Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

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Road Map

History

Liability Scheme

Defenses

Other Issues

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

CERCLA passed in 1980 to clean up leaking, inactive, or abandoned sites and provide emergency response to spills

Love Canal in New York (1978)

Times Beach, Missouri

Funding Superfund

- CERCLA designed to provide funds and governmental response authorities to address releases and threatened releases of hazardous substances
  - "Fund Lead"
  - Administrative Orders under Section 106, 42 U.S.C. § 9606
- Federal funding for the "Superfund" was initially $1.6 billion (1981 – 1985). Established a direct tax on sales of petroleum and certain chemical feedstocks to fund Superfund.
- Taxing authority expired on December 31, 1995. Superfund is now funded through appropriations and cost recovery

CERCLA Liability Scheme

SECTION 107 OF CERCLA

Section 107

- Allows the federal government, individual states, and private parties to recover costs incurred in response to a release or threatened release of hazardous substances
  - Federal government, States and Indian Tribes can recover all costs they have incurred "not inconsistent with the national contingency plan"
    - What is the National Contingency Plan? 40 C.F.R. Part 300
    - What does "all costs" mean?

Section 107 (cont.)

- Private parties can recover “any other necessary costs of response . . . consistent with the national contingency plan”

Categories of Liable Parties Section 107(a) of CERCLA

- Current owners and operators
- Owners or operators at the time of disposal of “hazardous substances”
- Generators, or persons who “arranged for disposal or treatment of hazardous substances
- Transporters of hazardous substances to “sites selected by such person”

Liability Scheme

Strict Liability

Joint and Several

Retroactive Liability

Section 113(f) of CERCLA

- Parties liable under Section 107 of CERCLA may seek contribution from other liable parties

Defenses to Liability Section 107(b) of CERCLA

Act of God

An "unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." See United States v. M/V Santa Clara I, 887 F. Supp. 825, 843 (D.S.C. 1995) (storm did not justify the act of God defense because it was predicted and the effects were avoidable); United States v. Barrier Indus., 991 F. Supp. 678, 679-80 (S.D.N.Y. 1998) (unprecedented cold spell not defense); United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D.Cal.1987) (heavy rainfall was not an act of God under CERCLA because it was “foreseeable based on normal climatic conditions and any harm caused by the rain could have been prevented through design of proper drainage channels.”).

Act of War

The leading CERCLA case on this issue is United States v. Shell Oil Co., 841 F. Supp. 962, 970-72 (C.D. Cal. 1993), aff'd, 281 F.3d 812 (9th Cir. 2002). The court found that oil companies could not invoke "act of war" defense to escape liability for dumping hazardous substances which were disposed of following production of aviation fuel during World War II; further, the term "act of war" as used in CERCLA could not reasonably be construed to cover either government's wartime contracts to purchase aviation fuel or its regulation of oil companies' production of aviation fuel

Act or Omission of a Third Party

- Defense applies to act or omission of a third party "other than an employee or agent of defendant, or than **one whose act or omission occurs in connection with a contractual relationship**, existing directly or indirectly with the defendant
  - Due Care
  - Precautions against foreseeable acts or omissions of any such third party

Other Issues

Natural Resource Damages

In addition to the recovery of cleanup costs, CERCLA allows for the recovery of natural resources damages

Section 101(16) defines “natural resources” as “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.”

Judicial Review of Response Actions

- Section 113(h) of CERCLA provides a bar on pre-enforcement review of challenges to removal or remedial actions except in certain circumstances:
  - In a cost recovery action under Section 107(a)
  - In an action to enforce an order issued under Section 106
  - An action seeking reimbursement under Section 106(b)(2)

Sale of a Useful Product

- *Burlington Northern and Santa Fe Railway Co., et al. v. United States*, 556 U.S. 599, 612 (2009)
  - Addressed arrangement for disposal and sale of a useful product
  - "In order to qualify as an arranger, [the defendant] must have entered into the sale . . . with the intention that at least of portion of the product be disposed of during the transfer . . . ."
  - Introduced an element of intent

United States v. General Elec. Co., 670 F.3d 377 (1st Cir. 2012)

Sale of scrap pyranol to Mr. Fletcher for use in formulating paint was an arrangement for disposal

- GE viewed scrap pyranol as a waste product
- GE knew that the drums of pyranol were not of sufficient quality to be of use to Fletcher
- GE forgave unpaid debt, and refused to take waste back
- Never tried to market scrap pyranol to anyone other than Fletcher

United States v. Dico, Inc., Titan Tire Corporation (8th Cir. April 11, 2019)

- Contaminated Butler Building sold to purchaser who was not aware of PCB contamination
- Court found that it was not the sale of a useful product

Divisibility and Apportionment

- Liability is joint and several if two or more persons have contributed to a single harm
- Defendants bear the burden of proving that there are distinct harms or that the harm is reasonably capable of apportionment
- Equitable considerations play no role in the apportionment analysis

Air Deposition

Pakootas v. Teck Cominco Metals, Inc., 830 F.3d 975 (9th Cir. 2016)—the 9th Circuit held that deposition of hazardous substances emitted from from Teck Cominco's smelter stacks did not constitute "disposal" under the statute.