

# **SOUTH CAROLINA EHS CONFERENCE**

## **CERCLA: CRADLE TO GRAVE LIABILITY AND WHAT TO DO ABOUT IT**

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**WILLIAMS MULLEN**



> Overview

- Cradle to Grave Liability as a Policy Concept
- CERCLA Liability: Origins and Endings
- How Hazardous Substances are Made
- Maturation into Full Liability
- Early Retirement: Defenses, Exclusions and Limitations
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- CERCLA Liability Control: Prevention Methods
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- Q&A



## > Cradle to Grave Liability as a Policy Concept

- Product/chemical/pollutant/waste is regulated at each stage of its life cycle
  - Production/generation
  - Storage and handling
  - Transportation
  - Treatment/Modification
  - Reuse
  - Disposal/Discharge/Emission/Release
- In turn, liability arises at each stage of regulated life cycle/activity
- Spreads liability among parties that had a hand in management
- But can also concentrate it in one party where others are hard to pursue
- Often comes with extensive recordkeeping, reporting, and planning duties
- Regulated parties may seek to allocate risk among themselves



> CERCLA Liability: Origins and Endings

- Comprehensive Emergency Response, Compensation and Liability Act (“CERCLA” or “Superfund” Law) (42 U.S.C. §§ 9601 *et seq.*).
- Abandoned or idled contaminated sites or sites with disposed of wastes and chemicals.
- Emergency cleanup, natural resources restoration, and long-term remediation goals.
- No actively regulated or permitted responsible person or ready source of funds.
- Need for mechanism to recover cleanup costs.
- Liability to follow a hazardous substance from cradle (manufacture/production) to grave (ultimate destruction or remediation).



# Cradle to Grave Liability Under CERCLA: The Life Cycle



> How Hazardous Substances are Made

- Liability starts with the “making” of a hazardous substance
- **Hazardous substances** include:
  - “Any element, compound, mixture, solution, or substance” specifically designated under CERCLA or by CERCLA-related rulemaking by EPA;
  - Hazardous wastes (characteristic or listed) pursuant to Resource Conservation and Recovery Act (“RCRA”);
  - Clean Water Act designated hazardous substances: non-“oil” chemicals that “present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches;”
  - Clean Water Act Section 307(a) “toxic pollutants;”
  - Clean Air Act § 112 “hazardous air pollutants;” and
  - Any TSCA § 7 “imminently hazardous chemical substance or mixture.”

CERCLA § 101, 42 U.S.C. § 9601(14).



## > Maturation into Full Liability

### – Liability for a “potentially responsible person” (“PRP”):

- “(1) **the owner and operator** of a vessel or a facility,”
- “(2) **any person who at the time of disposal of any hazardous substance owned or operated any facility** at which such hazardous substances were disposed of,”
- “(3) **any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person**, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and”
- “(4) **any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person**,

from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.”

CERCLA § 107(a); 42 U.S.C. § 9607(a).



> Maturation into Full Liability (cont.)

– So, Potential for Liability Grows during Hazardous Substance Life Cycle

- Current owner or operator of property where disposal of hazardous substances occurred
- Past owner or operator when hazardous substances occurred
- Arranger for disposal or treatment of owned hazardous substance
- Arranger for transportation of owned hazardous substance to facility for disposal or treatment
- Accepted hazardous substance for disposal or treatment

- And when “response costs” are incurred in connection with any of these





> Maturation into Full Liability (cont.)

– Key Activities Regarding Hazardous Substances

- **“Owner or Operator”** of a “Facility” – “in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.”
- **“Facility”** – “(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.”

CERCLA § 101, 42 U.S.C. § 9601



> Maturation into Full Liability (cont.)

– Key Activities Regarding Hazardous Substances (cont.)

- **“Disposal”** – “discharge, deposit, injection, dumping, spilling, leaking, or placing of any [hazardous substances] into or on any land or water so that such [hazardous substances] or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.” (RCRA definition)
- **“Arrange”** – Not defined by statute or regulation, but caselaw has framed this.
- **“Accept”** – Not defined by statute or regulation but caselaw has framed this.
- **“Transportation”** – “the movement of a hazardous substance by any mode, including a hazardous liquid pipeline facility (as defined in section 60101(a) of title 49).”

CERCLA § 101, 42 U.S.C. § 9601



> Maturation into Full Liability (cont.)

– Key Activities Regarding Hazardous Substances (cont.)

- **Treatment** – “any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.” (RCRA definition)

- In connection with being an arranger



> Maturation into Full Liability (cont.)

– Key Activities Regarding Hazardous Substances (cont.)

