA, cited above.

<sup>12</sup> 42 U.S.C. § 9601(22).

<sup>13</sup> 40 C.F.R. §§ 302.4, Appendix B.

<sup>14</sup> 42 U.S.C. § 9607(i).

<sup>15</sup> 42 U.S.C. § 9607(j).

## **Limitations on Response Actions**

Section 104(a)(3) limits the extent to which actions may be taken under CERCLA to respond to releases of hazardous substances, pollutants, or contaminants in certain situations. Response actions generally may not be taken in situations involving (1) releases of naturally occurring substances in their unaltered form; (2) releases from products (such as asbestos) that are part of a residential, business, or community structure or building; or (3) releases into public or private drinking water supplies due to deterioration of supply systems through ordinary use.<sup>16</sup> However, in the event of a public health or environmental emergency declared by the President, CERCLA authorizes response actions to be taken under the statute in any of these three situations, if no other person has the authority and capability to respond in a timely manner.

## **Prioritization and Procedures for Response Actions**

Section 105(a) of CERCLA required the President to develop a National Hazardous Substance Response Plan to establish procedures and standards for prioritizing and responding to releases of hazardous substances, pollutants, and contaminants into the environment. The law directed the President to incorporate these procedures and standards into the National Oil and Hazardous Substances Pollution Contingency Plan (referred to as the National Contingency Plan for short, or NCP). As delegated by the President, EPA promulgated the National Hazardous Substance Response Plan in federal regulation as part of the NCP.<sup>17</sup> These regulations govern any response actions taken under CERCLA.

Consistent with the purpose of the NCP, Section 105(a) of CERCLA also required the President to develop a National Priorities List (NPL) of the most hazardous sites in the United States as an administrative mechanism to prioritize response actions.<sup>18</sup> The President has delegated this task to EPA. The NPL must be updated at least once annually. Section 105(c) primarily requires the use of a Hazard Ranking System (HRS) to determine which sites warrant placement on the NPL.<sup>19</sup> The system scores each site based on certain factors, such as the quantity and nature of hazardous substances; the likelihood of the migration of contamination in groundwater, surface water, and air; and the proximity to human populations and sensitive environments. Because of this range of factors, the severity of contamination alone may not necessarily be sufficient cause to list a site on the NPL. For example, a geographically isolated site with substantial contamination still may not score highly enough on the HRS to warrant placement on the NPL, if the distance from human populations prevents the likelihood of exposure.

In addition to the use of the HRS to evaluate eligibility for listing a site on the NPL, there are two other mechanisms under which EPA also may list a site. First, Section 105(a) allowed each state the one-time opportunity to designate a single site within its borders as the state's highest priority for listing on the NPL. Second, EPA may list a site for which the Agency for Toxic Substances and Disease Registry (ATSDR) has issued a public health advisory, if EPA also determines that the contamination presents a significant public health threat and that its use of "remedial" authority will be more cost-effective than its sole use of "removal" authority without listing the

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<sup>16</sup> 42 U.S.C. § 9604(a)(3).

<sup>17</sup> 40 C.F.R. Part 300.

<sup>18</sup> 42 U.S.C. § 9605(a).

<sup>19</sup> 42 U.S.C. § 9605(c).

site.<sup>20</sup> As discussed below in the “Scope of Response Actions” section, a site must be listed on the NPL as a condition for the availability of Superfund appropriations to perform remedial actions, but removal actions are not subject to such condition.

EPA has listed over 1,600 sites on the NPL over time, including federal facilities. EPA has deleted over 300 of these sites once EPA determined, in concurrence with the states, that the long-term cleanup objectives had been met. The vast majority of the sites were listed based on EPA’s evaluation of the potential risks using the HRS, but some sites have been listed as a result of states designating them as their top priority and as a result of an ATSDR public health advisory.<sup>21</sup>

## **Scope of Response Actions**

CERCLA authorizes two types of response actions: “removal” and “remedial” actions. These terms are defined in Sections 101(23)<sup>22</sup> and 101(24)<sup>23</sup> of CERCLA respectively. Removal does not necessarily mean the physical removal of contamination from the soil, surface water, or groundwater, and remedial actions do not necessarily involve treatment of contamination. Rather, both actions may involve various methods to prevent exposure to contamination, including the relocation of potentially exposed individuals if warranted. It should be noted that the NCP allows remedial actions to be financed with Superfund monies only at sites listed on the NPL, whereas removal actions may be financed with Superfund monies at non-NPL sites to address emergency situations.<sup>24</sup> This restriction is intended to reserve Superfund monies for costlier remedial actions at NPL sites that are thought to present the greatest risks. This funding restriction in the regulations is based on the statutory requirement of Section 105(a) of CERCLA for EPA to prioritize contaminated sites for the purpose of taking remedial actions.

Removal actions tend to be shorter term actions that address more immediate risks, whereas remedial actions tend to be longer term actions that offer a more permanent solution. As such, remedial actions often entail more extensive and costly measures. Because of the typically greater extent and cost of remedial actions, they are subject to more in-depth review in the form of a Remedial Investigation and Feasibility Study (RI/FS). An RI/FS involves an investigation of the contamination to assess potential risks of exposure and a study of the feasibility of remedial alternatives to address those risks. Remedial actions also are subject to public participation requirements under Section 117 of CERCLA.<sup>25</sup> (See the “Public Participation” section of this report.) Removal actions are not subject to a similar degree of review or public comment because of the perceived need for swifter response to address more immediate risks.

Section 104(c)(1) generally restricts the timing of removal actions funded with Superfund monies to one year and the cost to \$2 million, with exceptions provided in certain situations.<sup>26</sup> For example, a remedial action may exceed these limitations if the continuance of the removal action

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<sup>20</sup> 40 C.F.R. 300.425(c)(3).

<sup>21</sup> For information on the number and status of sites across the United States listed on the NPL over time, see EPA’s Superfund program website: <http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm>.

<sup>22</sup> 42 U.S.C. § 9601(23).

<sup>23</sup> 42 U.S.C. § 9601(24).

<sup>24</sup> 40 C.F.R. § 300.425(b)(1).

<sup>25</sup> 42 U.S.C. § 9617.

<sup>26</sup> 42 U.S.C. § 9604(c)(1).

would contribute to the remedial action planned at the site. These general timing and cost limitations on removal actions are intended to ensure that removal actions are not pursued on a broader scale as a way to avoid the more in-depth review required of remedial actions.

However, CERCLA does not impose these limitations on a removal action funded by a responsible party with its own funds, nor by a federal agency at a federal facility with dedicated monies appropriated to that agency for that purpose apart from Superfund. From a practical standpoint, imposing the above timing and cost limitations on removal actions at many federal facilities administered by the Department of Defense and Department of Energy could constrain the needed scope of removal actions, as cleanup challenges are often greater at these federal facilities in comparison to non-federal sites.

## **Federal-State Cost Sharing**

Section 104(c)(3) of CERCLA requires the state in which a non-federal NPL site is located to agree to share the costs of remedial actions at that site, as a condition of obligating federal Superfund monies to finance those actions.<sup>27</sup> States are not responsible for sharing the costs of cleanup at sites where the potentially responsible parties pay for the cleanup, including federal facilities that are funded by the federal agencies that administer them. Rather, the federal government and the states are to share the costs of assuming the responsibility for the orphan shares of the cleanup costs, for which there are no viable parties to pursue.

This cost-sharing requirement in Section 104(c)(3) is intended to reduce the financial burden on the federal taxpayer presented by the often long-term financial commitment involved in carrying out a remedial action. Notably, CERCLA does not require states to agree to share the costs of removal actions, which typically are less costly as a result of their smaller scope. Consequently, federal Superfund monies may be used to finance the entire costs of removal actions.

At a site where the state must agree to share the costs of remedial actions as a condition of the obligation of federal Superfund monies, the state first must provide certain assurances of its financial commitments, specified in a binding contract or cooperative agreement with the federal government. Absent such contract or agreement, federal Superfund monies are not available to finance remedial actions at that site. To allow the obligation of federal Superfund monies to commence the remedial actions, the state must agree to pay 10% of the costs of those actions. If the site was owned or operated by the state, or a political subdivision of the state, at the time of disposal, the state must agree to pay at least 50% of the costs of the remedial actions.

In addition to the above conditions, the state must agree to perform future maintenance of the remedial actions for their expected operational life. The point of maintenance usually occurs after any necessary construction is complete and the remedial action is operating as intended. CERCLA authorizes a delay in the state's responsibility for the maintenance of groundwater or surface water remedies. Section 104(c)(6) allows a state to delay its maintenance responsibilities for the first 10 years of the operation of such remedial actions.<sup>28</sup> The statute allows a delay in the state's maintenance responsibility specifically for these types of actions to reduce the burden of those costs on the state, as the cleanup of groundwater or surface water tends to be more costly

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<sup>27</sup> 42 U.S.C. § 9604(c)(3).

<sup>28</sup> 42 U.S.C. § 9604(c)(6).

than other types of remediation. During the initial 10-year period, federal Superfund monies instead can be used to pay the maintenance costs of groundwater or surface water remedies.

## **Selection of Response Actions**

Section 121(a) of CERCLA generally requires response actions at contaminated sites to achieve acceptable levels of exposure that would be protective of human health and the environment.<sup>29</sup> Response actions also are to be cost-effective over both the short-term and long-term, including the operation and maintenance of the action. Section 121(b) states a preference for the selection of remedial actions that involve treatment to “permanently and significantly” reduce the “volume, toxicity or mobility” of contamination, as opposed to actions that do not involve such treatment.<sup>30</sup>

Actions not involving treatment often entail the containment of wastes on-site, or the removal and disposal of wastes off-site. The containment of wastes on-site could present lingering health and environmental risks if the containment method were to fail over time. If the remedial action would result in wastes being left on-site, Section 121(c) requires the President to review the performance of the remedial action every five years to determine whether that action continues to be protective of human health and the environment.<sup>31</sup> If the action is not functioning as intended, the President may take additional remedial actions at the site to achieve the cleanup goal.

Although Section 121 includes certain requirements to govern the selection of remedial actions, it does not specify how clean an individual site must be to protect human health and the environment. Section 121 also does not identify the specific nature of the remedial actions that would be required to attain a cleanup goal at an individual site. Instead, these cleanup decisions are made on a site-by-site basis taking many factors into consideration, including the potential for human exposure based on the anticipated land use, and the technical and economic feasibility of cleanup alternatives to prevent exposure.

## **Cleanup Standards**

The level of cleanup that is required can vary widely from site to site depending on the contaminants present, the cleanup standards or criteria that apply to those contaminants, and the response actions selected to attain those standards or criteria. Rather than specify standards or criteria for individual hazardous substances, Section 121(d) of CERCLA broadly requires that cleanup comply with applicable, relevant, and appropriate requirements (ARARs) to protect human health and the environment.<sup>32</sup> ARARs can include a host of federal or state standards, requirements, or other criteria. In this sense, CERCLA functions as an “umbrella” statute under which other statutes or regulations also may be applied to the cleanup of a contaminated site.

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<sup>29</sup> 42 U.S.C. § 9621(a).

<sup>30</sup> 42 U.S.C. § 9621(b).

<sup>31</sup> 42 U.S.C. § 9621(c).

<sup>32</sup> 42 U.S.C. § 9621(d).

Section 121(d)(4) authorizes the waiver of a particular standard, if:

- the contemplated response action would be part of a larger remedial action that would meet the standard once the larger action is completed;
- compliance with the standard would result in a greater risk than the alternatives;
- compliance with the standard would be technically impracticable from an engineering perspective;
- an equivalent standard of performance would be attained;
- in the case of a state standard, the state has not consistently applied that standard elsewhere within its jurisdiction; or
- meeting the standard would not provide a balance between the need for protection of public health and welfare and the environment at the site under consideration, and the availability of monies in the Superfund Trust Fund to respond to more immediate risks at other sites.<sup>33</sup>

Although CERCLA generally does not list specific standards that may apply to the cleanup of an individual site, there are two sets of standards cited in Section 121(d) that broadly apply to the selection of remedial actions at any site. First, the law requires remedial actions to achieve a level of cleanup that would attain Maximum Contaminant Levels (MCLs) established for current or potential sources of drinking water under the Safe Drinking Water Act.<sup>34</sup> Second, remedial actions must be consistent with other water quality criteria established under Sections 303<sup>35</sup> or 304<sup>36</sup> of the Clean Water Act. However, the applicability of these sets of standards to an individual site remains limited to circumstances in which the standards still are deemed “relevant and appropriate,” consistent with the underlying premise of an ARAR.

