CERCLA

As a result of several well-publicized hazardous waste disposal disasters in the 1970's, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980. CERCLA, also known as Superfund, authorizes EPA to respond to environmental emergencies involving hazardous wastes or pollutants and contaminants, initiate investigations and cleanups, and take enforcement action against responsible parties. To provide money for these activities, Congress established a trust fund that was financed by taxes on the manufacture and import of chemicals and petroleum.

EPA may exercise its response authority through removal or remedial actions. Removal actions are implemented when there is an immediate threat to human health and the environment. EPA has used removal actions to avert fires and explosions, prevent exposure to acute toxicity, and protect drinking water supplies. Removal actions typically take less than twelve months to implement and cost less than two million dollars. Remedial actions address long-term threats to human health and the environment caused by more persistent contamination sources. Consequently, they usually take much longer to complete and cost considerably more to implement than removal actions.

Congress designed CERCLA to ensure that those who caused the pollution, rather than the general public, pay for the cleanup. In order to be held liable for the costs or performance of cleanup under CERCLA, a party must fall within one of four categories found in CERCLA section 107(a) *(see box)*. Using CERCLA's polluter pays liability scheme, EPA has ensured the successful cleanup of many of the nation's worst hazardous waste sites by those responsible for the contamination – the Potentially Responsible Parties (PRPs).

Despite its broad categories of liable parties, CERCLA also provides various forms of liability protection which extend to all lawsuits brought under CERCLA, whether initiated by EPA or by a private party. A party who satisfies the statutory provisions can avoid lawsuits brought by EPA seeking cleanup costs or a response action. Additionally, the party would be protected from third parties who are trying to recoup money they expended in cleaning up a site.

CERCLA's Four Liability Categories

- Current owner or operator of the facility;
- Owner or operator of the facility at the time of disposal of hazardous substances;
- Person who generated or arranged for the disposal or treatment of hazardous substances; or
- Transporter of the hazardous substances, if this person selected the disposal or treatment site.

CERCLA's Liability Scheme

Under CERCLA, liability for cleanup is strict and joint and several, as well as retroactive. The implications of these features are as follows:

- **Strict** - A party may be held liable even if it did not act negligently or in bad faith.
- **Joint and several** - If two or more parties are responsible for the contamination at a site any one or more of the parties may be held liable for the entire cost of the cleanup, unless a party can show that the injury or harm at the site is divisible.
- **Retroactive** - A party may be held liable even if the hazardous substance disposal occurred before CERCLA was enacted in 1980.

Contiguous Property Owners, Bona Fide Prospective Purchasers, and Innocent Landowners

The SBLRBRA creates two new conditional exemptions from CERCLA "owner/operator" liability for contiguous property owners and bona fide prospective purchasers (BFPP). Again, these exemptions embody aspects of pre-existing EPA policies. The new law also modified the existing innocent landowner defense by clarifying the meaning of "all appropriate inquiries." All three provisions embody some common elements for persons to maintain non-liable status while also including unique provisions and requirements.

Section 221 of the Act adds new § 107(q) which exempts from owner or operator liability persons that own land contaminated solely by a release from contiguous, or similarly situated property owned by someone else. In the case of a contiguous property owner, the owner must not have known or had reason to know of the contamination at the time of purchase and must not have caused or contributed to the contamination. The section also modifies what constitutes appropriate care/ reasonable steps for contiguous property owners by clarifying that the requirement does not obligate a contiguous property owner to conduct groundwater investigations or remediate groundwater contamination except in accordance with EPA's pre-existing policy.

The new law generally provides greater protections for contiguous property owners than EPA's existing policy on owners of contaminated aquifers. The new law does not limit

the exemption to properties contaminated by groundwater but may also apply to soil contamination resulting from neighboring properties. The Act also grants EPA the authority to provide assurances that the Agency will not take action against a person and protection from third party suits. As in EPA's Contaminated Aquifer Policy, a person who purchases with knowledge of the contamination cannot claim the exemption; however, the new law notes that a party who does not qualify for the exemption for this reason may still qualify as a BFPP.

