OVERVIEW

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) was signed into law by President Jimmy Carter on December 11, 1980, after passage in the closing days of a lame-duck session of Congress.[1] CERCLA was intended to fill a significant gap in the nation's environmental protection laws: cleanup of abandoned contaminated properties. The passage of the Resource Conservation and Recovery Act (RCRA) in 1976 established a comprehensive scheme for regulating the management and disposal of hazardous waste by active facilities. Notably, RCRA did not provide the United States Environmental Protection Agency (EPA) with the necessary authority or funding to address contamination from countless abandoned facilities, a legacy of the industrial revolution. This problem came into sharp relief following public outrage over the apparent inability of EPA to respond promptly to the Love Canal disaster.

The infamous 16-acre site was a long-forgotten burial ground for industrial wastes. From 1942 to 1953, over 20,000 tons of chemicals were dumped into the landfill, after which the property was sold to the Niagara Falls school district for one dollar. The 99th Street School was built over Love Canal a year later, and within the next decade, residential neighborhoods followed. Love Canal made national headlines in 1978. Local reporters had detected contaminants in the water supply, and after conducting a survey of local residents found alarming evidence of birth defects, abnormally high incidence of miscarriages, and leukemia; these findings

1. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675).

were confirmed a year later by EPA, but the agency lacked express legal authority to take remedial action.

Local residents, frustrated with the federal government's failure to respond immediately to the situation, went so far as to take two EPA officials hostage in May 1980. Ultimately, the federal government did respond by purchasing the property in and around Love Canal, relocating approximately 950 families, and capping the site.

Love Canal became a catalyst for legislative action. In congressional hearings, it became clear that Love Canal was not an isolated incident but rather was typical of a "pervasive national problem."[2] EPA estimated that there were 30,000 to 50,000 unregulated hazardous waste sites and that 1,200 to 2,000 of these sites posed a "serious risk to public health."[3] To address this looming public health threat, several bills were introduced to provide EPA with express authority to respond to and remediate abandoned contaminated sites and to establish a massive new fund (a "Superfund") to cover the costs. Among the many sticking points was whether to impose joint and several liability for EPA's cleanup costs on responsible parties, whether to impose such liability retroactively, whether to include personal injury and property damage within the ambit of the liability scheme, and whether to exclude petroleum spills from the liability scheme. With time running out on the lame-duck session, a bipartisan group of senators hammered out a compromise bill, the now-famous Stafford-Randolph Compromise.[4]

Under the Stafford-Randolph Compromise, much of the contentious language from earlier bills—the words "joint and several," the liability provisions for personal injury or property or income loss and oil spill cleanup authority—were removed. The Senate passed this compromise

2. *Congress Clears "Superfund" Legislation*, 36 Cong. Q. Almanac 584, 585–86 (1980).

3. H.R. Rep. No. 96-1016, pt. 1, at 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6120–6121.

4. S. 1480, 96th Cong., 2d Sess. (1980).

bill after limited debate[5] and then shuttled the legislation to the House for a "take-it-or-leave-it" vote.[6] They took it.[7]

CERCLA enables the federal government to respond to releases or threatened releases of hazardous substances from abandoned and leaking hazardous waste disposal sites. Specifically, EPA is authorized to utilize congressionally appropriated funds—the Hazardous Substances Superfund (Superfund or the Fund)—to remediate sites[8] that the agency places on the National Priorities List (NPL), a list of the nation's most hazardous sites.[9]

Congress appropriated $1.6 billion for the first five years of the Superfund program; 87.5 percent of this revenue came from a tax on chemical and petroleum feedstocks, and the remaining 12.5 percent came from Treasury appropriations. Funding rose to $8.5 billion in 1986, when Congress passed the Superfund Amendments and Reauthorization Act of 1986 (SARA or the 1986 amendments).[10] An underlying principle of Superfund, however, is to shift the costs of remediation from taxpayers to the parties whose operations caused the contamination—the "polluters pay" principle.[11] To that end, Congress authorized EPA to seek recovery of cleanup costs from any responsible party.[12] Alternatively, EPA may order a responsible party to clean up a hazardous waste site

5. 126 Cong. Rec. 5, 14,905, 15,009 (daily ed. Nov. 24, 1980).