## **State Participation**

CERCLA authorizes a broad role for states to participate in the cleanup process. States must agree to share in the costs of remedial actions at non-federal NPL sites as a condition of the obligation of federal Superfund monies. In acknowledgment of their sharing of the costs of cleanup, Section 121(f) of CERCLA requires that states be afforded opportunities for “substantial and meaningful involvement” in initiating, developing, and selecting remedial actions.<sup>37</sup> However, there are certain limitations on the involvement of states in cleanup decisions at federal facilities, as states do not share in the costs of cleanup at these facilities. If a state wishes to challenge a remedial decision of a federal agency at a facility which that agency administers, Section 121(f)(3) requires that the state show that the decision of the agency is not supported by “substantial evidence.”<sup>38</sup>

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<sup>33</sup> 42 U.S.C. § 9621(d)(4).

<sup>34</sup> 42 U.S.C. § 300f et seq.

<sup>35</sup> 33 U.S.C. § 1313.

<sup>36</sup> 33 U.S.C. § 1314.

<sup>37</sup> 42 U.S.C. § 9621(f).

<sup>38</sup> 42 U.S.C. § 9621(f)(3).

## **Public Participation**

CERCLA also provides a role for the general public in commenting on the selection of remedial actions at individual sites. This role is similar to that under many other federal laws that require the opportunity for the public to comment on certain types of federal decisions. Section 117 of CERCLA requires EPA, or other federal agency responsible for administering and funding the cleanup of a contaminated site, to provide the public an opportunity to comment on proposals for the selection of remedial actions.<sup>39</sup> Once a final decision is made, public notice of the decision must be provided, with an explanation of any “significant” differences from the proposed action and a response to each “significant” public comment on the proposed action.

The opportunity for public comment required by Section 117 of CERCLA applies only to decisions on remedial actions. Decisions on removal actions are not subject to these requirements because of the presumed need for expedited action to address more immediate risks. In practice, EPA and other federal agencies typically notify the public of the selection of removal actions to inform communities of the nature and timing of such actions. To assist the public in understanding technical information presented in cleanup decision documents, Section 117(e) of CERCLA authorizes technical assistance grants of up to \$50,000 for community groups.<sup>40</sup> These grants are available only to affected communities at sites listed on the NPL.

## **Agency for Toxic Substances and Disease Registry**

Section 104(i) of CERCLA established the Agency for Toxic Substances and Disease Registry (ATSDR) primarily to assess potential health risks at NPL sites.<sup>41</sup> The ATSDR assesses individual sites based on the likelihood of human exposure to contamination through the air, soil, surface water, groundwater, and other pathways such as consumption of contaminated food sources. The purpose of these assessments is two-fold: to inform the public of potential health hazards at a contaminated site, and to aid decision-makers in evaluating what cleanup actions may be warranted to prevent potentially harmful exposure. Although the findings of the ATSDR may be used to inform the selection of cleanup actions, the agency does not have any authority to dictate cleanup decisions. In addition to site-specific assessments, Section 104(i) directs the ATSDR to prepare toxicological profiles of hazardous substances commonly found at NPL sites to identify potential health effects that can result from exposure.

Section 104(i) of CERCLA also authorizes the ATSDR to carry out several other functions intended to protect public health. For example, the agency is authorized to provide medical care and testing to individuals in the event of a public health emergency caused by, or believed to be caused by, exposure to toxic substances. CERCLA does not provide any criteria as to what constitutes a public health emergency for this purpose, presumably leaving the declaration of such an emergency to the discretion of the ATSDR. As with other roles, the resources of the agency to fulfill this role are subject to appropriations by Congress. To date, the ATSDR has not used its authority under CERCLA to declare a public health emergency. In practice, the agency’s role has

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<sup>39</sup> 42 U.S.C. § 9617.

<sup>40</sup> 42 U.S.C. § 9617(e).

<sup>41</sup> 42 U.S.C. § 9604(i).



focused on educating the public about known health risks from exposure to hazardous substances, and assessing potential risks at individual sites to aid in informing cleanup decisions.

## **Financial Liability**

Section 107 of CERCLA identifies the categories of potentially responsible parties connected with a contaminated site who are liable for the costs of response actions that EPA deems necessary to protect human health and the environment.<sup>42</sup> Such parties also are liable for damages for injury to, destruction of, or loss of natural resources resulting from a release of a hazardous substance, including the costs of assessing such injury, destruction, or loss; and the costs of public health assessments carried out by the ATSDR under Section 104(i) of CERCLA. The following sections discuss the categories of parties who are liable under Section 107 of CERCLA, the reach of liability, defenses to liability, and limitations on the liability of certain categories of parties.

### **Categories of Potentially Responsible Parties**

Section 107(a) identifies four categories of potentially responsible parties who are liable for the costs of response actions, natural resource damages, and public health assessments associated with the release or threatened release of a hazardous substance:

- any person who currently owns or operates a facility or vessel from which a hazardous substance was released;
- any person who at the time of disposal of a hazardous substance owned or operated the facility at which such disposal occurred;
- any person who arranged for the disposal or treatment of a hazardous substance (often referred to as a generator of waste), and any person who arranged for the transport of a hazardous substance for disposal or treatment; and
- any person who accepts or accepted a hazardous substance for transport to a disposal or treatment facility, incineration vessel, or site selected by such person.<sup>43</sup>

In the context of liability, it should be noted that financial responsibility for cleanup costs may extend to actions beyond a facility boundary, if a hazardous substance were to migrate (i.e., move or spread) through the environment. Section 101(8) of CERCLA defines the term “environment” to include not only the land, but also surface water, groundwater, or ambient air.<sup>44</sup> Consequently, cleanup actions may be necessary not only on the facility where the initial release occurred, but anywhere the hazardous substance may migrate through the environment. For example, hazardous substances that migrate into groundwater or surface water can travel some distance, even miles, and can necessitate cleanup actions across a larger area than where the release first occurred.

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<sup>42</sup> 42 U.S.C. § 9607.

<sup>43</sup> 42 U.S.C. § 9607(a).

<sup>44</sup> 42 U.S.C. § 9601(8).

## Reach of Liability

Over time, the courts have interpreted liability under Section 107 of CERCLA to be strict, joint and several, and retroactive. This judicial interpretation is rooted in case law, legislative history, and the definition of liability in Section 101(32) of CERCLA<sup>45</sup> that applies the same standards of liability as in Section 311 of the Clean Water Act.<sup>46</sup>

- Strict liability means that a party can be held liable regardless of whether the conduct of that party was negligent.
- Joint and several liability means that one or more of the liable parties can be held responsible for the full cost of the cleanup at a site, regardless of the degree of involvement in the contamination. However, Section 113(f)(1) of CERCLA allows a party to seek recovery of some of its cleanup costs from other parties at a site through contribution claims in court.<sup>47</sup> In deciding such claims, a court is to base the allocation of cleanup costs on “equitable factors.” In the event that a party can show that the waste *it* sent to the site could not have contributed to the contamination, joint and several liability is not to apply to that party.
- Retroactive liability means that parties are liable for the cleanup of hazardous substances released prior to the enactment of CERCLA on December 11, 1980. However, Section 107(f)(1) extends liability for natural resource damages only to releases that occurred on or after the enactment of CERCLA, which resulted in injury to, destruction of, or loss of the natural resources.<sup>48</sup>

It should be emphasized that the above description of the basic liability standards of CERCLA merely offers a brief summary of the broad reach of the statute, as generally interpreted by the courts over time. As such, this description does not examine the complexities of individual court decisions on these matters. Since the enactment of CERCLA in 1980, well over one thousand court decisions have interpreted these basic liability standards under the statute to determine the financial responsibility of potentially responsible parties for the costs of cleanup. How a court may view the cleanup liability of an individual party at any one site would depend on numerous legal issues that are beyond the scope of the summary of CERCLA offered in this report.

## Defenses to Liability

Section 107(b) of CERCLA provides defenses to liability under certain circumstances.<sup>49</sup> A party cannot be held liable for the release or threatened release of a hazardous substance, and resulting injury to, destruction of, or loss of natural resources, if that party can provide evidence that the release or threatened release was caused solely by

- an act of God;
- an act of war;

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<sup>45</sup> 42 U.S.C. § 9601(32).

<sup>46</sup> 33 U.S.C. § 1321.

<sup>47</sup> 42 U.S.C. § 9613(f)(1).

<sup>48</sup> 42 U.S.C. § 9607(f)(1).

<sup>49</sup> 42 U.S.C. § 9607(b).

- an act or omission of a third party with whom the defendant has no contractual relationship, if the defendant exercised due care with respect to the hazardous substance and took precautions against foreseeable acts or omissions of that third party and against the foreseeable consequences of such acts or omissions; or
- any combination of these three circumstances.

The third party defense sometimes is characterized as the “innocent” landowner defense, in the sense that it typically pertains to property owners who had no involvement in the actions that led to the contamination. Section 101(35) of CERCLA defines the term contractual relationship for the purpose of the third party defense, and specifies the conditions that a landowner must satisfy to claim the lack of a contractual relationship connecting the owner to the contamination.<sup>50</sup> See the “Bona Fide Prospective Purchasers and Innocent Landowners” section of this report below.

## **Limitations on Liability**

To address the fairness of the liability scheme of CERCLA, Congress has amended the statute at various times to limit, or in some cases eliminate, the liability of certain categories of parties who may not have been involved in actions that resulted in contamination, who may have contributed only very small quantities or less toxic wastes to a contaminated site, or whose conduct Congress did not wish to discourage. These categories of parties include:

- response action contractors who merely perform the work to clean up a contaminated site, but who did not cause or otherwise contribute to the contamination;
- state and local governments that acquired contaminated property involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances, and did not cause or otherwise contribute to the contamination;
- persons who only hold a contaminated property in a fiduciary capacity;
- financial lenders who acquire financial interests or ownership of a contaminated property through foreclosure;
- generators and transporters of scrap materials intended for recycling, but instead may have been disposed of by other persons;
- persons who contributed only very small quantities of waste or only municipal solid (i.e. non-hazardous) waste to a site;
- service station dealers who only disposed of recycled oil that was not contaminated with hazardous substances, and who fully complied with federal regulations for managing the recycled oil;
- “innocent” landowners who purchased a property without knowledge of existing contamination, with respect to the third party defense noted above;
- other “innocent” owners of property that became contaminated merely through migration from a contiguous property where the initial release occurred; and

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<sup>50</sup> 42 U.S.C. § 9601(35).

- “bona fide” prospective purchasers who otherwise may be hesitant to acquire a property on which contamination is known or suspected to be present, because of the potential liability for cleanup upon acquiring ownership.