The most notable aspect of the BFPP provision is that for the first time Congress has limited the CERCLA liability of a party who purchases real property with knowledge of the contamination. The caveats to this exemption, in addition to the common elements, include a requirement that all disposal takes place prior to the date of purchase, that the person does not impede a response action, and that the property may be subject to a "windfall lien". The windfall lien provision provides for a lien on the property of a BFPP if EPA has unrecovered response costs and the response action increased the fair market value of the property. The lien arises as of the date the response cost was incurred and the amount cannot exceed the increase in fair market value attributed to the response action.

EPA's policy on prospective purchaser agreements (PPAs) proved one of the most successful and high profile administrative liability reforms prior to enactment of the new law. Immediately after passage, EPA was asked repeatedly whether the Agency would continue to issue PPAs. Many people suggested that EPA needs to continue the practice, despite the fact that the legislation provides an exemption and confronts an ongoing complaint, from some of these same people, that EPA should not be involved in private real estate transactions.

To address this issue, on May 31, 2002, EPA's Office of Site Remediation Enforcement issued new guidance entitled *Bona Fide Prospective Purchasers and the New Amendments to CERCLA* (also found at http://epa.gov/compliance/resources/policies/cleanup/superfund/bonf-pp-cercla-mem.pdf). This guidance states that "EPA believes that, in most cases, the Brownfields Amendments make PPAs from the federal government unnecessary." Therefore, in the majority of cases EPA intends for the law to be self-implementing. However, the guidance does recognize the following two exceptions where EPA may enter into an agreement with the purchaser: 1) there is likely to be a significant windfall lien needing resolution; and 2) the transaction will provide significant public benefits and a PPA is needed to ensure the transaction will take place.

The contiguous property owner exemption, the definition of what constitutes a BFPP, and the innocent landowner defense found in CERCLA Section 107(b)(3) and the definition of "contractual relationship" in Section 101(35), all contain the following common obligations which persons seeking these exemptions must meet:

- conduct "all appropriate inquiry" prior to purchase of the property;
- not be potentially liable or affiliated with any person potentially liable;
- exercise appropriate care by taking reasonable steps to "stop any continuing release; prevent any threatened future release; and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance;"
- provide full cooperation, assistance, and access to persons undertaking a response action or natural resource restoration;
- comply with all governmental information requests
- comply with land use restrictions and not impede the performance of institutional controls; and
- provide all legally required notices regarding releases of hazardous substances

At time of publication, EPA is considering whether to produce general guidance on these "common elements." EPA has heard from stakeholders that they need clarification of these requirements to ensure they take appropriate actions to avoid liability. EPA would like to ensure national consistency and provide direction where needed. However, requirements such as what constitutes appropriate care/reasonable steps will greatly depend on site specific circumstances.

Changes to CERCLA Section 101(35)(B) now define "all appropriate inquiries" for purposes of all three provisions. First, the Act directs EPA to promulgate regulations based on statutory criteria within two years of date of enactment, establishing standards for all appropriate inquiry. For purchases prior to issuance of these regulations, the Act utilizes two standards based on date of purchase. For purchases prior to May 31, 1997, the Act sets forth a narrative standard, directing courts to consider such factors as, inter alia, specialized knowledge of the defendant, the obviousness of the contamination, and relationship of purchase price to property value. For purchases after May 31, 1997, the Act states that procedures set forth in the American Society for Testing and Materials, Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process, Standard E1527-97 shall satisfy the requirement. The section also provides that for purchasers of property for residential use or similar use by a nongovernmental or noncommercial entity a facility inspection and title search shall fulfill the requirements.

