



# CERCLA AND MERLA BASICS

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"In the 19th Century, we devoted our best minds to exploring nature. In the 20th Century, we devoted ourselves to controlling and harnessing it. In the 21st Century, the best minds are working on how to restore nature."

-- Stephen Ambrose, 1936-2002

# CERCLA

## Liability

- Government Powers

- Private Causes of Action

- Specific Liability Issues

  - Parent Corporation Liability
  - Successor Liability
  - Lender Liability
  - Bankruptcy Discharge

- Reporting Requirements

- Site Management and Remedy Selection

- Enforcement

## History of CERCLA

1980 Enactment

1986 Superfund Amendment and Reauthorization Act

1996 Lender Liability Protection Amendments

2002 Brownfield Amendments

## Government Powers

Administrative Orders

Injunctive Relief

Conduct Cleanup and Sue for Cleanup Costs

## Elements

*“Responsible Person”*

*“Release”*

*of “Hazardous Substance”*

**from “Facility” into environment**

*incur “Response Costs”*

## *“Responsible Persons”*

Current Owners and Operators

Former Owners and Operators

Generators or “Arrangers”

Transporters

## “Hazardous Substances”

Excluded from “Hazardous Substances”  
definition:

Petroleum

Natural Gas

Natural Gas Liquids

Liquefied Natural Gas (“LNG”)

Synthetic Gas Usable for Fuels

## “Facility”

Any location “where hazardous substances come to be located”

## Recoverable Costs

Removal Costs

Remedial Costs

Costs of Health Assessment or Health Effect  
Studies

Natural Resources Damages

## Nature of CERCLA Liability

Strict

Retroactive

Joint and Several (unless harm is divisible)

## Contribution

“Any person may seek contribution from any other person who is liable or potentially liable under Section 107(a)”

Section 113(f)

*Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004)

Party may seek contribution under Section 113(f) for response costs only if the liable party:

- 1) has been the subject of a “civil action” under either Sections 106 or 107, or
- 2) has “resolved” its ‘liability to the United States or a State for those response costs in an “administratively or judicially approved settlement”

## Statute of Limitations

Removal Action: Within 3 years after completion of removal actions

Remedial Action: Within 6 years after initiation of physical on-site construction of remedial action

Contribution Action: Within 3 years after date of judgment in action for recovery of costs, on administrative order under sections 122(g) or 122(h), or entry of judicially approved settlement

Natural Resources Damages Action: Within 3 years after discovery of the loss

## Defenses

Act of God

Act of War

Act of Third Party

## Elements of Third Party Defense

- 1) No relationship, contractual or otherwise, b/w land owner and third party who allegedly caused contamination
- 2) Landowner exercised due care
- 3) Landowner took precautions against acts of third party

## Development of Third Party Defense

### Third-Party Defense (1980) (§ 9607(b))

- No contractual relationship

### Innocent Purchaser Defense (1986) (§ 9601(35))

- “Did not know or have reason to know”

### Bona Fide Purchaser (2002) (§ 9607(r))

- Abate and cooperate

### Contiguous Property Owner Defense (2002) (§ 9607(q))

- Abate and cooperate

## “No Contractual Relationship” (aka Innocent Purchaser)

Landowner did not know and had “no reason to know” about hazardous substances,

Landowner is government agent who acquired property by escheat, involuntary transfer or exercise of eminent domain, or

Landowner acquired property by inheritance or bequest

“All Appropriate Inquiry” (Innocent Landowner, Bona Fide Prospective Purchaser, and Contiguous Property Owner Defenses)

Conduct environmental site assessment by environmental professional within 180 days prior to acquisition of real property:

Interviews

Record Review

Visual Inspection

Professional Declaration

40 C.F.R. § 312.50

## Special Issues

Parent Corporation Liability

Successor Liability

Lender Liability

Bankruptcy

## Corporate Liability

Q: Can parent corporation be held liable for actions of subsidiary?

A: Parent is liable only when:

- 1) basis to “pierce the corporate veil” under common law, or
- 2) parent actually manages or directs operations regarding hazardous substances, thus have direct “operator” liability

United States v. Bestfoods, 524 U.S. 51 (1998)

## Successor Liability

Q: Can you acquire CERCLA liabilities of predecessor company?

A: Generally follow common law doctrine:

- 1) Acquire assets: Successor corporation is not liable, unless one of the traditional exceptions apply (e.g., de facto merger)
- 2) Acquire stock: Take CERCLA liabilities

Caution: What is the applicable law of successor liability? State law or federal common law?

## Lender Liability

Q: Can lender be liable for borrower's liabilities?

A: Lender must actually participate in management

Q: Does lender become Owner/Operator when they foreclose?