Amendments to CERCLA that provided such limitations on cleanup liability for specific categories of parties are examined further below. As discussed in the “Other Exclusions” section of this report, there also are certain situations identified in CERCLA in which a party would not be subject to liability, such as the proper application of a registered pesticide product<sup>51</sup> or a federally permitted release of a hazardous substance.<sup>52</sup>

## **Cleanup Contractors**

Soon after the enactment of CERCLA in 1980, it was realized that a private contractor hired to clean up a contaminated site may be exposed to potential liability as an operator of that site, or as a person who arranged for disposal or transport of waste in instances in which the contractor removed waste as part of the cleanup. This exposure to potential liability was viewed as a deterrent to private contractors being willing to clean up contaminated sites. In response to this concern, Section 119 of the Superfund Amendments and Reauthorization Act of 1986 added Section 119 to CERCLA to limit the liability of “response action” contractors who are hired to perform cleanup actions.<sup>53</sup>

Section 119(a)(1) states that cleanup contractors shall not be liable under CERCLA, or any other federal law, to any person for “injuries, costs, damages, expenses, or other liability” resulting from the release or threatened release of a hazardous substance, pollutant, or contaminant.<sup>54</sup> (However, no immunity from liability under state law is conferred under CERCLA.) Section 119(a)(2) states that a cleanup contractor shall not be exempt from federal liability for a release caused by that contractor as a result of conduct that is “negligent, grossly negligent, or which constitutes intentional misconduct.”<sup>55</sup> Under certain circumstances, Section 119(c) authorizes the President the discretion to indemnify a cleanup contractor for negligent conduct, but not grossly negligent conduct or intentional misconduct.<sup>56</sup> Such indemnification is intended to cover a contractor’s liability that cannot be covered by insurance at a “fair and reasonable” price.

## **Fiduciaries and Financial Lenders**

Enacted in the 104<sup>th</sup> Congress, the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (P.L. 104-208, Division A, Title II, Subtitle E of the Omnibus Consolidated Appropriations Act for FY1997) added Section 107(n) to CERCLA to limit the liability of persons who hold a facility or vessel only in a fiduciary capacity for another person to the value of the assets held on behalf of that person.<sup>57</sup> This limitation on liability is provided if the fiduciary did not cause or contribute to a release or threatened release of a hazardous substance

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<sup>51</sup> 42 U.S.C. § 9607(i).

<sup>52</sup> 42 U.S.C. § 9607(j).

<sup>53</sup> 42 U.S.C. § 9619.

<sup>54</sup> 42 U.S.C. § 9619(a)(1).

<sup>55</sup> 42 U.S.C. § 9619(a)(2).

<sup>56</sup> 42 U.S.C. § 9619(c).

<sup>57</sup> 42 U.S.C. § 9607(n).

from such facility or vessel. Fiduciaries who held an interest in a contaminated property had been concerned that joint and several liability under CERCLA could result in their financial liability exceeding the value of the assets held.

P.L. 104-208 also amended the definition of “owner or operator” in Section 101(20) of CERCLA<sup>58</sup> to exclude financial lenders that did not participate in the management of a facility or vessel from which there was a release or threatened release of a hazardous substance, but who held indicia of ownership primarily to protect security interests. Lenders also were exempted from liability as owners or operators of foreclosed properties, but only if they did not participate in the management of the facility or vessel prior to foreclosure. Lenders especially had been concerned about becoming liable for the cleanup of contaminated properties following foreclosure, when they become owners of the property, and hence could become liable for cleanup under Section 107.

### **Generators and Transporters of Recyclable Materials**

Enacted in the 106<sup>th</sup> Congress, Title VI—Superfund Recycling Equity—of Appendix I of the Consolidated Appropriations Act for FY2000 (P.L. 106-113) added Section 127 to CERCLA to exempt certain parties involved in the recycling of scrap materials from cleanup liability as generators and transporters of wastes.<sup>59</sup> The exemption is available to persons who “arranged” for the recycling of scrap materials (by selling the materials or otherwise arranging for their recycling). Recyclers involved in these activities had been concerned about becoming liable as generators or transporters of wastes if they sold or transported scrap materials to a facility that disposed of the materials instead of recycling them as intended. Some had perceived this potential liability as a deterrent to recycling.

The exemption is available to the above persons only for materials that fall within the statutory definition of recyclable materials in CERCLA. Section 127(b) defines recyclable materials to include the following scrap materials: plastic, glass, textiles, rubber (other than whole tires), metal, or spent lead-acid, spent nickel-cadmium, and other spent batteries, and minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap.<sup>60</sup> Two items are expressly excluded: (1) shipping containers of a certain capacity that contained a hazardous substance or onto which a hazardous substance adhered, and (2) materials containing polychlorinated biphenyls (PCBs) in excess of federal standards.

Even if a material can be considered recyclable within the above statutory definition, the exemption is not automatic. Section 127(c) requires the person who arranged for the recycling of the materials to demonstrate that certain criteria were met.<sup>61</sup> For example, the material must have been of commercial specification grade; a market must have existed for the material; a substantial portion of that type of material must have been made available for the manufacture of a new saleable product; and the material could have been used to replace, or to substitute for, virgin raw material. The person also must demonstrate that he or she exercised “reasonable care” to

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<sup>58</sup> 42 U.S.C. § 9601(20).

<sup>59</sup> 42 U.S.C. § 9627.

<sup>60</sup> 42 U.S.C. § 9627(b).

<sup>61</sup> 42 U.S.C. § 9627(c).

determine that the receiving facility where the materials were intended to be recycled was in compliance with federal, state, and local environmental laws.

Section 127(f) makes the exemption unavailable if the person claiming the exemption had reason to believe the scrap material would not be recycled by the receiving facility; that the material would be burned as fuel or for energy recovery or incineration; that the receiving facility was not in compliance with federal, state, and local environmental laws; or that hazardous substances had been added to the material; or if the person failed to exercise “reasonable care” in managing and handling the material.<sup>62</sup>

### **Contributors of “De micromis” and Municipal Solid Wastes**

Enacted in the 107<sup>th</sup> Congress, Section 102(a) of the Small Business Liability Relief and Brownfields Revitalization Act (P.L. 107-118) amended Section 107 of CERCLA to limit the liability of parties who contributed only certain quantities or types of wastes to sites listed on the NPL. The amendment did not extend these exemptions to such parties at sites not listed on the NPL. Section 102(a) of P.L. 107-118 added Section 107(o) to CERCLA to exempt from cleanup liability parties who generated or transported waste to a site listed on the NPL, if they contributed only “de micromis” amounts of hazardous substances to that site.<sup>63</sup> To qualify for this exemption, a party must demonstrate that it contributed less than 110 gallons of liquid materials or less than 200 pounds of solid materials containing hazardous substances. The exemption is not available to persons who contributed such quantities of wastes to a site on or after April 1, 2001.

Section 102(a) of P.L. 107-118 also added Section 107(p) to CERCLA to exempt from cleanup liability residential property owners, small businesses, and small non-profit organizations that contributed only municipal solid waste to a site listed on the NPL.<sup>64</sup> The exemption is limited to municipal solid waste generated by a household or that possesses characteristics typical of household waste. The exemption is available only to the generators of the waste and persons who arranged for the transport of the waste. The exemption is not available to the owner or operator of the disposal site where the waste was sent, such as a landfill, nor to transporters of the waste who selected the disposal site.

### **Bona Fide Prospective Purchasers and Innocent Landowners**

Subtitle B of Title II of P.L. 107-118 authorized exemptions from cleanup liability for two categories of parties: (1) “bona fide” prospective purchasers and (2) owners whose properties became contaminated only as a result of migration from a contiguous property owned by another person. Subtitle B also established more specific criteria for the availability of the third party defense to “innocent” landowners who had no knowledge of existing contamination at the time of acquiring a property and had no involvement in the actions that led to the contamination. These exemptions are available to site owners who meet the requisite statutory criteria, regardless of whether the site is listed on the NPL. In contrast, the above exemptions from cleanup liability for contributors of de micromis amounts of wastes and municipal solid wastes are available only at sites listed on the NPL.

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<sup>62</sup> 42 U.S.C. § 9627(f).

<sup>63</sup> 42 U.S.C. § 9607(o).

<sup>64</sup> 42 U.S.C. § 9607(p).

Prior to the enactment of P.L. 107-118, EPA had used its existing authorities under Section 122 of CERCLA<sup>65</sup> to enter into voluntary settlement agreements with prospective purchasers who had no involvement in the contamination, as a mechanism to limit their cleanup liability upon acquiring ownership of a contaminated property. EPA commonly referred to these agreements as “Prospective Purchaser Agreements.”<sup>66</sup> This type of settlement usually capped a purchaser’s financial responsibility for the cleanup, or required less extensive cleanup work by the purchaser. These agreements also typically included a covenant promising that the federal government would not sue for further liability, and offered protection from contribution claims by other liable parties. (See the “Voluntary Settlement Agreements” section of this report for additional discussion.) After the enactment of P.L. 107-118, a “bona fide” prospective purchaser who met the requisite statutory criteria could become eligible for an exemption from cleanup liability without entering into a formal settlement agreement with EPA.

Section 222 of P.L. 107-118 added Section 107(r) to CERCLA, exempting “bona fide” prospective purchasers of contaminated property acquired after the date of the enactment of P.L. 107-118 (January 11, 2002).<sup>67</sup> This exemption is not available to persons who purchased a contaminated property on or before January 11, 2002, and therefore is not retroactive. A person who knowingly purchased a contaminated property on or before that date must have entered into a Prospective Purchaser Agreement with EPA under Section 122 of CERCLA to limit his or her cleanup liability upon acquiring ownership. Section 222 of P.L. 107-118 also added Section 101(40) to CERCLA, defining the term “bona fide prospective purchaser” and specifying the criteria of eligibility for the exemption provided in Section 107(r) of the statute.<sup>68</sup>

In addition to “bona fide” prospective purchasers, Section 221 of P.L. 107-118 added Section 107(q) to CERCLA, exempting owners of contaminated property from cleanup liability if the contamination occurred only as a result of the migration of a hazardous substance from a contiguous property owned by another person.<sup>69</sup> To obtain the exemption, an owner of a contiguous property must have had no knowledge of the presence of the hazardous substance, nor the possibility of its migration, when acquiring ownership. Section 223 of P.L. 107-118 amended the definition of the term “contractual relationship” in Section 101(35) of CERCLA<sup>70</sup> to establish more specific criteria for “innocent” landowners to claim the third party defense against liability under Section 107(b)(3) of CERCLA.<sup>71</sup> Of importance, the exemptions for “bona fide” prospective purchasers and contiguous property owners reference these criteria in the definition of contractual relationship, making the criteria applicable to all three exemptions.

Under these criteria, an owner claiming an exemption as a “bona fide” prospective purchaser, “innocent” landowner, or contiguous property owner must have had no association with the activities that led to the contamination, and must have had no relationship with the persons who

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<sup>65</sup> 42 U.S.C. § 9622.

<sup>66</sup> In 1989, EPA developed guidance for entering into Prospective Purchaser Agreements with potentially responsible parties under Section 122 of CERCLA. EPA revised its guidance in 1995 to expand the circumstances under which such agreements would be considered. See Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *Guidance on Agreements with Prospective Purchasers of Contaminated Property*, May 24, 1995.

<sup>67</sup> 42 U.S.C. § 9607(r).

<sup>68</sup> 42 U.S.C. § 9601(40).

<sup>69</sup> 42 U.S.C. § 9607(q).

<sup>70</sup> 42 U.S.C. § 9601(35).

<sup>71</sup> 42 U.S.C. § 9607(b)(3).

caused or contributed to the contamination (aside from a contractual relationship only involving the conveyance of the property). The key difference among these exemptions is that a “bona fide” prospective purchaser may know that a property is contaminated at the time of acquisition, and still be exempt from liability under CERCLA for the cleanup costs. A person claiming an exemption as an “innocent” landowner or a contiguous property owner must prove that he or she had no knowledge, or no reason to know, of the contamination at the time of acquisition.

To demonstrate that a best effort was made to know whether contamination may be present, CERCLA requires a person to have made “all appropriate inquiries” into the previous ownership and uses of the property.<sup>72</sup> A person seeking to claim an exemption from liability as a “bona fide” prospective purchaser, “innocent” landowner, or contiguous property owner must satisfy this requirement *before* acquiring ownership. As directed by P.L. 107-118, EPA promulgated regulations that identify specific measures a person must take to demonstrate that “all appropriate inquiries” were made satisfactorily.<sup>73</sup> The process outlined in the regulations for making “all appropriate inquiries” is similar to a preliminary site assessment, and must be performed by an environmental professional hired at the person’s expense.