Secured Creditor Exemption

CERCLA Section 101(20)(A) contains a secured creditor exemption that eliminates owner/operator liability for lenders who hold indicia of ownership in a CERCLA facility primarily to protect their security interest in that facility, provided they do not participate in the management of the facility.
Before 1996, CERCLA did not define the key terms used in this provision. As a result, lenders often hesitated to loan money to owners and developers of contaminated property for fear of exposing themselves to potential CERCLA liability. In 1992, EPA issued the "CERCLA Lender Liability Rule" to clarify the secured creditor exemption. After the Rule was invalidated by a court in 1994, Congress incorporated many sections of the Rule into the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. That Act amended CERCLA's secured creditor exemption to clarify the situations in which lenders will and will not be protected from CERCLA liability. The amended exemption appears at CERCLA Section 101(20)(E)-(G).

Other Considerations

The 1996 amendment also protects lenders from contribution actions and government enforcement actions. Regardless of CERCLA's secured creditor exemption from owner/operator liability, a lender may be liable under CERCLA as a generator or transporter if it meets the requirements outlined in CERCLA Section 107 (a)(3) or (4). In June 1997, EPA issued a lender policy that further clarifies the liability of lenders under CERCLA *(see page 59)*. Statutory and Regulatory Provisions

"Participation in Management" Defined

A lender "participates in management" (and will not qualify for the exemption) if the lender:

- Exercises decision-making control over environmental compliance related to the facility, and in doing so, undertakes responsibility for hazardous substance handling or disposal practices; or
- Exercises control at a level similar to that of a manager of the facility, and in doing so, assumes or manifests responsibility with respect to
  1. Day-to-day decision-making on environmental compliance, or
  2. All, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.

The term "participate in management" does not include certain activities such as when the lender:

- Inspects the facility;
- Requiries a response action or other lawful means to address a release or threatened release;
- Conducts a response action under CERCLA section 107(d)(1) or under the direction of an on-scene coordinator;
- Provides financial or other advice in an effort to prevent or cure default; and,
- Restructures or renegotiates the terms of the security interest; provided the actions do not rise to the level of participating in management.

After foreclosure, a lender who did not participate in management prior to foreclosure is not an "owner or operator" if the lender:

- Sells, releases (in the case of a lease finance transaction), or liquidates the facility;
- Maintains business activities or winds up operations;
- Undertakes a response action under CERCLA section 107(d)(1) or under the direction of an on-scene coordinator; or,
- Takes any other measure to preserve, protect, or prepare the facility for sale or disposition; provided the lender seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms. EPA considers this test to be met if the lender, within 12 months after foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

Limitation of Fiduciary Liability

A "fiduciary" is a person who acts for the benefit of another party. Common examples include trustees, executors, and administrators. CERCLA Section 107(n), added by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, protects fiduciaries from personal liability in certain situations, provides a liability limit for those fiduciaries who are found liable, and describes situations in which fiduciaries will and will not receive this statutory protection. CERCLA's fiduciary provision, however, does not protect the assets of the trust or estate administered by the fiduciary.

Fiduciary Liability

For actions taken in a fiduciary capacity, liability under any CERCLA provision is limited to assets held in the fiduciary capacity. A fiduciary will not be liable in its personal capacity for certain actions such as:

- Undertaking or requiring another person to undertake any lawful means of addressing a hazardous substance;
- Enforcing environmental compliance terms of the fiduciary agreement; or
- Administering a facility that was contaminated before the fiduciary relationship began.

The liability limitation and "safe harbor" described above do not limit the liability of a fiduciary whose negligence causes or contributes to a release or threatened release.

The term "fiduciary" means a person acting for the benefit of another party as a bona fide trustee, executor, or administrator, among other things. It does not include a person who:

- Acts as a fiduciary with respect to a for-profit trust or other for-profit fiduciary estate, unless the trust or estate was created:
  - Because of the incapacity of a natural person, or
  - As part of, or to facilitate, an estate plan.
- Acquires ownership or control of a facility for the purpose of avoiding liability of that person or another person.

Nothing in the fiduciary subsection applies to a person who:

- Acts in a beneficiary or non-fiduciary capacity, directly or indirectly, and benefits from the trust or fiduciary relationship; or
- Is a beneficiary and fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits exceeding customary or reasonable compensation.

