Overview: The CERCLA Process

Connie Sue Martin
Overview

• Removal and/or Remediation Process
• Natural Resource Damage Assessment and Restoration
CERCLA

- Comprehensive Environmental Response, Compensation and Liability Act
- Enacted in 1980 to clean up leaking, inactive or abandoned hazardous waste sites and provide emergency responses to spills
• Remedial statute -- applies retroactively where past acts contribute to current endangerment

• Parties responsible for causing releases should pay for cost of clean-up
CERCLA

• Created a “Superfund” for federally-funded cleanups; initial funding was $1.6 billion (1981-1985), funded by direct tax on sales of petroleum and certain chemical feedstocks
- Superfund Amendments and Reauthorization Act
- Amended and reauthorized CERCLA in 1986
- Expanded the role of Indian Tribes in both remediation and natural resource damage processes.
• Generally, governing body of an Indian Tribe is to be “afforded substantially the same treatment as a State” with respect to many provisions of Superfund (42 U.S.C. § 9626(a))
• Section 107(f)(1) amended to extend recovery for liability for damages to natural resources to Indian Tribes.

• Tribes may assert claims for both on- and off-reservation natural resource damages.
CERCLA Liability

- Strict
- Status liability of “Potentially Responsible Parties”
- Joint and Several
- Remedial (retroactive)
Strict Liability

- Liability without regard to fault
- Based on status (owner, operator, arranger)
Status Liability

- Current owner or operator of contaminated property;
- Former owner or operator (including lessee) of contaminated property at the time of release; and
- “Generator” of hazardous substances or arranger of disposal or treatment (“Transporters”).
Remedial (retroactive)

- Looks backward in time to impose liability on responsible party
- Liability attaches notwithstanding that operations leading to contamination may have been legal, even standard industry practice, at the time
• When two or more PRPs release hazardous substances (regardless of the amount released), each PRP is responsible for the entire liability.

• PRPs have the burden of proving that the harm is divisible and that liability (clean-up cost) should be apportioned among the PRPs.
Remedial Process

Identification of Potential Sites

Removal Site Assessment

Removal Action

Remedial Site Assessment

Remedial Investigation/Feasibility Study

Selection of Remedy (Record of Decision)

Remedial Design/Remedial Action

Remedial Action
• When remedy selected and implemented involves leaving contaminants on site, EPA required to assess protectiveness of remedy no less often than every 5 years after the initiation of remedial action. 42 U.S.C. § 9621(c).
In addition to costs of response and remediation activities, PRPs also responsible for loss or damage to natural resources.

Actions for loss or damage to natural resources may be brought by federal, state, and tribal Natural Resource Trustees.
Natural Resource Trustees

• Federal Trustee: President
  – Interior (USFWS, USGS, NPS, MMS, BOR, BLM, BIA)
  – Commerce (NMFS) and Agriculture (USFS)
  – Departments of Energy and Defense
  – Not EPA

• State Trustee: Governor

• Indian Tribal Trustee: Tribal Chairman
Natural Resource Damage Liability

- Different from strict, joint and several PRP liability for remedial costs
- Trustees must establish cause and effect relationship between PRP and contaminant leading to NR damage
Natural Resources

- Land, air, water, groundwater, drinking supplies, fish, wildlife, habitats, and other resources belonging to, managed by, held in trust by, or appertaining to, any state, local, tribal or foreign government. 42 U.S.C. 9601 (16)
Measure of Damages

- Costs of restoring, replacing or acquiring the equivalent of injured natural resources
- Lost or diminished use values, including market and non-market values
- Costs of assessing injury to natural resources
- Interest
• EPA required under CERCLA to notify Trustees of key events

• EPA required under CERCLA to coordinate and consult with Trustees to determine adequacy of EPA’s ecological investigation, evaluate actual or potential injury to trust resources, and select appropriate remedial action
Events Triggering Notification

- Site discovery
- PA/SI
- Proposal for listing on NPL
- Initiation of RI/FS negotiations
- Receipt of draft and final RI/FS workplans
- Receipt of draft and final RI/FS workplans
Events Triggering Notification

- Completion of draft ROD
- Final ROD
- Initiation of RD/RA negotiations
- Receipt of draft and final RD/RA workplans
- Five-Year Review process
Coordination and Consultation

• Draft and final RI/FS work plans
• Draft RI and FS
• Final RI and FS
• Proposed Plan for remediation
• Draft ROD
• Final ROD
• RD/RA
• Five-year Review Planning
Interplay Between Remedial Actions and NRDAR

- Involvement in CERCLA process early on permits NRD Trustees to shape assessment activities, response actions, work plans, remedy selection
- Increased opportunity for resource protection
- Increased opportunity for participation in negotiations with PRPs
Overview: The CERCLA Process

Connie Sue Martin