A person also must satisfy other conditions *after* receiving ownership of a property to maintain an exemption from liability under CERCLA as a “bona fide” prospective purchaser, “innocent” landowner, or contiguous property owner. The owner must take “reasonable steps” to (1) stop any continuing release of a hazardous substance; (2) prevent any future releases; and (3) prevent or limit exposure to any previously released hazardous substance.<sup>74</sup> The owner also must provide any legally required notices of the discovery of hazardous substances on the property, and must comply with any land use restrictions and institutional controls that may be put into place by regulators to prevent potential exposure to the hazardous substances. Satisfying these criteria can have the effect of minimizing, but not eliminating, an owner’s responsibility for managing the contamination, even though the owner may be exempt from cleanup liability under CERCLA.

A person who discovered contamination upon conducting “all appropriate inquiries” must take “reasonable steps” to manage the contamination once becoming the owner to maintain exemption status as a “bona fide” prospective purchaser. If a person conducted “all appropriate inquiries” before acquiring a property and still did not discover the contamination, that person must take these steps once the existence of the contamination is known to maintain exemption status as an “innocent” landowner, or a contiguous property owner if the contamination resulted from migration. It should be emphasized that the burden of proof is on the person seeking an exemption from liability to demonstrate that “all appropriate inquiries” were made before acquiring ownership *and* that “reasonable steps” are taken after acquiring ownership to manage the contamination once its existence is known. (See CRS Report RL31911, “*Innocent Landowners*” and “*Prospective Purchasers*” Under the Superfund Act, by Robert Meltz.)

## **Hazardous Substance Superfund Trust Fund**

CERCLA established the Hazardous Substance Superfund Trust Fund to provide a source of funds for the federal government to finance the cleanup of contaminated sites where the

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<sup>72</sup> 42 U.S.C. § 9601(35)(B).

<sup>73</sup> 40 C.F.R. Part 312.

<sup>74</sup> 42 U.S.C. § 9601(35)(B)(i)(II).



potentially responsible parties cannot pay or cannot be identified. This assumption of financial responsibility for these “orphan shares” of cleanup costs is intended to ensure that the actions necessary to protect human health and the environment are carried out. The availability of Superfund Trust Fund monies to pay for the cleanup of orphaned sites is subject to appropriations by Congress. Once appropriated, the availability of Superfund monies under EPA’s Superfund program to pay for remedial actions is further subject to cost-sharing agreements with the states in which the sites are located, as discussed in the “State Participation” section of this report.

## **Original Taxing Authority**

The special taxing authority to finance the Superfund Trust Fund expired at the end of 1995. Before this authority lapsed, three dedicated taxes on petroleum, chemical feedstocks (and imported chemical derivatives), and corporate income provided most of the revenues for the Superfund Trust Fund. Revenues from the General Fund of the U.S. Treasury also contributed to the trust fund to augment the dedicated taxes, but these general tax revenues were a relatively small portion of the total revenues to the trust fund during the time that the dedicated taxes were collected through the end of 1995.

As originally enacted in 1980, Section 211(a) of CERCLA authorized the Superfund excise taxes on petroleum<sup>75</sup> and chemical feedstocks.<sup>76</sup> Section 515(a) of the Superfund Amendments and Reauthorization Act of 1986 expanded the reach of the tax on domestically manufactured chemical feedstocks to include imported chemical derivatives.<sup>77</sup> Taxing imported derivatives was intended to compensate for the potential loss of revenues as overseas manufacturing of chemical feedstocks increased. Prior to expiration at the end of 1995, the Superfund excise tax on petroleum was 9.7 cents per barrel. The Superfund excise tax on chemical feedstocks and imported chemical derivatives varied from \$0.22 per ton to \$4.87 per ton, depending on the substance (with the exception of xylene which was taxed at a higher rate of \$10.13 per ton in the initial years of the tax until 1992.) Section 516(a) of the Superfund Amendments and Reauthorization Act of 1986 established the special tax on corporate income to provide an additional revenue stream for the Superfund Trust Fund.<sup>78</sup> Prior to expiration in 1995, the Superfund tax on corporate income (formally referred to as the Corporate Environmental Income Tax) was 0.12% of corporate alternative minimum taxable income in excess of \$2 million.

Whether to reinstate Superfund taxes has been a long-standing controversy since the taxing authority lapsed at the end of 1995. Congress has considered numerous bills to reauthorize the taxes, but none have been enacted to date. The reauthorization debate has centered around numerous “fairness” issues. Supporters of the taxes maintain that dedicated tax revenues for the Superfund program are necessary to ensure that polluters pay for the cleanup of contamination they have caused or may cause in the future, often referred to as the “polluter pays principle.” In this sense, some have characterized Superfund taxes as an “insurance plan” for the public that is intended to provide resources for cleanup in the event that businesses may become bankrupt and cannot be pursued for their liability. On the other hand, opponents of the taxes have observed that not all of the individual businesses subject to the tax may have been involved in activities that

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<sup>75</sup> 26 U.S.C. § 4611.

<sup>76</sup> 26 U.S.C. § 4661.

<sup>77</sup> 26 U.S.C. § 4671.

<sup>78</sup> 26 U.S.C. § 59A.

resulted in contamination, and that the actual polluters are paying for the cleanup of most Superfund sites through enforcement actions under the liability provisions of CERCLA.

The extent to which Superfund taxes may have affected “innocent” businesses has been a principal question in the debate over the fairness of the tax structure. The Superfund tax on corporate income was intended to raise additional revenues from a wide range of businesses that may have benefitted from the use of hazardous substances in some way. However, this income tax captured all businesses that met the income threshold, regardless of whether a business may have used or disposed of any hazardous substances. Congress created the Superfund taxes on petroleum and chemical feedstocks based on the broadly held assumption that much of the environmental contamination in the United States had been caused as a result of industrial activities that involved these substances. However, not all petroleum and chemical companies may have been involved in actions that led to contamination.

The appropriateness of the Superfund tax on petroleum has been especially controversial in light of the exclusion of petroleum from the cleanup authorities of CERCLA. Because of this exclusion, monies from the Superfund Trust Fund generally have paid for the cleanup of petroleum contamination, only if the contamination includes hazardous substances that are not part of the petroleum product itself. Congress has established other trust funds to address releases of petroleum. Title V of the Superfund Amendments and Reauthorization of 1986 created the Leaking Underground Storage Tank Trust Fund to pay for actions to respond to petroleum released from underground tanks.<sup>79</sup> Title VIII of the Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509) created the Oil Spill Liability Trust Fund to pay for actions to respond to surface releases of petroleum.<sup>80</sup>

Since Superfund taxing authority lapsed at the end of 1995, there have continued to be varying perspectives on how to fund the cleanup of contaminated sites in the most fair manner to ensure that the responsible parties satisfy their liability, while minimizing the financial burden on taxpayers who did not cause or otherwise contribute to the contamination, or who did not benefit in some way from the actions that resulted in the contamination. The current source of revenues for the Superfund Trust Fund is discussed below.

## **Current Source of Revenues**

After the authority to collect the Superfund taxes expired, the remaining revenues from these taxes were expended by the end of FY2003, leaving revenues from the General Fund of the U.S. Treasury as the main source of monies for the Superfund Trust Fund. Although the Superfund taxes have expired, industry has continued to provide some of the funding for the trust fund via corporate income taxes that contribute to the General Fund. (Revenues to the General Fund consist of corporate income taxes, individual income taxes, and miscellaneous federal receipts and collections that are not dedicated to specific federal trust funds.)

In addition to general Treasury revenues, others sources of monies have continued to contribute some revenues to the Superfund Trust Fund for appropriation by Congress. Cleanup costs borne

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<sup>79</sup> 26 U.S.C. § 9508. For a discussion of the Leaking Underground Storage Tank Trust Fund, see CRS Report RS21201, *Leaking Underground Storage Tanks (USTs): Prevention and Cleanup*, by Mary Tiemann.

<sup>80</sup> 26 U.S.C. § 9509. For a discussion of the Oil Spill Liability Trust Fund, see CRS Report RL33705, *Oil Spills in U.S. Coastal Waters: Background and Governance*, by Jonathan L. Ramseur.

by the federal government that are later recouped from the potentially responsible parties are deposited into the trust fund (referred to as cost recoveries). These recouped funds can be made available for the cleanup of other sites where the potentially responsible parties cannot pay or cannot be found. Fines and penalties assessed against potentially responsible parties for violations of CERCLA are deposited into the trust fund as well. Interest also accrues on the trust fund balance. Collectively, these monies have been relatively small compared to the amount of general Treasury revenues that now support most of the annual discretionary appropriations from the trust fund to implement EPA's Superfund program. However, these other sources of monies do continue to help finance the trust fund, and to some extent reduce the need for general Treasury revenues at sites where the potentially responsible parties cannot be found or cannot pay.

## **Special Account Funds**

Private settlement funds have been an additional source of monies for the Superfund Trust Fund. As amended in 1986, Section 122(b)(3) of CERCLA authorizes EPA to retain funds that it receives from private parties under voluntary settlement agreements to perform the cleanup of sites at which those parties may be liable.<sup>81</sup> (See the "Voluntary Settlement Agreements" section below.) These private settlement funds are deposited into site-specific Special Accounts within the Superfund Trust Fund, which are dedicated to the cleanup of the sites covered under the settlements. EPA has received nearly \$4 billion in private settlement funds over time and has deposited these funds into over 1,000 Superfund Special Accounts since the establishment of the first account in FY1990.<sup>82</sup> These funds are available directly to EPA and are not subject to discretionary appropriations by Congress. Once all planned future work at a site is complete, EPA may "reclassify" the remaining balance of a Special Account for direct obligation to perform cleanup work at other sites, as a means to replace any appropriated funds that also may have been spent at the site covered by the Special Account. In other instances, EPA may transfer the remaining balance of a Special Account to the general portion of the Superfund Trust Fund, which would be subject to subsequent appropriation by Congress.

## **Enforcement Mechanisms**

There are three mechanisms through which the federal government can take actions to enforce cleanup liability under CERCLA, if the potentially responsible parties can be identified and have the financial capability to pay. These mechanisms include judicial or administrative orders, cost-recovery actions, and voluntary settlement agreements. Like the response authorities of CERCLA, these enforcement authorities are Presidential authorities. As discussed earlier in this report, a 1987 Executive Order delegated the President's response authorities under CERCLA to EPA and other federal agencies. This order also delegated the enforcement of the statute to EPA at sites on the land, and to the U.S. Coast Guard within inland river ports and harbors, the Great Lakes, and U.S. coastal waters. References in this report to the enforcement authorities of EPA apply equally to the U.S. Coast Guard within its delegated jurisdiction. CERCLA also authorizes citizen suits to enforce the cleanup requirements of CERCLA, but a cleanup action first must be

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<sup>81</sup> 42 U.S.C. § 9622(b)(3).

<sup>82</sup> For background information on the use and overall status of Superfund Special Accounts, see EPA's Office of Enforcement and Compliance Assurance website: <http://www.epa.gov/oecaerth/cleanup/superfund/spec-acct.html>.

completed before compliance with applicable requirements can be challenged. Each of these enforcement mechanisms is discussed below.

## **Judicial or Administrative Orders**

Section 106(a) of CERCLA authorizes EPA to issue an administrative order, or to pursue a judicial order through the Department of Justice, to require a potentially responsible party to perform cleanup actions to address “an imminent and substantial endangerment to public health or welfare, or the environment” arising from an actual or threatened release of a hazardous substance.<sup>83</sup> Section 106(b)(1) authorizes fines of up to \$25,000 per day for failure to comply with a cleanup order.<sup>84</sup> Section 107(c)(3) of CERCLA also allows a party that fails to comply with a cleanup order to be held liable for punitive damages up to three times the costs incurred by the United States out of the Superfund Trust Fund to carry out the cleanup action that the party did not perform.<sup>85</sup> Monies received by the United States for such punitive damages are to be deposited into the trust fund, and can be made available to finance the cleanup of other sites, subject to appropriations by Congress.