Protection of Government Entities That Acquire Property Involuntarily

CERCLA sections 101(20)(D) and 101(35)(A) protect federal, state, and local government entities from owner/operator liability if they involuntarily acquire contaminated property while performing their governmental duties. If a unit of state or local government makes an involuntary acquisition, it is exempt from owner/operator liability under CERCLA. Additionally, a state, local, or federal government entity that makes an involuntary acquisition will have a third-party defense to owner/operator liability under CERCLA if:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (e.g., did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

Regulations set forth at 40 CFR 300.1105, and validated by the 1996 Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, provide some examples of involuntary acquisitions.

As the following examples indicate, a government entity need not act completely passive in order to acquire property involuntarily. Often government entities must take some sort of discretionary, volitional action before they can acquire property following circumstances such as abandonment, bankruptcy, or tax delinquency. In these cases, the "involuntary" status of the acquisition is not jeopardized.

Acceptable Involuntary Acquisitions

EPA considers an acquisition to be "involuntary" if the government's interest in, and ultimate ownership of, the property exists only because the conduct of a non-governmental party gives rise to the government's legal right to control or take title to the property.

Involuntary acquisitions by government entities include the following:

- Acquisitions made by a government entity functioning as a sovereign (such as acquisitions following abandonment or tax delinquency);
- Acquisitions made by a government entity acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority (such as acquisitions of the security interests or properties of failed private lending or depository institutions);
- Acquisitions made by a government entity through foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program; and
- Acquisitions made by a government entity pursuant to seizure or forfeiture authority.

Other Considerations

A government entity will **not** have a CERCLA liability exemption or defense if it has caused or contributed to the release or threatened release of contamination. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Furthermore, the liability exemption and defense described above do not shield government entities from liability as generators or transporters of hazardous substances under CERCLA section 107(a)(3) or (4).

In June 1997, EPA issued a policy that further clarifies the CERCLA liability of government entities that involuntarily acquire property *(see page 59 and fact sheet on page 125)*.

De Minimis Waste Contributor Settlements , Ability to Pay, and the De Micromis Exemption

At a CERCLA site, some parties may have contributed only minimal amounts of hazardous substances compared to the amounts contributed by other parties. Under CERCLA section 122(g), these contributors of small amounts may enter into de minimis waste contributor settlements with EPA. Such a settlement provides the waste contributor with a covenant not to sue and contribution protection from the United States. As a result, the settling party is protected from legal actions brought by EPA or other parties at the site. In exchange for the settlement, the de minimis party agrees to provide funds, based on its share of total waste contribution, toward cleanup, or to undertake some of the actual work.

Section 102(b) of SBLRBRA amended Section 122(g) of CERCLA and grants EPA the authority to enter into expedited settlements with persons who demonstrate an inability or limited ability to pay response costs. The Act directs EPA to consider whether the person can pay response costs and still maintain basic business operations, which includes consideration of financial condition and ability to raise revenues. The SBLRBRA also requires EPA to provide a written determination of ineligibility to a potentially responsible party that requests a settlement under any provision in Section122(g). Any determination regarding eligibility is not subject to judicial review.

Section 102(a) of SBLRBRA also added new §107(o) to CERCLA and exempts generators and transporters of de micromis quantities of hazardous substances from response

cost liability.[1] The new law requires a person seeking the exemption to demonstrate that "the total amount of the material containing hazardous substances they contributed was less than 110 gallons of liquid materials and 200 pounds of solid materials" and that "all or part of disposal, treatment, or transport occurred before April 1, 2001." This exemption is subject to the following exceptions: 1) if the materials contribute significantly, either on their own or in the aggregate, to the cost of the response action or natural resource to the cost of the response action or natural resource restoration; 2) if the person fails to comply with an information request; 3) if the person impedes a response action or natural resource restoration; or 4) if the person has been convicted of a criminal violation for conduct to which the exemption would apply.