- **“Release”** – “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).”
  - Notable Exemptions:
    - exposure to persons “solely within a workplace” for which a claim can be asserted against the employer;
    - engine exhaust emissions from “a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine;”
    - release of certain source, byproduct, or special nuclear materials; and
    - the “normal application of fertilizer.”



> Maturation into Full Liability (cont.)

– Key Activities Regarding Hazardous Substances (cont.)

• Release Reporting; TSD Notification

- “Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C. 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.”
- Notice of treatment, storage or disposal facilities for hazardous substances (akin to hazardous waste TSD facility notification).
- Penalties (civil/criminal) for failure to meet release reporting & notice obligations.

CERCLA § 103, 42 U.S.C. § 9603



> Maturation into Full Liability (cont.)

– Response cost liability:

- “all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;”
- “any other necessary costs of response incurred by any other person consistent with the national contingency plan;”
- “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and”
- “the costs of any health assessment or health effects study carried out under section 9604(i) of [CERCLA].”

– Federal lien against real property/rights based on response costs and damages

CERCLA § 107(a), 42 U.S.C. § 9607(a).



> Maturation into Full Liability (cont.)

– Nature of liability

- Strict – without regard to fault
- Joint and several (usually) – any one PRP can be held fully liable for all response costs (unless certain exceptions apply based on caselaw)
- Retroactive –
  - any past owners/operators of a facility when hazardous substances were disposed of at that facility
  - arrangers for treatment or disposal, or for transportation for treatment or disposal, of hazardous substances to facilities where such hazardous substances were disposed of
  - acceptors of hazardous substances at facilities where such hazardous substances were disposed of
- CERCLA liability indemnity agreements in private contracts not binding on agencies.



> Maturation into Full Liability (cont.)

– CERCLA Release Liability Causes of Action

• Abatement Action under CERCLA § 106

- Action to address “an imminent and substantial endangerment to the public health or welfare or the environment” due to release or threatened release from a facility.
- Collect Fines for Failure to Comply with Abatement Order Issued by EPA.

• Cost Recovery Action under CERCLA § 107(a)

- To recover response and remedial action costs and damages (plus interest) incurred by federal government, state, Indian Tribe, or locality.





> Maturation into Full Liability (cont.)

– CERCLA Release Liability Causes of Action

- Contribution Action under CERCLA § 113
  - PRP may sue other PRP for contribution as to relative proportion of liability to federal government, state, Indian Tribe, or locality under CERCLA § 107(a).
  - Court “may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”
- Settlement agreements with EPA/states/Tribes/localities.
  - Administrative versus judicial settlements and orders.
  - Resolve cost recovery actions and fines for noncompliance.
  - Can provide greater certainty as to further investigations and remedial action planning and costs.
  - Can prevent contribution actions by other PRPs based as to settled allocation of response costs.



> Early Retirement: Defenses, Exclusions and Limitations

– Defenses to Liability

- Damages resulting release or threatened release were caused solely by
  - (1) an act of God;
  - (2) an act of war;
  - (3) “an act or omission of a third party other than”
    - “an employee or agent of the defendant,” or
    - “one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant;”
  - or
  - (4) any combination of the foregoing paragraphs.

**\*THIRD-PARTY ACT OR OMISSION DEFENSE HAS CONDITIONS, THOUGH**



> Early Retirement: Defenses, Exclusions and Limitations (cont.)

– Defenses to Liability (cont.)

• Conditions to “third-party act or omission” defense:

- PRP must have exercised “due care” regarding the hazardous substance involved, “taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances,” and
- PRP must have taken “precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.”



> Early Retirement: Defenses, Exclusions and Limitations (cont.)

– Defenses to Liability (cont.)

- Bona Fide Prospective Purchaser (“BFPP”) Exemption –
  - Prospective purchaser or tenant of property at which release has occurred and does not have a “contractual relationship” with PRP
  - Eligibility conditions: must have done/do all of the following –
    - performed “all appropriate inquiry” before acquisition of property interest;
    - “disposal of hazardous substances occurred before” purchase/lease of property;
    - exercise “appropriate care” after acquisition of property interest;
    - provide “required notices” of “discovery or release of any hazardous substances;”
    - provide “full cooperation, assistance, and access” for response and restoration;
    - comply with any land use/institutional control for a related response action, **and**
    - comply with any CERCLA “request for information or administrative subpoena.”



> Early Retirement: Defenses, Exclusions and Limitations (cont.)

– Defenses to Liability (cont.)