If the party who receives and complies with a Section 106 order can prove it is not liable under CERCLA, or that the cleanup actions required by EPA under the order were “arbitrary and capricious” or otherwise not in accordance with law, Section 106(b)(2) authorizes that party to be reimbursed from the Superfund Trust Fund.<sup>86</sup> This provision is intended to protect an innocent party from the costs of enforcement actions that may be imposed inappropriately upon that party, or to prevent a liable party from being required to pay for a more stringent cleanup than may be warranted to protect human health and the environment.

## **Cost-Recovery Actions**

At some sites, EPA may spend Superfund Trust Fund monies upfront to initiate the cleanup if the potentially responsible parties are not yet identified, or if a cleanup order or settlement agreement with the identified parties is not yet finalized. In the event that EPA does expend Superfund monies at a site with viable parties, reimbursement may be included in the terms of any administrative settlement agreement that may be entered into with the parties. EPA also may pursue recovery of Superfund monies from the parties through judicial actions, in conjunction with the Department of Justice.

Section 107(a) of CERCLA specifically authorizes EPA to recover Superfund monies from the potentially responsible parties, as long as those actions are not inconsistent with the NCP.<sup>87</sup> States and Indian tribes, and any other person, who chooses to perform cleanup actions also may recover their costs from the potentially responsible parties, as long as those actions are consistent with the NCP. The costs of health effects studies carried out by the ATSDR under Section 104(i) of

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<sup>83</sup> 42 U.S.C. § 9606(a).

<sup>84</sup> 42 U.S.C. § 9606(b)(1).

<sup>85</sup> 42 U.S.C. § 9607(c)(3).

<sup>86</sup> 42 U.S.C. § 9606(b)(2).

<sup>87</sup> 42 U.S.C. § 9607(a).

CERCLA,<sup>88</sup> and damages for injury to, destruction of, or loss of natural resources (and the assessment of such injury, destruction, or loss), are recoverable as well.

Section 113(g)(2) of CERCLA limits the time during which a cost-recovery action may be commenced against a potentially responsible party, which could reduce a party's financial liability at a site if recovery is not sought quickly enough.<sup>89</sup> Cost-recovery actions must be filed within three years after the completion of a removal action, except for removal actions allowed to extend beyond the general time limit of 12 months. For these lengthier removal actions, the costs can be sought within six years after the determination was made to extend the timing beyond 12 months. Cost-recovery actions must be commenced within six years after the initiation of the physical construction of a remedial action. If the remedial action is initiated within three years after the completion of the removal action that preceded it, the costs of that removal action may be recovered as part of the recovery of the costs of the remedial action that followed.

## **Voluntary Settlement Agreements**

If a potentially responsible party is willing to resolve its liability voluntarily, Section 122 of CERCLA<sup>90</sup> gives EPA the discretion to enter into an administrative settlement agreement with that party instead of pursuing an enforcement action through a judicial or administrative order under Section 106, or a cost-recovery action under Section 107. Avoiding an enforcement action by EPA through a voluntary settlement agreement can save a party the costs of litigation, possibly motivating a party to agree to settle its liability.

Section 122(f) gives EPA the discretion to include a covenant in the agreement promising that the federal government will not sue for further liability.<sup>91</sup> Such a covenant can provide an incentive for a party to agree to perform specific cleanup actions or to make a monetary payment in exchange for a cap on its liability. As discussed in the "Special Account Funds" section above, Section 122(b)(3) authorizes EPA to retain the funds received under a settlement and directly use the funds to fulfill the terms of the settlement.<sup>92</sup> A party who voluntarily settles its liability at a site also is afforded protection from contribution claims by other parties at that site, under Section 113(f)(2) of CERCLA.<sup>93</sup> Such protection is intended to offer yet another incentive for a party to settle, especially if a contribution claim by another party appears imminent.

Whether to enter into a settlement agreement with EPA under Section 122 is entirely voluntary on the part of the potentially responsible party. However, once finalized, the terms of the agreement to perform specific cleanup actions or to make a monetary payment are binding on the party who entered into the agreement. If the party fails to perform the agreed-upon cleanup actions or to pay the agreed-upon costs of the cleanup, Section 109 of CERCLA authorizes civil penalties of up to \$25,000 each day that the violation of the agreement continues to occur.<sup>94</sup>

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<sup>88</sup> 42 U.S.C. § 9604(i).

<sup>89</sup> 42 U.S.C. § 9613(g)(2).

<sup>90</sup> 42 U.S.C. § 9622.

<sup>91</sup> 42 U.S.C. § 9622(f).

<sup>92</sup> 42 U.S.C. § 9622(b)(3).

<sup>93</sup> 42 U.S.C. § 9613(f)(2).

<sup>94</sup> 42 U.S.C. § 9609.

## Ability-to-Pay Considerations

In enforcing cleanup liability under CERCLA, EPA has the discretion to consider a potentially responsible party's financial capability in determining that party's share of the cleanup costs. A party with limited financial capability who desires to reduce its share of the cleanup costs may request a reduction in its share through the negotiation of a voluntary settlement agreement with EPA under Section 122 of CERCLA, discussed above. In the negotiation process, the party seeking the reduction must submit financial information to EPA for the agency's consideration to determine whether the party's ability to pay the cleanup costs may in fact be limited.

In 1995, EPA issued its first guidance document on ability-to-pay considerations for use in settlement negotiations. The agency revised its guidance again in 1997.<sup>95</sup> EPA formulated its guidance based on court interpretations of the reach and intent of the cleanup liability provisions of CERCLA,<sup>96</sup> and the agency's policy of balancing two fundamental interests: ensuring that a potentially responsible party satisfies its liability for cleanup, while at the same time not creating an undue financial hardship on that party, or on those who may be dependent upon that party.

In 2002, Congress included provisions in Section 102(b) of Title I of P.L. 107-118 that amended Section 122(g) of CERCLA to establish a new category of *de minimis* settlement that explicitly endorsed EPA's policy to reduce a party's share of the cleanup costs based on that party's ability to pay.<sup>97</sup> Prior to this amendment, CERCLA explicitly authorized *de minimis* settlements only for owners of property who were not involved in the release of hazardous substances and who had no knowledge of any hazardous substances on the property; and for persons who contributed a relatively small amount of hazardous substances that were minimally toxic in comparison to other hazardous substances at the site.

In determining whether a party satisfactorily demonstrates a limited ability to pay, EPA must consider the ability of the person to pay for cleanup actions and "... still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues."<sup>98</sup> Consistent with earlier EPA guidance, the amendment explicitly requires a person seeking a reduced settlement to provide EPA with the financial information that would be necessary to determine the ability of that person to pay for cleanup actions at the site concerned.<sup>99</sup>

If EPA were to grant a reduced settlement, the person who is the subject of the settlement must waive all contribution claims against other potentially responsible parties at the site, unless EPA were to determine that requiring a waiver would be an "unjust" condition.<sup>100</sup> A reduced settlement does not remove a party from the responsibility to provide information and access to the site in the future that may be necessary to carry out the cleanup.<sup>101</sup> After a reduced settlement is

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<sup>95</sup> Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *General Policy on Superfund Ability to Pay Determinations*, September 30, 1997. The full text of this document is available on the agency's website: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf>.

<sup>96</sup> For example, see *United States v. Bay Area Battery*, 895 F. Supp. 1524 (N.D.Fla. 1995).

<sup>97</sup> 42 U.S.C. § 9622(g)(7)(A).

<sup>98</sup> 42 U.S.C. § 9622(g)(7)(B).

<sup>99</sup> 42 U.S.C. § 9622(g)(7)(C).

<sup>100</sup> 42 U.S.C. § 9622(g)(8)(A).

<sup>101</sup> 42 U.S.C. § 9622(g)(8)(C).

finalized, EPA must notify any other potentially responsible parties at the site who have not resolved their liability with the federal government.<sup>102</sup>

Financial capability aside, EPA still may decline a potentially responsible party's request for a reduced settlement, if the agency determines that the party has failed to comply with any request for access, information, or an administrative subpoena in relation to the site, or has impeded or is impeding, through action or inaction, the performance of a cleanup action at the site.<sup>103</sup> If EPA were to determine that a potentially responsible party is not eligible for a reduced settlement, EPA is required to provide the reasons for the determination in writing to the potentially responsible party who requested the reduced settlement.<sup>104</sup>

EPA's determination of a party's eligibility for a reduced settlement is not subject to judicial review,<sup>105</sup> nor is a dispute over an ability-to-pay determination of the agency within the jurisdiction of the EPA Environmental Appeals Board.<sup>106</sup> Consequently, EPA would appear to have final authority to determine a party's ability to pay its share of the cleanup costs, based on the financial information submitted by that party in the settlement negotiation process. In practice, a party only can pay to the extent of its actual financial capability, to the point of bankruptcy. The authority of EPA to reduce a party's share of the cleanup costs is intended to avoid such financial outcomes as a consequence of cleanup liability under CERCLA.

## **Enforcement Discretion**

CERCLA does not require EPA to use any one particular enforcement mechanism at an individual site, but allows the agency enforcement discretion to select which of the above mechanisms would be the most effective in achieving cleanup goals. EPA typically attempts to negotiate voluntary settlement agreements with the potentially responsible parties first, and usually turns to the use of Section 106 orders or Section 107 cost-recovery actions when a negotiated settlement appears unlikely. At a site where there are multiple potentially responsible parties, EPA also has the enforcement discretion to pursue the liability of all, some, or only one party. Even when enforcing against less than all parties, EPA still may recover the full amount of cleanup costs through joint and several liability. As described earlier in this report, joint and several liability means that any liable party can be held responsible for the full cost of cleanup, regardless of the degree of involvement.

EPA usually pursues the liability of parties at a site who are thought to have contributed more greatly to the contamination, and to be more capable of performing or paying for the cleanup. This selective approach is intended to reduce the enforcement transactions costs to the federal government. For the purpose of fairness, Section 113(f)(1) of CERCLA authorizes the parties who are enforced against to recover some of their costs from other potentially responsible parties whom EPA did not elect to pursue.<sup>107</sup> Section 113(f)(3)(B) also authorizes parties who have

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<sup>102</sup> 42 U.S.C. § 9622(g)(12).

<sup>103</sup> 42 U.S.C. § 9622(g)(8)(B).

<sup>104</sup> 42 U.S.C. § 9622(g)(9).

<sup>105</sup> 42 U.S.C. § 9622(g)(11).

<sup>106</sup> Environmental Protection Agency, Environmental Appeals Board, *The Environmental Appeals Board Practice Manual*, June 2004, "EAB Jurisdiction," pp. 2-4.

<sup>107</sup> 42 U.S.C. § 9613(f)(1).

resolved all (or some) of their liability under settlements with EPA to seek contribution from other parties who are not participants in the settlements.<sup>108</sup> Section 113(f)(2) explicitly protects parties from contribution claims who have entered into settlements with EPA to resolve their liability under Section 122 of CERCLA.<sup>109</sup>

## **Citizen Suits**

Although EPA is responsible for enforcing cleanup liability, Section 206 of the Superfund Amendments and Reauthorization Act of 1986 added Section 310 to CERCLA authorizing citizens to challenge the adequacy of a cleanup action in court.<sup>110</sup> The timing of a citizen suit for these purposes is limited. Section 113(h)(4) of CERCLA does not permit a citizen suit to be brought for violation of a cleanup requirement until the selected cleanup action at a site is completed.<sup>111</sup> Further, a citizen suit may not be brought with regard to a removal action at a site where a remedial action is planned. This limitation on the timing of a citizen suit is intended to allow the complete implementation of cleanup actions planned at a site, prior to subjecting the adequacy of those actions to judicial review to assess their compliance with CERCLA.