The Act provides significant protection for generators and transporters of de micromis amounts of hazardous substances at NPL sites where disposal, treatment or transport occurred after April 1, 2001. While EPA is not directed to provide contribution protection to these parties, the Act includes substantial disincentives for litigation by private party plaintiffs. First, the exemption shifts the burden of proof to private party plaintiffs to show that the exemption does not apply. Second, the new law makes private party plaintiffs liable for the defendant's costs and fees if a court finds the defendant to be exempt under this provision. These provisions should force potentially responsible parties seeking contribution for response costs to exercise greater diligence in respect to whom they drag into court.

The complete text of SBLRBRAmay be found at http://www.epa.gov/brownfields/html-doc/hr2869.htm

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1. § 102(a), 115 Stat. 2356 (to be codified at 42 U.S.C. § 9607(o))(subsequent citations are to 42 U.S.C.).

Service Station Dealers Exemption

The Superfund law includes a liability exemption for service station dealers who accept used oil for recycling. The exemption is meant to encourage service station dealers to accept used motor oil for recycling from do-it-yourself recyclers, i.e., people who change the oil in their own cars, trucks, and appliances. A dealer may be eligible for the exemption if the recycled oil is not mixed with any other hazardous substance and is managed in compliance with Solid Waste Disposal Act regulations.

As long as a small quantity of used oil was removed from the engine of a "light duty motor vehicle" or house appliances by the owner, and the owner presents it to the dealer for delivery to an oil recycling facility, the dealer can presume that the used oil is not mixed with other hazardous substances. The mixing of the used oil with other hazardous substances is what would trigger Superfund liability.

Superfund defines a service station dealer as persons who own or operate retail establishments that sell, repair, or service motor vehicles and accept recycled oil from light vehicle and household appliance owners for recycling.

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Municipal Solid Waste

Section 102(a) o f SBLRBRA also added §107(p) to CERCLA which exempts certain generators of municipal solid waste (MSW) from Superfund response cost liability at NPL sites. The persons covered by this exemption are owners, operators, and lessees of residential property; small businesses; and certain non-profit organizations. This exemption is subject to all but one of the same exceptions as found in the de micromis exemption. The new law defines MSW in the following two ways: 1) as waste generated by a household; and 2) as waste generated by a commercial, industrial, or institutional entity which is essentially the same as waste generated by a household, is collected as part of normal MSW collection, and contains no greater amounts of hazardous substances than that contained in the waste of a typical single family household.

Similar to the de micromis exemption, the MSW exemption has burden of proof and fee shifting provisions to discourage litigation against exempt parties. However, the burden of proof provision in the MSW exemption is a bit more complicated because it differs based on time of disposal and applies in some cases to both private and governmental plaintiffs. Furthermore, the statute sets forth a complete bar to private party actions against owners, operators, or lessees of residential property which generated MSW. As with the de micromis exemption, the cost and fee shifting provision only applies to nongovernmental entities.

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Brownfields Grants, State and Tribal Funding

In addition to the contiguous property owner, bona fide prospective purchaser, and innocent landowner provisions, Title II for the first time provides explicit statutory authority for EPA's brownfields program. Title II also authorizes EPA to provide grants to states and tribes to develop response programs. While this article focuses on the liability provisions these aspects of the new law are certainly worth mentioning.

Generally, brownfields are considered properties which have real or perceived contamination that discourages redevelopment or reuse due to the potential liability of those persons associated with the site. Since 1995, EPA has maintained a successful brownfields program aimed at promoting the cleanup and redevelopment of brownfield properties. The brownfields program has provided numerous grants and assistance to states and communities for brownfields assessments, revolving loan funds for brownfields cleanup, and job training and development. The program has also worked to identify "Showcase Communities" that serve as national models for successful brownfields assessments, cleanups, and redevelopment.