• Contiguous Property Owner Exemption -

- Did not cause, contribute, or consent to the release or threatened release on contiguous property and does not have a “contractual relationship” with PRP
- Eligibility conditions: must have done/do all of the following –
  - performed “all appropriate inquiry” before acquisition of property interest;
  - did not know/had no reason to know of release contamination from other property;
  - take “reasonable steps” after acquisition of property interest;
  - provide “required notices” of “discovery or release of any hazardous substances;”
  - provide “full cooperation, assistance, and access” for response and restoration;
  - comply with land use/institutional controls for a related response action, **and**
  - comply with any CERCLA “request for information or administrative subpoena.”

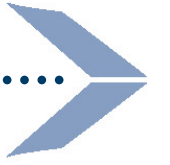


> Early Retirement: Defenses, Exclusions and Limitations (cont.)

– Defenses to Liability (cont.)

• BFPP and Contiguous Property Owner All Appropriate Inquiry (“AAI”)

- Used to establish in part that there was not “contractual relationship” under “third party act or omission” defense to CERCLA liability
- Used in same way as between BFPP or Contiguous Property Owner and Seller/Landlord or Neighboring Facility
- Main elements of AAI set by CERCLA statute, but detailed protocol set by EPA regulation in 40 C.F.R. Part 312
  - » ASTM International standards for Phase I Environmental Site Assessment (ASTM International Standard E1527–21) can suffice for meeting AAI in typical real estate transactions



> Early Retirement: Defenses, Exclusions and Limitations (cont.)

– Defenses to Liability (cont.)

- BFPP's and Contiguous Property Owner's Duty to Take Appropriate Care/Reasonable Steps –
  - “Stop any continuing release;”
  - “Prevent any threatened future release;” and
  - “Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.”



> Early Retirement: Defenses, Exclusions and Limitations (cont.)

– Defenses to Liability (cont.)

• *De Micromis* Exclusion for Response Costs

– Applicable to “Arranger” and “Acceptor” PRPs

– Must demonstrate that:

» The total amount of the material containing hazardous substances arranged for or accepted by the PRP “was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation);” and

» “all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.”

– BUT, certain factors can render *de micromis* exclusion unavailable.

– EPA CERCLA *de micromis* enforcement and settlement guidance may apply.





> Early Retirement: Defenses, Exclusions and Limitations (cont.)

– Defenses to Liability (cont.)

• Municipal Solid Waste from Small Businesses

- Applicable to certain small businesses (and related parent, subsidiary and “affiliate” entities) with no more than 100 full-time employees was an “arranger.”
- Applies to response costs at a facility on the National Priorities List for municipal solid waste disposed of at a facility by that small business.
- “Municipal solid waste:” essentially normal household waste in type, disposed of in the normal stream of municipal solid waste, that contains hazardous substances at the same relative quantity as that associated with typical household waste.
- Does not include waste from “manufacturing or processing operations (including pollution control waste) that is not essentially the same as” household waste.
- Other factors can render *de micromis* exclusion unavailable.



> Early Retirement: Defenses, Exclusions and Limitations (cont.)

– Limitation on Liability: Federally Permitted Releases

- “Federally Permitted Release” of hazardous substances includes (most relevantly):
  - Generally, discharges expressly authorized or contemplated pursuant to a permit issued under Clean Water Act § 402 and related permit application;
  - Generally, discharges authorized pursuant to a permit issued under Clean Water Act § 404 (individual and general permits) for dredge and fill material;
  - Certain releases from hazardous waste management facilities pursuant to permit;
  - Certain ocean dumping pursuant to Clean Water Act permits;
  - Certain underground injections authorized pursuant to the Safe Drinking Water Act Part C;
  - Certain air pollutant emissions authorized by permits issued under the Clean Air Act or an State Implementation Plan not disapproved by EPA;
  - Well injections for production of oil or gas approved per state law; and
  - Certain discharges to publicly owned treatment works if permitted or authorized by and enforceable under Clean Water Act and in compliance with applicable treatment standard.



> Early Retirement: Defenses, Exclusions and Limitations (cont.)

– Limitation on Liability: Federally Permitted Releases

- Liability for federally permitted releases limited to that arising under other applicable law, BUT note certain conditions to limit of liability:
  - Such release must in compliance with applicable permit or law; and
  - Limitation of liability applies to recovery of response costs or damages under CERCLA only;
  - Any common law liability associated with such release is not affected; and
- So, PRP remains liable under other applicable law (statute, regulation or common law) “for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.”



