## CONTENTS

Overview xi

About the Author xix

1 Government Response Authority under Section 104 of CERCLA 1
   I. Introduction 1
   II. Federal Agencies and Departments That May Be Involved in CERCLA Cleanups 1
   III. State Authority under Superfund 2
      A. Required State Participation 3
      B. State Authority to Lead Remedial Action 3
   IV. The Statutory Prerequisites to Government Response 4
      A. Release or Threat of Release 4
      B. Environment 8
      C. Hazardous Substance, Pollutant, or Contaminant 9
      D. Petroleum Exclusion 10
      E. Other Limitations on Response Authority 13
   V. Government Response Authorities 13
      A. National Contingency Plan (NCP) 14
      B. Removal Actions versus Remedial Actions 17
      C. Ancillary Response Authorities 24
   VI. Information-Gathering Authority 25
      A. Information Requests 25
      B. Entry and Access 27
      C. Responding to EPA Notice Letters 29
Contents

2 The Substance and Procedure of Remedy Selection 33
   I. Introduction 33
   II. Remedy Selection Standards 34
      A. Protection of Human Health and the Environment 35
      B. Cost-effectiveness and Permanence 43
      C. Innovative Technologies 46
   III. Remedy Selection Procedures 46
      A. Proposed Remedial Action Plan 46
      B. Record of Decision 47
      C. Administrative Record 48
      D. State Participation in Remedy Selection 49
      E. Five-Year Review 50

3 Abatement Authority under Section 106 53
   I. Introduction 53
   II. Overview of Section 106(a) 54
      A. Prerequisites for Assertion of Authority under Section 106(a) 55
      B. Parties Subject to Section 106(a) 59
      C. Standard of Liability 62
      D. Statute of Limitations 62
   III. Section 106 Administrative Orders 63
      A. Constitutionality of Section 106(a) Orders 64
      B. Sufficient Cause 69
      C. Strategic Options When Faced with a Section 106(a) Administrative Order 73
   IV. Section 106 Civil Actions 79
      A. Prima Facie Case 80
      B. Defenses 80
      C. Standard of Review Applicable to Remedy Selected 81
Contents

4 Liability 83
   I. Introduction 83
   II. Nature of Liability—Strict, Joint, and Several 85
      A. Strict Liability 85
      B. Retroactive Liability 86
      C. Joint and Several Liability 87
   III. Parties Liable under Section 107 94
      A. Current Owners or Operators 95
      B. Former Owners or Operators 97
      C. Party Who Arranged for Disposal 99
      D. Transporters 107
      E. Federal, State, and Local Government Liability 109
   IV. Individual, Parent, and Successor Liability 112
      A. Individuals and Parent Corporations 113
      B. Successors 119
   V. Lender Liability 120
   VI. Causation 123
   VII. Defenses to Liability 125
      A. Statutory Defenses 125
      B. Equitable Defenses 143
      C. Indemnification and “As Is” Sales 144
   VIII. Statute of Limitations 146
   IX. Types of Recoverable Costs 148
      A. Response Costs 149
      B. Natural Resource Damages 157
      C. Health Effects Studies 158

5 Settlement 159
   I. Introduction 159
   II. Prelitigation Settlement Evaluation 160
      A. Possible Liability 161
      B. Position of Other PRPs at the Site 161
## Contents

VI. Standard and Scope of Judicial Review 211  
A. Limitations Imposed by Section 113 on the Review of EPA's Selection of Remedy 211  
B. De Novo Review of Section 106 Actions for Injunctions 212  

VII. Judicial Review of Consent Decrees 213  
A. Intervention 214  
B. Standard of Review 216  
C. PRP Participation in the Consent Decree Review Process 219  

7 Organizing PRPs at Multiparty Sites 223  
I. Introduction 223  
II. Formation and Structure of PRP Organizations 224  
III. Tasks of the Steering Committee 228  
A. Executive Committee 229  
B. Technical Subcommittee 229  
C. Allocation Subcommittee 230  
IV. To Join or Not to Join the Steering Committee 232  