The new law recognizes EPA's efforts and expands the existing program. The Act authorizes annual appropriations of $200 million for the brownfields grant program for fiscal years 2002 through 2006. EPA will use appropriations to provide brownfield characterization and assessment grants, to capitalize revolving loan funds, and for the first time to provide direct grants for brownfields cleanup. The Act also provides an

expanded list of persons eligible for these funds that include states, local governments, state chartered redevelopment agencies, tribes, land clearance authorities, and for certain funds nonprofits and other private entities. The Act provides ranking criteria for grant distribution and directs EPA to provide guidance for grant applicants. EPA published guidance in the Federal Register on October 24, 2002 (Volume 67, Number 207, pp. 65348-65350) available on line at http://www.epa.gov/fedreg. Fact sheets titled "Eligibility for Brownfields Funding" and "Summary of Brownfields Grant Guidelines" may be found in Appendix B.

Title II also authorizes $50 million annually from 2002 through 2006 to provide assistance for state and tribal response programs, to capitalize a revolving loan fund for brownfield remediation, or purchase insurance or create a risk sharing pool, an indemnity pool, or insurance mechanism to help fund response actions. To receive grants state and tribal programs must meet or be working towards several criteria or the state or tribe must have a memorandum of agreement for voluntary response programs with EPA. States receiving funds must also maintain and update annually a public record of sites going through a state's response program.

Limitations on the EPA CERCLA Enforcement and Cost Recovery Authority

Section 231 of SBLRBRA amends CERCLA by adding a new Section 128. Section 128(b) sets forth limitations on EPA's enforcement authority under Section 106(a) and cost recovery authority under Section 107(a). These limitations apply to actions against persons who have conducted or are conducting response actions at "eligible response sites" in compliance with a "State program that specifically governs response actions for the protection of public health and the environment." The limitations only apply to response actions commenced after February 15, 2001 and in states that maintain a public record of sites being addressed under a state program in the upcoming year and those addressed in the preceding year. Additionally, these limitations are subject to specified exceptions.

The definition of an "eligible response site" is found in new CERCLA Section 101(41). The definition includes "brownfield sites" as defined in Section 101(39)(A) and (B). The definition of a brownfield site is very broad in that it essentially captures any real property with real or perceived contamination and, generally, excludes facilities:

- subject to a planned or ongoing CERCLA removal; listed or proposed for listing on the national priorities list;
- subject to a unilateral administrative order, court order, administrativeorder on consent, or consent decree under CERCLA;
- subject of a unilateral administrative order, court order, administrative order on consent, consent decree, or permit under the Resource Conservation & Recovery Act (RCRA, 42 U.S.C. Section 6901 et seq.), the Clean Water Act (CWA, 33 U.S.C. Section 1251 et seq.), the Toxic Substances Control Act (TSCA, 15 U.S.C. Section 2601 et seq.), or the Safe Drinking Water Act (SDWA, 42 U.S.C. Section 300f et seq.);

- subject to corrective action under RCRA §§ 3004(u) or 3008(h), to which a corrective action permit or order has been issued or modified requiring the implementation of corrective measures;
- a land disposal unit with closure notification submitted and a closure plan or permit;on land subject to the custody, jurisdiction, or Ccontrol of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian Tribe;
- a portion of a facility contaminated by PCBs subject to remediation under TSCA; or
- a portion of a facility receiving assistance from the Leaking Underground Storage Tank Trust Fund (LUST Fund sites).

For purposes of the definition of an eligible response site, LUST Fund sites are included. EPA may include sites excluded under the fourth, fifth, sixth, and eighth bullets on a site-by-site basis. The definition of eligible response site contains an additional exclusion for sites at which EPA has conducted a PA or SI and after consulting with the State has determined that the site achieves a preliminary score sufficient for, or otherwise qualifies for, listing on the NPL.