6. On December 1, 1980, Senators Stafford and Randolph sent a letter to Congressman Florio, the sponsor of the House bill that the Senate had replaced, and warned against any tinkering, noting: "That the bill passed at all is a minor wonder. Only the frailest, moment-to-moment coalition enabled it to be brought to the senate floor and considered. Indeed, within a matter of hours that fragile coalition began to disintegrate to the point that, in our judgment, it would now be impossible to pass the bill again, even unchanged. . . ." Mark Reisch, Committee on Environment and Public Works, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund), Pub. Law 96-510, at 774–75 (1983).

7. For a comprehensive summary of the legislative history of CERCLA, see Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envtl. L. (1980).

8. CERCLA § 104(a).

9. CERCLA § 105(b). EPA is also authorized to remediate non-NPL sites using the fund.

10. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

11. *See, e.g.,* H.R. Rep. No. 99-253 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment . . . and (2) to hold responsible parties liable for the costs of these clean-ups.").

12. CERCLA § 107.

where the site presents an "imminent and substantial endangerment to the public health or welfare or the environment."[13]

As noted above, Congress chose to omit from the final text of CERCLA the words "joint and several" or any other words clarifying the liability standard. Nevertheless, courts have interpreted the legislative history of CERCLA as intending liability to be strict, joint, and several among and between four classes of potentially responsible parties (PRPs).[14] PRPs face liability without regard to fault, without regard to the fact that the disposal activity now giving rise to such liability occurred decades ago, and without regard to the fact that such past practices were not only lawful but also often directed, permitted, or at least known by state officials. CERCLA liability is not predicated on some form of noncompliant behavior by PRPs. Moreover, under the principle of joint and several liability, one PRP can in theory be held liable for the entire cost of cleaning up a site, notwithstanding that many other parties share responsibility for the contamination—and the costs can be enormous.[15]

The harsh realities of CERCLA's liability provisions have met with considerable, if mostly unsuccessful, resistance from PRPs. Nevertheless, as the Superfund cleanup program has evolved and developed, and as PRPs have gained experience, albeit painful, with the intricacies and realities of Superfund litigation, insights and lessons have emerged.

One goal of this book is to identify and develop these insights and lessons. They require a full understanding of the major elements of the CERCLA program. To that end, this book describes EPA's response and enforcement authorities; EPA procedures for identifying cleanup standards and selecting remedial plans that achieve those standards; the statutory liability and judicial review provisions; PRP organization and

13. *See* CERCLA § 106.

14. We discuss these four categories of PRPs in Chapter 4, but briefly, they are as follows: (1) the current owners and operators of a contaminated site; (2) former owners and operators who were present when the contamination occurred; (3) parties that arranged for treatment or disposal of a hazardous substance at the site; and (4) transporters who selected the site for treatment or disposal of the hazardous substance. *See* CERCLA § 107(a)(1)–(4).

15. The Government Accountability Office (GAO) reported that the average cleanup cost for a site on the NPL is $26 million. *See* U.S. Gov't Accountability Office, GAO-96-125, Superfund—Barriers to Brownfield Redevelopment 3 (1996).

settlement issues; litigation, both as between PRPs and the United States and as among PRPs; and a handful of other significant issues arising out of CERCLA cleanup activities. From this discussion, two central themes should become apparent.

First, there has been, and continues to be, an endless appetite to litigate the contours of CERCLA liability. Sadly, Congress *knew* it was creating a litigation behemoth when it passed Superfund. Consider the following remark by Representative Harsha on passage of the Stafford-Randolph Compromise:

> We are establishing civil liability and criminal penalties in this legislation, and numerous questions have been raised as to what we are doing to common law with this new statute. These are not spurious issues. They are going to be litigated and the courts are going to have a field day in ridiculing the Congress on passing laws that are vague, internally inconsistent, and using tools such as superseding laws which are in conflict without any further guidance. This bill is not a superfund bill—it is a welfare and relief act for lawyers.[16]

One need look no further than the nation's highest court for confirmation of the extraordinary endurance of Superfund litigation. Since 2000—the third decade of the Superfund program—the U.S. Supreme Court has reviewed CERCLA decisions on four separate occasions.[17] In large measure, Congress is to blame for the litigation that has dogged Superfund since its inception. The statute, even as amended, is often vague and/or contradictory, leaving many important issues to be resolved by the courts.[18] The legislative history of CERCLA is scarce, as there were no committee or subcommittee hearings and no committee reports on

16. 126 Cong. Rec. 31,970 (1980).