Once the cleanup actions are completed, Section 310(a)(1) authorizes a citizen to commence a civil action against any person who is alleged still to be in violation of a “standard, regulation, condition, requirement, or order,”<sup>112</sup> including any provision of a federal facility cleanup agreement issued under Section 120.<sup>113</sup> Section 310(b)(1) requires such suits to be brought in the district court for the district in which the violation is alleged to have occurred.<sup>114</sup> Section 310(c) authorizes the court to require actions to correct the violation and impose civil penalties.<sup>115</sup> Section 310(d)(1) requires the plaintiff to notify the President, the state in which the violation is alleged to have occurred, and the alleged violator 60 days in advance of commencing a civil action,<sup>116</sup> in a manner prescribed by federal regulation.<sup>117</sup> Section 310(d)(2) prohibits citizen suits if the President already has commenced and is “diligently prosecuting” an enforcement action against the potentially responsible party.<sup>118</sup>

Section 310(a)(2) also authorizes a citizen to commence a civil action against the President or any other officer of the United States, including the Administrators of EPA and ATSDR, for alleged failure to perform any non-discretionary act or duty required under CERCLA, including such act or duty required at a federal facility.<sup>119</sup> Section 310(b)(2) requires such suits to be brought in the

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<sup>108</sup> 42 U.S.C. § 9613(f)(3)(B).

<sup>109</sup> 42 U.S.C. § 9613(f)(2).

<sup>110</sup> 42 U.S.C. § 9659.

<sup>111</sup> 42 U.S.C. § 9613(h)(4).

<sup>112</sup> 42 U.S.C. § 9659(a)(1).

<sup>113</sup> For the purpose of citizen suits, Section 310(a)(1) states that “any person” includes “the United States and any other governmental instrumentality or agency, to the extent permitted by the 11<sup>th</sup> amendment to the U.S. Constitution.”

<sup>114</sup> 42 U.S.C. § 9659(b)(1).

<sup>115</sup> 42 U.S.C. § 9659(c).

<sup>116</sup> 42 U.S.C. § 9659(d)(1).

<sup>117</sup> 40 C.F.R. Part 374.

<sup>118</sup> 42 U.S.C. § 9659(d)(2).

<sup>119</sup> 42 U.S.C. § 9659(a)(2).



United States District Court for the District of Columbia.<sup>120</sup> Section 310(c) authorizes the court to order the President or other officer of the United States to perform the act or duty concerned.<sup>121</sup> Section 310(e) requires the plaintiff to notify the Administrator of EPA, or other department or agency, 60 days in advance of commencing a civil action for the alleged failure to perform a non-discretionary act or duty,<sup>122</sup> in a manner prescribed by federal regulation.<sup>123</sup>

Citizen suits are not available for alleged failure of the President or an officer of the United States to perform a non-discretionary act or duty under Section 311 of CERCLA.<sup>124</sup> This provision states that the Secretary of Health and Human Services “shall” establish and support a research and training program to enhance understanding of the potential health risks associated with exposure to hazardous substances. The program also is to research methods and technologies that would detect hazardous substances in the environment and reduce their amount and toxicity. The program is to be carried out through the awarding of grants, cooperative agreements, and contracts, the funding for which is subject to annual appropriations by Congress.

## **Federal Facilities**

After CERCLA was enacted in 1980, questions arose as to whether Congress intended federal facilities to be subject to the cleanup authorities and liability provisions of the statute to the same extent as non-federal facilities. As originally enacted, Section 101(21) of CERCLA defined the term “person” for the purposes of the statute to include the federal government,<sup>125</sup> meaning that the reference to persons who may be held liable under Section 107 may include the federal government. However, the original enactment of the law did not otherwise explicitly address the liability of federal agencies, nor the applicability of other provisions of the statute to federal agencies. Section 120 of the Superfund Amendments and Reauthorization Act of 1986 added Section 120 to CERCLA to clarify that federal departments and agencies are subject to the requirements of CERCLA to the same extent as other entities, including the liability and enforcement provisions of the law.<sup>126</sup> To comply with CERCLA, the federal agency with administrative jurisdiction over a federal facility is responsible for performing and paying for the cleanup of contamination out of its own budget, subject to appropriations by Congress.

Section 111(e) of CERCLA explicitly prohibits the use of Superfund Trust Fund monies to clean up federal facilities, as these monies are dedicated to paying for the cleanup of sites where the potentially responsible parties cannot be identified or cannot pay.<sup>127</sup> However, Section 111(e)(3) does allow the use of Superfund Trust Fund monies at an individual federal facility to provide alternative water supplies, if groundwater contamination has migrated beyond the boundary of that facility, and there are other potentially responsible parties connected to that facility in

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<sup>120</sup> 42 U.S.C. § 9659(b)(2).

<sup>121</sup> 42 U.S.C. § 9659(c).

<sup>122</sup> 42 U.S.C. § 9659(e).

<sup>123</sup> 40 C.F.R. Part 374.

<sup>124</sup> 42 U.S.C. § 9659(a), 9660.

<sup>125</sup> 42 U.S.C. § 9601(21).

<sup>126</sup> 42 U.S.C. § 9620.

<sup>127</sup> 42 U.S.C. § 9611(e).

addition to the United States.<sup>128</sup> In all other instances, Superfund Trust Fund monies are not available for the cleanup of federal facilities.

Congress appropriates funding to various accounts of federal agencies to pay for the performance of the cleanup of federal facilities. These funds generally are intended to fulfill the liability of the United States as the owner or operator of these facilities.<sup>129</sup> However, these accounts do not constitute a cleanup liability fund in a broader sense. The funds are authorized to pay for the performance of the cleanup of the federal government's own facilities by federal agencies. However, the funds are not explicitly authorized to pay cleanup cost-recovery or contribution claims that may be submitted to the United States by other parties, either at federal facilities or at non-federal sites where a federal agency may be held liable as a generator or transporter of wastes sent to a site for disposal. The Judgment Fund of the U.S. Treasury has been the source of payments for cleanup claims submitted to the United States to satisfy the federal share of liability under CERCLA, and compromise settlements for such claims.<sup>130</sup> By statute, the Judgment Fund is a permanent, indefinite appropriation that is intended to pay monetary claims against the United States, which are not otherwise provided by Congress through separate appropriations.<sup>131</sup>

EPA and the states play a role in overseeing and enforcing the implementation of CERCLA at federal facilities, although the agencies that administer these facilities actually fund their cleanup. Section 120(e) of the law requires EPA to take the lead in overseeing the cleanup of federal facilities listed on the NPL,<sup>132</sup> but Section 120(f) allows states and local governments to participate in cleanup decisions.<sup>133</sup> The states play a more prominent role in overseeing the cleanup of federal facilities not listed on the NPL. While CERCLA authorizes EPA and the states to oversee the cleanup of federal facilities, certain provisions of the law can limit their ability to direct or dictate how the cleanup process may be carried out.

As discussed below, CERCLA gives EPA decision-making authority to select remedial actions at federal facilities listed on the NPL, but does not explicitly authorize EPA to direct the schedule of performing those actions, nor how those actions are to be operated and maintained over the long-term to ensure their performance. Further, EPA's enforcement of cleanup requirements at federal facilities through court actions is complicated by the limited ability of one federal agency to sue another. With respect to states, CERCLA requires the opportunity to be involved in cleanup decisions, but does not give states any decision-making authority. In practice, these limitations may restrict the extent to which EPA and the states may oversee the cleanup of federal facilities, even though Section 120 of CERCLA specifically requires federal facilities to comply with the requirements of the statute to the same extent as other entities.

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<sup>128</sup> 42 U.S.C. § 9611(e)(3).

<sup>129</sup> The vast majority of the funds are appropriated to the Department of Defense and the Department of Energy for the cleanup of federal facilities which served national defense purposes.

<sup>130</sup> See General Accounting Office, *The Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act*, B-253179, November 29, 1993, available on GAO's website: <http://archive.gao.gov/lglpdf63/151167.pdf>.

<sup>131</sup> 31 U.S.C. § 1304.

<sup>132</sup> 42 U.S.C. § 9620(e).

<sup>133</sup> 42 U.S.C. § 9620(f).

## **Facilities on the National Priorities List**

Within 6 months of the listing of a federal facility on the NPL, Section 120(e)(1) of CERCLA requires the federal agency with administrative jurisdiction over the facility to consult with EPA and the appropriate state authorities to begin a Remedial Investigation/Feasibility Study (RI/FS).<sup>134</sup> As discussed earlier in the “Scope of Response Actions” section of this report, an RI/FS involves an investigation of contamination to assess potential risks to human health and the environment, and a study of the feasibility of the remedial alternatives to address those risks. While consultation with EPA and state authorities is required, CERCLA does not give explicit decision-making authority to EPA or the states to dictate precisely how a federal agency performs this investigation and study phase of the cleanup process.

Within 180 days of the completion of the RI/FS and review by EPA, Section 120(e)(2) requires the federal agency with administrative jurisdiction over the facility to enter into an interagency agreement with EPA to govern the remedial actions to be taken at that facility.<sup>135</sup> This agreement provides an opportunity for EPA to formalize how the other federal agency will carry out the cleanup of the facility to satisfy the requirements of CERCLA. Section 120(e)(4) identifies four elements that are to be included in each interagency agreement: (1) a list of the remedial alternatives considered at the facility, (2) identification of the remedial actions selected from among the alternatives, (3) a schedule for completing each remedial action, and (4) arrangements for any long-term operation and maintenance activities that may be necessary to ensure the performance of the remedial actions over time.<sup>136</sup>

If EPA and the federal agency with administrative jurisdiction over the facility cannot agree on the selection of the remedial actions in negotiating an interagency agreement, Section 120(e)(4)(A) authorizes the Administrator of EPA to resolve the dispute and select the remedial actions he or she deems most appropriate to protect human health and the environment.<sup>137</sup> Although the Administrator may delegate this dispute-resolution authority to an officer or employee of EPA, Section 120(g) prohibits the transfer of the Administrator’s authorities under Section 120 to any other agency, official, or employee of the United States, by Executive Order of the President or otherwise,<sup>138</sup> This prohibition primarily is intended to ensure that the role of EPA is maintained in determining the selection of remedial actions.

CERCLA does not provide the Administrator of EPA decision-making authority with respect to other elements of an interagency agreement for a federal facility listed on the NPL, namely the schedule for completing the remedial actions and arrangement for any long-term operation and maintenance activities that may be necessary to ensure the performance of those actions over time. These latter elements would appear to be subject to negotiation between EPA and the federal agency with administrative jurisdiction over the facility. If consensus cannot be reached and the agreement finalized within the statutory deadline of 180 days from the completion of the RI/FS,

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<sup>134</sup> 42 U.S.C. § 9620(e)(1).

<sup>135</sup> 42 U.S.C. § 9620(e)(2).

<sup>136</sup> 42 U.S.C. § 9620(e)(4).

<sup>137</sup> 42 U.S.C. § 9620(e)(4)(A).

<sup>138</sup> 42 U.S.C. § 9620(g).

Section 120(e)(5) requires the federal agency with administrative jurisdiction over the facility to report the delay to Congress.<sup>139</sup>

With respect to the timing of the cleanup, Section 120(e)(3) requires the federal agency responsible for the facility to complete the remedial actions “as expeditiously as practicable” once those actions are selected, but does not indicate a specific time frame or deadline for their completion.<sup>140</sup> The timing of a remedial action ultimately depends on the technical feasibility of that action and the availability of appropriations by Congress. Accordingly, Section 120(e)(3) requires federal agencies to notify Congress of the amount of funding needed to carry out the selected remedial actions at their facilities in their annual budget requests.

Notably, the lack of a final interagency agreement governing an entire facility does not preclude individual remedial actions from proceeding to address discrete contaminated sites at a facility. Further, removal actions intended to address more immediate risks are not subject to an interagency agreement. The main reason for this difference is that the time required to finalize an agreement may delay a removal action needed to address an emergency situation. Because of these reasons, some cleanup actions may proceed without an interagency agreement in place, in effect leaving EPA with less formal means to oversee the cleanup.