The limitations on EPA's authority in Section 128(b)(1) are subject to a number of statutory exceptions. EPA is not prohibited from taking action if the state requests EPA assistance; contamination has migrated across state lines or onto federal property; after considering response actions already taken, a release or threatened release poses an imminent and substantial endangerment requiring additional response actions; or new information indicates that conditions or contamination at the site may present a threat. If EPA intends to take an action that may be prohibited under § 128(b)(1), it must notify the state and wait forty-eight hours for a reply, unless one of these exceptions applies, in which case EPA must still notify the state but may act immediately. Additionally, the new law does not prohibit EPA from seeking to recover costs incurred prior to

date of enactment or during a period during which the limitations did not apply.

EPA has decided not to issue guidance on these new limits on EPA authority. Congress provided a fairly detailed statutory structure. Also, this provision appears to embody EPA's current practice of generally not getting involved at sites being cleaned up under a state program. Some EPA regional personnel have communicated with their respective states regarding how they anticipate handling the notification requirements and state requests for assistance, if necessary.

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RCRA

Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976 to protect human health and the environment from the potential hazards of waste disposal; to conserve energy and natural resources; to reduce the amount of waste generated; and to ensure that wastes are managed in an environmentally sound manner. RCRA is actually a combination of the first federal solid waste statutes with subsequent amendments to address hazardous waste and underground storage tanks (USTs). These three distinct yet interrelated programs exist as part of RCRA. Subtitle D is the solid waste program and its focus is on the management of household garbage and non-hazardous industrial solid waste. Subtitle C is the hazardous waste program and its focus is on the management of hazardous waste from the time it is generated until its ultimate disposal. Subtitle I is the underground storage tank program and its mission is to prevent and clean up releases of petroleum or hazardous substances from tanks.

States are an integral part of all three of RCRA's programs. The states oversee most of the Subtitle D solid waste program whereby they issue permits and ensure compliance with its requirements. "Under Subtitle C, EPA reviews state programs that consist of requirements for the generation, transportation, treatment, storage, and disposal of hazardous wastes for facilities within that state. If the state program is acceptable, EPA authorizes that state to administer the state program in lieu of the federal program and facilities must then comply with the authorized state requirements rather than the corresponding federal requirements. However, after authorization, both the state and EPA have the authority to enforce those requirements."

Past and present activities at RCRA facilities have sometimes resulted in releases of hazardous wastes into the soil, ground

water, surface water, and air. Subtitle C of RCRA requires the investigation and cleanup of these hazardous waste releases at RCRA facilities. This program is known as corrective action. The facilities that fall under the corrective action program are generally active ones that are permitted or are seeking a permit to treat, store, or dispose of hazardous waste. As a condition of the operating permit, owners/operators are required to clean up hazardous wastes that are or have been released through current or past activities. It is, therefore, usually the current owner and operator of a facility that is held responsible for cleaning up any contamination. However, other parties may be held responsible under certain conditions.

RCRA Cleanup Reforms

In order to expedite the cleanup at hazardous waste sites regulated by RCRA, EPA launched a set of administrative reforms in 1999 and 2001, known as the RCRA Cleanup Reforms. EPA developed the reforms as a comprehensive way to address the key impediments to cleanups, maximize program flexibility, and spur progress toward a set of ambitious national cleanup goals. The reforms include methods to enhance public access to cleanup information and improve opportunity for public involvement in the cleanup process; focus the program more effectively on achievement of environmental results; pilot innovative approaches; and capitalize on the redevelopment potential of RCRA facilities to expedite cleanup. (*See Appendix B*)

The RCRA Corrective Action enforcement program requires owners and operators of RCRA facilities to:

- conduct investigations
- conduct a thorough cleanup of the hazardous release
- monitor the cleanup to make sure it complies with applicable state and federal requirements

Underground Storage Tanks - Lender Liability Rule

(40 CFR Parts 280 and 281)

September 7, 1995

Subtitle I of RCRA contains a "security interest exemption" that provides secured creditors ("lenders") an explicit statutory exemption from corrective action for releases from petroleum USTs. Because the statute is unclear about the scope of the exemption coverage, EPA issued the UST Lender Liability Rule which specifies the conditions under which certain secured lenders may be exempted.