17. The four cases are as follows: *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157 (2004); *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007); *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009); and *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), *reh'g denied*, 135 S. Ct. 23 (2014).

18. Indeed, as the U.S. Supreme Court has noted, the provisions of CERCLA are not "model[s] of legislative draftsmanship," and its statutory language is "at best inartful and at worst redundant." *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986).

the Stafford-Randolph Compromise that became law—nothing resembling the typical legislative process. All discussions and negotiations took place behind closed doors.[19] The legislative history we have is dominated by contradictory interpretations of the bill that various senators offered during limited floor debate.[20]

The huge sums of money so routinely at risk in CERCLA cleanups, combined with the innumerable vagaries surrounding the statutory scheme, virtually ensure that the private parties who face Superfund liability will continue to look to the courts to protect their interests. For that reason, this book analyzes key issues primarily from the perspective of PRPs who become enmeshed in the web of Superfund claims and litigation and, where appropriate, describes the current and/or evolving regulations, guidance, and judicial interpretations.

The second theme is that, notwithstanding the historic and continuing high levels of CERCLA litigation, negotiation and settlement are, more often than not, the only means by which PRPs can gain any measure of success in mitigating their liabilities. Hardball litigation tactics, often seen by litigators as the road to success, simply do not play well in the Superfund litigation arena. Thus, we devote considerable attention to the provisions of CERCLA that are designed to enhance the prospect of settlement, as well as the considerations that bear on the decision of whether to settle or litigate. (See Chapter 5.)

Disclaimers

Three disclaimers are in order. First, this book provides a general explanation of CERCLA and the most significant issues that have arisen during the past 35 years of its implementation and administration by EPA. It is not intended to represent an exhaustive analysis of every issue that has been litigated nor a comprehensive repository of every case that addresses these issues.

19. *See* Alfred R. Light, *Clean Up of a Legislative Disaster: Avoiding the Constitution under the Original CERCLA*, 37 Environs: Envtl. L. & Pol'y J. 197–214 (2014).

20. *See* 126 Cong. Rec. 30,873, 30,916–76 (daily ed. Nov. 24, 1980).

Second, it goes without saying that this book should not be considered as providing legal advice. It is intended solely as a treatise summarizing the state of the law under CERCLA. Although there are numerous practice tips scattered throughout the text, they do not constitute legal advice. To provide legal advice, an attorney must first understand the particular problem and facts for which advice is needed—only then can the attorney apply the law to those facts and offer legal advice. Thus, this book should not be used as a substitute for obtaining legal advice on any issue.

Third, any treatise analyzing a statutory program that is implemented by a federal agency through regulation and guidance—and that is the subject of substantial case law interpretation—is, inevitably, a reflection of the program's evolution at the moment of publication. To illustrate, as recently as 2007, the U.S. Supreme Court changed what had been considered a bedrock principle of Superfund jurisprudence stretching back to the 1980s (ruling that PRPs may pursue recovery of cleanup costs under section 107, reversing decisions of 11 federal circuits).[21] Thus, readers should bear in mind that the contents of this book are but a snapshot of the state of the law as of 2015.

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It is tempting to dismiss Superfund as a closed chapter of environmental history—a statute whose funding expired long ago[22] and whose mission largely has been accomplished. Resist the temptation. To paraphrase the immortal words of Mark Twain, the reports of Superfund's death have been greatly exaggerated. At last count, there were over 1,300 sites on the NPL.[23] There is also an immense number of non-NPL sites that have yet to be remediated. Much has been accomplished, but much remains to be done.

21. United States v. Atlantic Research Corp., 551 U.S. 128, 131–32 (2007).

22. The Superfund trust stopped receiving funds in 1995 after the expiration of the "polluter pays" taxes that were sustaining it.

23. *See Superfund: National Priorities List (NPL)*, EPA, http://www.epa.gov/superfund/sites/npl/ (last updated Dec. 29, 2015).