8 Litigating a Federal Cost Recovery Action 235  
I. Introduction 235  
II. Complaint 236  
III. Answer, Affirmative Defenses, and Counterclaims 236  
IV. Third-Party Practice 239  
V. Case Management Order 241  
VI. Discovery 243  
A. Introduction 243  
B. Discovery Scheduling Order 244  
C. Discovery on Liability Issues 244  
D. Discovery on Remedy Issues 246
Contents

E. Discovery on Cost Issues 248
F. Discovery Disputes 249

VII. Special Masters 250
VIII. Dispositive Motions 251
IX. Trial 253

9 Private Party Actions 255

I. Introduction 255

II. Private Cost Recovery under Section 107 258
A. Incurrence of Response Costs 259
B. Necessary Costs 259
C. Consistency with the NCP 262
D. Notice and Government Approval 269
E. State and Common Law Claims 269

III. Contribution Actions under Section 113 270
A. The 1986 Amendments Established an Express Right of Contribution 271
B. The Supreme Court Alters the Landscape 272
C. Post-Atlantic Research Case Law 275
D. Timing of Contribution Action 278
E. Allocation Factors for Contribution 278
F. Orphan Share Issue 281
G. Alternative Dispute Resolution 282

IV. Availability of Declaratory Relief under Sections 107 and 113 283

V. Indemnification 284

VI. Suits against Government Entities 286
A. Suits against the Federal Government 286
B. Suits against States 288

VII. Defenses 288
A. Statutory Defenses 288
B. Equitable Defenses 289

VIII. Settlement Issues in Private Cost Recovery and Contribution Actions 290

IX. Documentation and Record-keeping Practices to Maximize Cost Recovery 293
Contents

10 Natural Resource Damages 297
   I. Introduction  297
   II. Scope of Liability for Natural Resource Damage 298
      A. Types of Natural Resources  298
      B. Standing to Sue for Natural Resource Damages  299
      C. Procedural Requirements for Natural Resource Damage Claims 302
      D. Liability for Natural Resources Damages 302
      E. Statute of Limitations for NRD Claims 305
      F. Defenses to NRD Claims 306
   III. Natural Resource Damages Assessment Regulation 312
   IV. Preemption  316
   V. Contingent Fee Prosecution of NRD Claims 319
      A. The Public Trust Doctrine and States’ Fiduciary Duties 319
      B. Preemption as Obstacle to Contingent Fee Arrangements 320

11 CERCLA and SARA Title III Reporting Requirements 323
   I. Introduction  323
   II. CERCLA Reporting Requirements 324
      A. Reporting Requirements under CERCLA Section 103(a) 325
      B. Reporting of Continuous Releases under CERCLA Section 103(f)(2) 331
      C. CERCLA Reporting Requirement under Section 103(c) 335
      D. Exemptions from Release Reporting Requirements 336
   III. Emergency Release Notification under SARA Title III 340
      A. Releases Subject to Notification 341
      B. Form of Notice 342
## 12 Insurance

I. Introduction 343
II. Notice to the Insurer 344
III. Duty to Defend 345
   A. Section 104(e) Information Requests 346
   B. General and Special Notice Letters 346
   C. Section 106 Orders 347
IV. Coverage 348
   A. “As Damages” 348
   B. “Occurrence” 352
   C. Pollution Exclusion 354
   D. Owned Property Exclusion 357
V. Direct Action against Insurers 358
VI. Subrogation Claims by Insurers 360
VII. Collateral Source Rule in CERCLA Context 363

## 13 Bankruptcy

I. Introduction 365
   A. Overview of Bankruptcy Proceedings 365
   B. Competing Goals and Interests 366
II. EPA versus the Debtor 367
   A. Discharge of Federal Cost Recovery Claim 367
   B. The Automatic Stay 373
   C. Abandonment 375
   D. Federal “Superiority” Lien Authority 377
III. PRPs versus the Debtor 379
   A. Disallowance of PRP Claims as “Contingent” 379
   B. Disallowance Because Claim Has Not “Arisen” 380
   C. PRP Actions to Preserve Claim against Debtors 382

Table of Cases 385
Table of Statutes 426
Index 437