States and local governments also may play a role in the cleanup of federal facilities listed on the NPL. Section 120(f) of CERCLA authorizes states and local governments to participate in the planning and selection of remedial actions at federal facilities.<sup>141</sup> Participation by states and local governments is to include, but is not limited to, review of all applicable data as it becomes available, and the development of studies, reports, and plans. Section 120(f) specifies that the opportunity for state officials to participate in cleanup decisions at federal facilities is to be provided in accordance with Section 121(f).

As discussed earlier in the “State Participation” section of this report, Section 121(f) requires states to be afforded opportunities for “substantial and meaningful involvement” in initiating, developing, and selecting remedial actions.<sup>142</sup> Section 121(d) also allows state standards to be applied to a remedial action, thereby offering additional opportunity for state participation.<sup>143</sup> However, Section 121(f)(3) specifies that, if a state wishes to challenge a remedial decision at a federal facility, that state must show that the decision is not supported by “substantial evidence” to compel the selection of a different remedy at that facility.<sup>144</sup> Unlike Section 120(f), the participation requirements of Section 121(f) are not extended to local governments.

## **Facilities Not on the National Priorities List**

States play a more prominent role in overseeing the cleanup of federal facilities not listed on the NPL. In acknowledgement of this role, Section 120(a)(4) of CERCLA clarifies the reach of state

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<sup>139</sup> 42 U.S.C. § 9620(e)(5).

<sup>140</sup> 42 U.S.C. § 9620(e)(3).

<sup>141</sup> 42 U.S.C. § 9620(f).

<sup>142</sup> 42 U.S.C. § 9621(f).

<sup>143</sup> 42 U.S.C. § 9621(d).

<sup>144</sup> 42 U.S.C. § 9621(f)(3).

law at contaminated federal facilities that are not listed on the NPL.<sup>145</sup> This provision stipulates that state cleanup standards or requirements shall apply to a federal facility that is not on the NPL only to the same extent as those standards or requirements would apply to a non-federal site located in that state. In practical terms, a state may not require more stringent cleanup at a federal facility than it would require at a non-federal site possessing comparable characteristics and conditions under which exposure to contamination may occur.

While state cleanup laws generally can be applied to federal facilities not listed on the NPL, CERCLA does not require federal agencies to enter into formal agreements with states to govern cleanup requirements in a fashion similar to interagency agreements with EPA. However, states may have other authorities to identify and enforce cleanup requirements at federal facilities that they oversee. Most notably, federal facilities that store, treat, or dispose of hazardous waste are subject to permits issued by states with federal authority delegated under the Solid Waste Disposal Act.<sup>146</sup> These permits can require “corrective action” to clean up contamination that may result from waste management or disposal practices.<sup>147</sup> In contemplation of such situations, Section 120(i) of CERCLA states that nothing in CERCLA may affect or impair the obligation of federal agencies to comply with requirements of the Solid Waste Disposal Act at the facilities that they administer, specifically including corrective action requirements.<sup>148</sup>

A corrective action that a state may require under the Solid Waste Disposal Act can be similar in scope to a removal or remedial action under CERCLA. This similarity can result in essentially the same stringency of cleanup in practice, regardless of which statute is applied. As such, Solid Waste Disposal Act permits at federal facilities not on the NPL can function much like CERCLA interagency agreements at federal facilities on the NPL, specifying individual actions required to clean up contamination. In this sense, Solid Waste Disposal Act permits can provide a means for a state to formalize and enforce cleanup requirements at many federal facilities that are not listed on the NPL, for which an interagency agreement with EPA is not required.

## **Transfer of Contaminated Federal Property**

Section 120(h) of CERCLA generally requires the United States to clean up contaminated federal property prior to transferring the property out of federal ownership.<sup>149</sup> The policy premise of this provision is that the United States should assume full responsibility for the cleanup of contamination caused by federal activities, and not shift the burden of that responsibility to the recipient merely as a consequence of acquiring the property. Section 120(h) applies to all contaminated federal property declared surplus to the needs of the federal government. The agency with administrative jurisdiction over a surplus federal property usually performs and pays for the cleanup of contamination to fulfill the financial liability of the United States.

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<sup>145</sup> 42 U.S.C. § 9620(a)(4).

<sup>146</sup> 42 U.S.C. § 6901 et. seq. The Solid Waste Disposal Act often is referred to as the Resource Conservation and Recovery Act (RCRA; P.L. 94-580), which substantially amended the Solid Waste Disposal Act in 1976 to regulate the storage, treatment, and disposal of hazardous waste.

<sup>147</sup> The Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616) amended the Solid Waste Disposal Act to require operators of hazardous waste facilities to perform corrective actions to clean up environmental contamination resulting from the improper management or disposal of hazardous wastes.

<sup>148</sup> 42 U.S.C. § 9620(i).

<sup>149</sup> 42 U.S.C. § 9620(h).

As is the case with federal facilities that remain in federal ownership, funds available for the cleanup of surplus federal properties are subject to appropriations by Congress, and are not eligible for Superfund monies. For example, the Department of Defense performs and pays for the cleanup of surplus federal property on closed military installations out of funds appropriated to the Base Realignment and Closure (BRAC) accounts.

Section 120(h) does not bind the United States to cleaning up a surplus federal property for any one particular use. As a result, the reuse of a property is negotiated between the administering federal agency and the recipient of the property. Disagreements over reuse can arise if the recipient intends to use the property for a purpose that would necessitate a level of cleanup that the federal agency may consider too costly, relative to available appropriations to fund the cleanup. The capabilities of cleanup technologies also could constrain the reuse of a surplus federal property, if it would be impractical to achieve a level of cleanup that would be needed to make the property suitable for a use desired by the recipient.

### **Continuing Liability of the United States**

Consistent with the policy premise of Section 120(h) and retroactive liability under Section 107, the United States remains responsible for contamination found not to have been sufficiently remediated after the property is transferred out of federal ownership. Section 120(h)(3) requires the continuing liability of the United States to be specified through a “covenant” incorporated into the deed transferring the property out of federal ownership.<sup>150</sup> The covenant must warrant that all remedial actions necessary to protect human health and the environment have been taken before the date of transfer, and that the United States shall conduct any additional remedial actions found to be necessary after the date of transfer. A clause also must be included in the deed granting the United States access to the property to perform cleanup actions for which it may be responsible.

In practice, the contents of a deed can place certain limitations on the continuing responsibility of the United States. A deed to a transferred federal property typically warrants cleanup only to a level suitable for the land use negotiated prior to transfer. In some cases, a deed may include a restriction prohibiting certain uses that would be considered unsuitable relative to the level of cleanup performed by the United States. Under such deed restrictions, the United States typically assumes responsibility for additional cleanup only to the extent that more work is found to be needed to make the originally agreed-upon use suitable.

If the new owner later wishes to use the property for a different purpose, the new owner typically must assume responsibility for the additional cleanup costs to make the property suitable for that purpose. In some instances, a deed may prohibit certain land uses even if the new owner is willing to pay the cleanup costs. For example, a deed to a decommissioned military training range may prohibit residential or other uses because of the limitations of cleanup technologies to detect and remove unexploded ordnance. Cleanup capabilities may be constrained especially when ordnance is located beneath the surface, or concealed on the surface by dense vegetation.

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<sup>150</sup> 42 U.S.C. § 9620(h)(3).

## **Transfer of Uncontaminated Parcels**

Some surplus federal properties may contain a mix of contaminated and uncontaminated parcels of land. Although the clean parcels may be ready for reuse, the requirement to clean up the contaminated parcels under Section 120(h) of CERCLA prior to transfer could delay the conveyance of the property as a whole. To address such situations, the 102<sup>nd</sup> Congress enacted the Community Environmental Response Facilitation Act (CERFA; P.L. 102-426) in 1992. This law amended Section 120(h) by adding a new subsection (4) that authorizes the transfer of uncontaminated parcels on a surplus federal property while cleanup continues on the contaminated parcels.<sup>151</sup> This parcel-by-parcel approach is intended to avoid potential delays in the transfer of “clean” surplus federal lands for reuse, especially such lands on closed military installations where economic redevelopment is desired to replace lost jobs. In the event that previously unknown contamination is later discovered after transfer out of federal ownership, Section 120(h)(4)(D) requires that a deed to an uncontaminated parcel still include a covenant warranting that the United States shall conduct any cleanup actions that may become necessary.<sup>152</sup>

## **Early Transfer of Contaminated Parcels**

The cleanup of a contaminated parcel may take several years or more, depending on the type and level of contamination, technical feasibility of cleanup actions, and availability of appropriations to pay for the cleanup. In such situations, the requirement to complete cleanup prior to transfer out of federal ownership could result in delaying the transfer. Enacted in the 104<sup>th</sup> Congress, Section 334 of the National Defense Authorization Act for FY1997 (P.L. 104-201) amended Section 120(h)(3) of CERCLA to add a new subsection (C) that allows the transfer of a contaminated parcel on a surplus federal property before cleanup is complete, if certain conditions are satisfied.<sup>153</sup> Although Congress enacted this amendment in annual defense authorization legislation, this authority applies to any surplus federal property administered by any federal agency, not just surplus U.S. military property.

Section 120(h)(3)(C) specifically authorizes a deferral of the cleanup covenant to allow the transfer of title to a contaminated parcel on a surplus federal property before cleanup is complete. Federal agencies often refer to this deferral of the covenant as an “early” transfer, although the statute does not use this term. The deed to a contaminated property transferred out of federal ownership must contain assurances that the cleanup still will be carried out after the property leaves federal ownership. The federal agency responsible for the performance of the cleanup also must identify the funding needed to carry out the cleanup in its annual budget requests.

The deed also must restrict the use of the property to purposes that would be protective of human health and environment, while the cleanup proceeds. For example, at the time of transfer, a property may be suitable for industrial use because the risks of exposure to contamination may be within an acceptable range, whereas other uses that would result in potentially harmful exposure would be restricted until the property is cleaned up sufficiently for that purpose. Once cleanup is complete, the United States remains obligated to provide a covenant at that time, warranting that

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<sup>151</sup> 42 U.S.C. § 9620(h)(4).

<sup>152</sup> 42 U.S.C. § 9620(h)(4)(D).

<sup>153</sup> 42 U.S.C. § 9620(h)(3)(C).

all necessary actions to protect human health and the environment have been taken to make the property suitable for its intended, eventual use.

The early transfer of a contaminated surplus federal property that is listed on the NPL is subject to the concurrence of the Administrator of EPA and the governor of the state in which the facility is located. The early transfer of a contaminated surplus federal property that is not listed on the NPL still requires the concurrence of the governor of the state in which the facility is located, but not EPA. Federal agencies proposing an early transfer also must provide the public at least 30 days advance notice and an opportunity to comment on the proposed transfer before it is executed.

## Cleanup Authorities Specific to Military Facilities

Considering that U.S. military facilities constitute a substantial portion of the inventory of contaminated federal facilities, Section 211 of the Superfund Amendments and Reauthorization Act of 1986 required the Secretary of Defense to establish the Defense Environmental Restoration Program to perform the cleanup of U.S. military facilities.<sup>154</sup> This provision also authorized dedicated Defense Environmental Restoration appropriations accounts to fund the program. Section 211 requires the Secretary of Defense to perform the cleanup of U.S. military facilities under the program in accordance with Section 120 of CERCLA, which in turn specifies the applicability of all of the requirements of CERCLA and the liability and enforcement provisions of the law. Section 211 also requires the Secretary to consult with EPA in implementing the Defense Environmental Restoration Program. Notably, the provisions of Section 211 did not amend CERCLA itself, but were treated as “stand-alone” provisions that apply strictly to U.S. military facilities.<sup>155</sup>

The scope of the Defense Environmental Restoration Program includes the performance of the cleanup of military facilities in the United States that *are* or *were* under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time the contamination occurred, and as such may include both active and decommissioned military facilities.<sup>156</sup> The inclusion of decommissioned facilities within the program’s scope is consistent with retroactive liability under Section 107 of CERCLA, under which the Department of Defense can be held liable for cleanup as the past owner and operator of those facilities. The scope of the program also includes the correction of other environmental damage that may present an imminent and substantial endangerment to the public health, welfare, or the environment (such as the presence of unexploded ordnance on decommissioned military training ranges), and the demolition and removal of unsafe buildings and structures for safety purposes. The scope of the program does not include the payment of cleanup cost-recovery or contribution claims that may be submitted to the United States by other parties to satisfy federal liability arising from activities of the Department of Defense. As discussed above, the Judgment Fund has been the source of federal monies for the payment of such cleanup claims.