> The Grave and the “Undead”

– CERCLA Liability Does Not Die Easily

- Many hazardous substances persist in the environment, so they can be found years later or take a long time to attenuate or be remediated
- Cleanups can take a long time (years and even decades)
- Ultimately resolved through either settlement with EPA or with other PRPs
  - But new information can cause these to be reopened if further investigation or cleanup needed
- Expensive process

– Settlements Versus Litigation

– Statutes of Limitations on Certain Actions

– Other Regulatory Programs That Wind Up or Tie Off Liability



# Cradle to Grave Liability Under CERCLA: Strategies for Prevention and Risk Management



> CERCLA Liability Control: Prevention Methods

- Innocent Landowner/BFPP/Contiguous Property Owner status
- Avoid use and generation of hazardous substances where feasible
  - Product design and raw material selection (e.g., PFAS)
  - Recovery/reclamation/reuse/recycling of hazardous waste back into process line or into commercial product to reduce waste generation for disposal, discharge or emission
- “Federally permitted release” liability limitation for air pollution, wastewater and stormwater discharges, wetland fill, and municipal solid waste disposal
  - Includes federally enforceable state permits under CAA, CWA and RCRA
  - Comply with such other permits and laws to avoid CERCLA liability for releases
- Treatment (RCRA) to reduce relative toxicity or volume of hazardous wastes
- Pollution prevention and waste reduction to reduce hazardous substances



> CERCLA Liability Day-Care: Managing Risk is Constant

- Vetting transporters and TSD facilities for proper management practices
- Waste management vendor contract terms for protections
- Design/manage facility and housekeeping to avoid releases on-site or from site
- Personnel training and practices to minimize risk
  - Process chemical and waste handling
  - Reporting and notifications
- Environmental insurance (if available and sensible)
- Voluntary remediation programs with liability immunity safeguards (if sensible)
  - SC Brownfields/Voluntary Cleanup Program & Loan Fund (DHEC) for “non-responsible parties”
- Understand emerging risks – new hazardous substances (e.g., PFAS), risk exposure, regulatory changes, case law evolution



> CERCLA Liability Day-Care: Managing Risk is Constant (cont.)

- Emerging/Evolving Risks -
  - Newly listed hazardous substances (e.g., PFAS)
  - Risk exposure standards/guidelines
  - Statutory and regulatory changes
  - Case law developments
- Integration with other regulatory program risks
  - TSCA/EPCRA/SARA Title III
  - RCRA
  - CAA and CWA





> CERCLA Liability Day-Care: Managing Risk is Constant (cont.)

- PFAS
  - Ubiquitous in the environment due to varied past common uses.
    - Fire fighting foam, water repellent, non-stick surfaces; textiles.
  - See:
    - <https://www.upstateforever.org/blog/clean-water/what-is-sc-doing-about-toxic-forever-chemicals#:~:text=Testing%20in%20August%202020%20by,hot%20spots%20near%20suspected%20polluters.>
    - [https://scdhec.gov/environment/polyfluoroalkyl-substances-pfas/pfas-bureau-water.](https://scdhec.gov/environment/polyfluoroalkyl-substances-pfas/pfas-bureau-water)
  - Recently proposed by EPA as new hazardous substance.
  - TSCA implications.
  - Sampling and analytical methods still in flux.
  - Industrial wastewater and stormwater discharges.
  - Landfill leachate and flaring exhaust.



> CERCLA Liability Day-Care: Managing Risk is Constant (cont.)

- Develop a **DOME** facility integrated strategy to help reduce and manage risk
  - **Design** - facility structure, emission points, process areas, raw material management areas, waste management areas/containment, loading docks, stormwater collection/management and discharges, industrial wastewater collection, treatment, and discharge POTW connections or direct discharge outfalls, equipment service areas, fuel storage units/areas/containment, fire suppression systems/collection.
  - **Operation** – Permit compliance assurance, other regulatory compliance, operational best practices, training (initial and recurring), auditing, continual improvement process, raw material selection, fuel storage, fire suppression agent selection, vendor selection and contract terms.
  - **Maintenance** – Process equipment service/maintenance, building maintenance and repair, paint/coatings selection; vendor training and contract responsibility for wastes.
  - **End of life/Other use** – Decommissioning process lines, equipment and buildings; sale of real property; lease of property to third parties; redevelopment potential/uses.



> CERCLA Liability Day-Care: Managing Risk is Constant (cont.)

- Develop a CERCLA (and other environmental) risk management team
  - Team members –
    - Management
    - On-site engineers
    - On-site process supervisors
    - Independent environmental consultant (if any)
    - Environmental attorney
  - Meet regularly to discuss pending issues and strategies and ways to improve
- Contact legal counsel promptly if unpermitted release occurs or if CERCLA liability issues arise

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# Q&A

*Please note: This presentation contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Individuals with particular needs on specific issues should retain the services of competent counsel.*

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