A: No, provided lender sells at earliest practicable time

## Discharge of CERCLA Liability in Bankruptcy

Injunction to stop or ameliorate outgoing pollution is not a “claim” in bankruptcy, and thus not dischargeable

Cleanup orders that can be converted into a right to payment are dischargeable

## Reporting Requirement

Facility owners and operators must report releases of “reportable quantities” of “hazardous substances” to the National Response Center

CERCLA § 103

## Investigative Powers

EPA may investigate if it has a reasonable basis to conclude there may be a release or threatened release of a hazardous substance or pollutant

CERCLA § 104(e)

## Site Management And Remedy Selection

National Contingency Plan (NCP): Procedures for discovering and ranking sites, and selecting and implementing remediation actions

National Priority List (NPL): List of high priority cleanup sites

Comprehensive Environmental Responses Compensation and Liability Information System (CERCLIS list): List of all sites brought to EPA's attention

## Cleanup Standards

(1) EPA chooses cleanup level that meets or exceeds “applicable or relevant and appropriate requirements” of federal environmental laws (ARARs)

(2) EPA selects a technology to meet the ARARs based on the following factors:

Cost-effectiveness

Long-term and short-term effectiveness

Permanence of remedy

Reduction of toxicity

Ease of implementation

State acceptance

Community acceptance



## Don't Forget Common Law Claims!

## MERLA History

Enacted in 1983 in response to CERCLA

- (1) To facilitate participation in CERCLA
- (2) To provide remediation for sites not enrolled in federal Superfund program

## “Responsible Parties”

Facility Owner and Operators

Generators

Transporters

Minn. Stat. § 115B.03, subd.1

## “Owners and Operators”

Persons who owned or operated the facility:

- (1) when the hazardous substance or pollutant or contaminant was placed or came to be located in or on the facility;
- (2) when the hazardous substance or pollutant or contaminant was located in or on the facility but before the release; or
- (3) during the time of the release or threatened release

Minn. Stat. § 115B.03, subd. 1

## “Generators”

Persons who owned or possessed the hazardous substance or pollutant or contaminant and arranged by contract, agreement, or otherwise for the disposal, treatment, or transport for disposal or treatment of the hazardous substance, or pollutant or contaminant

## “Transporters”

Persons who knew or reasonably should have known that the waste the person accepted for transport to a disposal or treatment facility contained a hazardous substance, or pollutant or contaminant, and either selected the facility to which it was transported or disposed of it in a manner contrary to law

## CERCLA vs. MERLA

MERLA does not impose liability on:

Current owners and operators who were not involved with the facility until after release occurred

## “Hazardous Substance”

Clean Water Act commercial chemicals

Clean Air Act hazardous air pollutant

RCRA hazardous wastes

Minnesota hazardous wastes (Minn. Stat. § 116.06, subd.11)

Excluded:

- Natural gas liquids

- Liquefied natural gas

- Synthetic gas

- Petroleum

- Crude oil and its fractions

Minn. Stat. § 115B.02, subd.8

## MERLA Damages

Removal Costs

Response Costs (akin to CERCLA's Remedial Costs)

Natural Resources Damages

Economic Loss

- Property damages

- Relocation losses

- Loss of past and future income or profits

Death, Personal Injury or Disease

- Medical expenses

- Rehabilitation costs

- Burial expenses

- Loss of future income

- Pain and suffering

- Physical impairment

Minn. Stat. § 115B.05, subd.1

## MERLA Statute of Limitations

Removal and Response Costs: Six years after institution of physical on-site construction

Damages: Six years from date on which cause of action accrues

Minn. Stat. § 115B.11, subds 2-3

## Exclusions and Limitations

MERLA excludes liability for release of pollutants and contaminants

Minn.Stat. § 115B.04, subd.2

Political subdivision's liability is limited

Minn. Stat. § 115B.04, subd. 4

Minn. Stat. § 446.04, subd.1

## Protections for Mortgages and Holders of Security Interests

Owners or Operators are not RPs if they are solely:

Mortgagee who forecloses on property with facilities

Mortgagee with capacity to intervene in operation of facility to protect its interest

Trustee because facility is among trust assets

Personal representative of estate because facility is among assets of estate or personal representative has capacity to direct operation of estate

Minn. Stat. § 115B.03, subds. 6-9

## Innocent Landowner

Owner is not RP unless:

- (1) Engaged in generating, transporting, storing, treating or disposing of hazardous substance or disposing of waste at facility, or knowingly permitted others to do so
- (2) Knowingly permitted any person to make regular use of facility for disposal of waste or hazardous substances
- (3) Knew or should have known hazardous substance was located in or on facility when they acquired facility
- (4) Took action which significantly contributed to release after that person knew or reasonably should have known hazardous substance was located in or on facility

## Defenses

Act of God

Act of War

Act of Vandalism or Sabotage (if exercised due care)

Act or Omission of Third Party

## Voluntary Investigation and Cleanup (VIC)

**Purpose:** Provide protection from future liability to property owners, financiers, lenders and successors and assigns

**Eligible Parties:** Persons who are not RPs but undertake approved voluntary response actions to remedy known contamination

**Fee for Services Program**

## Written Assurances

Technical Assistance Letter

No Action Letter

No Action Agreement

Certificate of Completion

No Association Determination

Off-Site Determination Letter or Agreement