The Defense Environmental Restoration Program initially focused on the cleanup of hazardous substances without a consolidated effort in place to address the safety risks of unexploded

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<sup>154</sup> 10 U.S.C. § 2701 et. seq.

<sup>155</sup> Because of its specific applicability to U.S. military facilities, Section 211 of the Superfund Amendments and Reauthorization Act of 1986 is codified in Title 10—“Armed Forces”—of the *United States Code*, rather than Title 42—“Public Health and Welfare”—under which the provisions of CERCLA generally are codified.

<sup>156</sup> 10 U.S.C. § 2701(c).



ordnance on decommissioned military training ranges. In response to concerns among the public about these potential safety hazards, the 107<sup>th</sup> Congress included provisions in Sections 311<sup>157</sup> and 312<sup>158</sup> of the National Defense Authorization Act for FY2002 (P.L. 107-107) that expanded the scope of the Defense Environmental Restoration Program to include the cleanup of unexploded ordnance, discarded military munitions, and munitions constituents (i.e., hazardous substances leached from munitions into the environment) on decommissioned military training ranges and munitions disposal sites in the United States. The Department of Defense established the Military Munitions Response Program as a sub-element within the Defense Environmental Restoration Program to carry out these requirements.

The statutory authority of the Military Munitions Response Program extends only to decommissioned military training ranges and munitions disposal sites in the United States, but not to operational ranges.<sup>159</sup> Since the enactment of specific cleanup authorities for military facilities in the 1986 amendments to CERCLA, the Department of Defense has expressed long-standing concern that the carrying out of cleanup actions on an operational range could prevent or interrupt its active use for training, and thereby possibly impair military readiness. So far, operational ranges have been subject to federal waste disposal regulations promulgated under the Solid Waste Disposal Act, but not cleanup under CERCLA unless the contamination migrates off-range. EPA promulgated these disposal regulations in 1997, referred to as the Military Munitions Rule.<sup>160</sup> Under this rule, munitions on an operational range are not considered hazardous waste, and therefore are not subject to hazardous waste disposal requirements under the Solid Waste Disposal Act, until they are removed from the range. Upon removal, their disposal is subject to permit requirements for hazardous waste disposal.

Munitions typically are removed from an operational range only to the extent necessary to ensure safe access by military personnel for training purposes. Consequently, much of the munitions may remain on an operational range indefinitely, unless contamination from munitions were to migrate off-range and present a risk of exposure. In such situations, removal of munitions could be pursued to eliminate the source of the contamination. Absent off-range migration, munitions generally may be left on a range as long as the range remains in operational status. In such circumstances, cleanup of the munitions typically is not required until the range is closed, and the range then becomes eligible for cleanup under the Military Munitions Response Program.

## **National Security Exemption**

Although Section 120 of CERCLA clarified the applicability of the statute to federal facilities, Section 120(j) authorized the President to exempt an individual federal facility from a requirement of CERCLA on a case-by-case basis if the exemption would be necessary to protect national security.<sup>161</sup> This exemption is intended to prevent situations in which a federal facility may become unavailable for purposes essential to protecting national security, if carrying out a

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<sup>157</sup> 10 U.S.C. § 2710.

<sup>158</sup> 10 U.S.C. § 2703(b).

<sup>159</sup> 10 U.S.C. § 2710(d). The statutory scope of the Military Munitions Response Program also specifically excludes any locations outside the United States, the presence of military munitions resulting from combat operations, and operational munitions storage and manufacturing facilities. However, the operation of storage and manufacturing facilities in the United States may be subject to regulation under other statutory authorities.

<sup>160</sup> 40 C.F.R. Part 266, Subpart M.

<sup>161</sup> 42 U.S.C. § 9620(j).

specific cleanup action somehow may interfere with those purposes. Section 120(j) specifically authorizes the President to exempt an individual facility administered by the Department of Defense or the Department of Energy from compliance with a requirement of CERCLA, if the President deems such an exemption necessary to protect national security.

The President must notify Congress within 30 days of the issuance of an exemption and explain the reason for it. The time period of an exemption initially is limited to one year, but the President may renew it annually with notification to Congress. To date, a national security exemption under CERCLA has not been invoked at any facility of the Department of Defense or the Department of Energy. Instead, contaminated facilities of both departments have been made subject to the cleanup requirements of CERCLA.

## **Brownfields Properties**

In 1993, EPA established an element within the Superfund program to assist communities with the cleanup of certain lower risk sites that did not warrant placement on the NPL, but at which cleanup was desired to encourage economic redevelopment. The purpose of the program was to provide federal financial assistance for the cleanup of properties referred to as “brownfields.” These properties typically are abandoned, idled, or underutilized, and on which known or suspected contamination is perceived as a deterrent to redevelopment by prospective purchasers who may be hesitant about becoming liable for cleanup once acquiring ownership.

EPA initially used Superfund appropriations to provide “seed monies” to communities in the form of grants and loans to aid them in financing certain types of cleanup actions. Although there was broad support for this effort, some questioned EPA’s authority under CERCLA to use Superfund monies for the cleanup of these lower risk sites that were not listed on the NPL and that did not appear to warrant emergency removal actions under the Superfund program. Still, in the annual appropriations process, Congress set aside funding for brownfields cleanup assistance within the Superfund account for several years without specifically amending CERCLA for this purpose.

In the 107<sup>th</sup> Congress, Subtitle A and Subtitle C of Title II of the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (P.L. 107-118, hereinafter referred to as the “Brownfields Act”) amended CERCLA to provide explicit statutory authority for EPA to administer a Brownfields program separately from the Superfund program. The Brownfields Act authorized appropriations for this new program apart from appropriations for the Superfund account.<sup>162</sup> There had been some concern about the diversion of Superfund appropriations away from addressing the greater human health and environmental risks at NPL sites. Still, the portion of Superfund appropriations that had been spent on the cleanup of brownfields properties was relatively small compared to the total appropriation.

The program explicitly authorized in the Brownfields Act is similar in scope to the program that EPA had established in 1993, with the exception that the Brownfields Act allowed federal financial assistance for the cleanup of contamination resulting from releases of petroleum. As discussed earlier in the “Federal Response Authorities” section of this report, CERCLA otherwise

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<sup>162</sup> Since the enactment of the Brownfields Act, Congress has appropriated specific levels of funding for Brownfields grants within EPA’s State and Tribal Assistance Grants account, and has appropriated funds to administer these grants within EPA’s Environmental Programs and Management account.

does not apply to the cleanup of petroleum. The Brownfields Act also created two separate types of grants within the Brownfields program. One provides more direct financial assistance for the assessment and cleanup of individual properties. The other provides financial assistance to states and Indian tribes to aid them in carrying out their own cleanup programs, which in turn may assist in the cleanup of individual properties.

Specifically, Section 201 of the Brownfields Act amended Section 104 of CERCLA to add a new subsection (k) that authorized \$200 million annually for grants to fund the assessment and cleanup of individual brownfields properties.<sup>163</sup> Entities generally eligible for these grants include state and local governments, Indian Tribes,<sup>164</sup> redevelopment agencies chartered or otherwise sanctioned by a state government, and land clearance authorities or other “quasi-governmental” entities operating under the supervision and control, or as an agent, of a local government. The grants are awarded on a competitive basis. The recipients may use the grant funds to characterize, assess, or remediate brownfields properties, or to capitalize revolving loan funds that in turn may finance the remediation of multiple brownfields properties by other entities, including loans issued to site owners or developers.

Section 231 of the act also added Section 128 to CERCLA, authorizing an additional \$50 million annually for other grants to assist states and Indian Tribes in establishing or enhancing their own cleanup programs.<sup>165</sup> States and Tribes may use these monies to augment their own resources to assist with the cleanup of brownfields properties to prepare them for reuse. They also may use these monies to pursue the cleanup of other contaminated sites within their respective jurisdictions, which may present potential health or environmental risks but are not addressed under the federal Superfund program. The authorization of appropriations for both the Section 104(k) and Section 128 grants expired at the end of FY2006, but Congress has continued to fund these grants through the annual appropriations process without enacting reauthorizing legislation.

As discussed earlier in the “Limitations on Liability” section of this report, Section 222 of the Brownfields Act exempted “bona fide” prospective purchasers of contaminated properties from liability under CERCLA, if they satisfy the prerequisite statutory criteria. This exemption is intended to work in tandem with federal grants assistance under the Brownfields program to further the purpose of stimulating the economic redevelopment of contaminated properties. Accordingly, Section 104(k)(4)(B)(iii) of CERCLA<sup>166</sup> specifically authorizes the eligibility of bona fide prospective purchasers for brownfields grants. If a party cannot qualify for this exemption, or another exemption from liability, that party is not eligible to receive a brownfields grant.<sup>167</sup> This statutory prohibition on awarding Brownfields grants to potentially responsible parties is consistent with the policy premise of the liability scheme of CERCLA to hold the potentially responsible parties responsible for the costs of cleanup, so as to minimize the burden of these costs on the federal taxpayer who had no connection with the site.

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<sup>163</sup> 42 U.S.C. § 9604(k).

<sup>164</sup> In Alaska, Tribal eligibility is extended specifically to the Alaska National Regional Corporation and Alaska Native Village Corporation as defined in the Alaska Native Claims Settlement Act. The Metakatla Indian Community also is specifically authorized in the statute as being eligible for the grants.

<sup>165</sup> 42 U.S.C. § 9628.

<sup>166</sup> 42 U.S.C. § 9604(k)(4)(B)(iii).

<sup>167</sup> 42 U.S.C. § 9604(k)(4)(B)(i)(IV).

Congress also has enacted certain tax incentives to encourage the cleanup of brownfields properties, through amendments to the Internal Revenue Code but not CERCLA itself. These incentives have constituted another form of federal financial assistance to support the cleanup of contaminated sites. Section 941(a) of the Taxpayer Relief Act of 1997 (P.L. 105-34) allowed a taxpayer to fully deduct the costs of cleaning up a brownfields property in the year the costs were incurred.<sup>168</sup> This type of deduction is referred to as “expensing,” as opposed to “capitalizing” in which the costs would be deducted over a period of years. The tax incentive was intended to encourage property developers to rehabilitate sites where environmental contamination may be a deterrent to bringing nonproductive properties back into use. The tax deduction has no direct application for public sector entities, such as municipalities, which do not pay income taxes. Enacted in the 111<sup>th</sup> Congress, Section 745 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312, Title VII, Subtitle C) extended this brownfields tax incentive through December 31, 2011.

Congress also had authorized another federal brownfields tax incentive in Section 702 of the American Jobs Creation Act of 2004 (P.L. 108-357, Title VII), which expired on December 31, 2009. This incentive addressed the treatment of gain or loss on the sale or exchange of certain qualified brownfields sites,<sup>169</sup> as defined in Section 101(39) of CERCLA.<sup>170</sup> This provision allowed a tax-exempt entity to invest in a qualified brownfields site, and not treat the gains as taxable “unrelated business income.” To be eligible for this tax incentive, the entity must have incurred cleanup costs exceeding the greater of \$550,000, or 12% of the property’s fair market value in a remediated condition, in addition to meeting certain other requirements. The tax incentive was not available to parties who are potentially liable for the cleanup under Section 107 of CERCLA.

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<sup>168</sup> 26 U.S.C. § 198.

<sup>169</sup> 26 U.S.C. § 512(b)(19).

<sup>170</sup> 42 U.S.C. § 9601(39).