Both prior to and after foreclosure of a facility, a lender is eligible for an exemption from compliance with all Subtitle I requirements as an UST "owner" and "operator" if the lender: 1) holds an ownership interest in an UST, or in a property in which the UST is located, to protect its security interest (a lender typically holds property as collateral as part of the loan transaction); 2) does not engage in petroleum production, refining, and marketing; and 3) does not participate in the management or operation of the UST. A lender also must empty its UST(s) within 60 days after foreclosure and either temporarily or permanently close the UST(s) unless there is a current operator at the site who can comply with UST regulations.

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Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities: Post-Closure Permit Requirements and Closure Process

(40 CFR Parts 264, 265, 270, and 271)

October 22, 1998

Under Subtitle C of RCRA, an owner/operator is required to obtain a permit to operate a hazardous waste treatment, storage, or disposal facility (TSDF). RCRA regulations specify the requirements that must be met when closing hazardous waste land disposal units ("units"). There are two ways to close units under RCRA. The units may either be clean closed by removal or decontamination of waste or they may be closed by leaving waste in place with post-closure care. If the facility operates under a permit, the permit should already contain a closure plan and include any post-closure requirements. If the facility does not have a permit, then a post-closure permit is needed only if waste will be left in place.

This rule, known as the Closure/Post-Closure Rule, amends RCRA's closure and post-closure care requirements by expanding regulatory options available to EPA and authorized state programs. These options remove impediments to cleanup at hazardous waste facilities in two areas. First, regulators may either issue a post-closure permit to a facility or impose the

same requirements in an enforceable document issued under an alternate non-permit authority. Second, EPA and authorized states may use corrective action requirements to address these units. The corrective action program, as discussed in the rule, allows EPA and authorized states to clean up under RCRA, CERCLA, or state authority authorized for this rule.

Hazardous Waste Identification Rule for Contaminated Media (HWIR-Media) Rule

(40 CFR Part 260 et seq)

November 30, 1998

EPA issued new RCRA requirements for hazardous remediation waste that is treated, stored, or disposed of during cleanup actions. This rule, known as the HWIR-Media rule, streamlines the RCRA permit requirements for cleanup activities through the use of remedial action plans (RAPs). It also eliminates the requirement for facility-wide corrective action at sites that are only required to obtain a permit because of the cleanup activities and discusses the use of a "staging pile" for temporary cleanup waste storage.

HWIR Media Rule:

- Makes permits for treating, storing, and disposing of hazardous remediation wastes faster and easier to obtain;
- Provides that obtaining these permits will not subject the owner and/or operator to facility-wide corrective action;
- Creates a new kind of unit called a "staging pile" that allows more flexibility to temporarily store remedia-tion waste during cleanup;
- Excludes dredging materials from RCRA Subtitle C (hazardous waste management requirements) if they are managed under an appropriate permit under the Marine Protection, Re-search and Protection Act or the Clean Water Act; and,
- Makes it faster and easier for states to receive author-ization when they update their RCRA programs to incorporate Federal RCRA regulation revisions.

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Corrective Action Management Unit (CAMU) CFR Amendments

Use of CAMUs was authorized in 1993 for the purpose of on-site treatment, storage, and disposal of hazardous wastes managed for implementing cleanup. When cleanup wastes are managed within a CAMU, they do not trigger certain Resource Conservation and Recovery Act requirements that apply to wastes generated by industrial processes. This gives the site cleanup manager much more flexibility to consider a broader range of cleanup options tailored to site- and waste-specific conditions, and has led to faster and more aggressive cleanups at individual sites.

The CAMU amendments are intended to provide minimum standards for operation of CAMUs. They address concerns of some stakeholders that management discretion under the original rule might lead to mistakes or abuse. EPA believes the amendments protect human health and the environment without undoing the benefits of the CAMU rule, and make the corrective action process is more consistent nationally, more explicit, and more predictable in its results.

The final CAMU amendments for the management of remediation wastes were signed by the Administrator on December 21, 2001. They establish standards governing: (1) the types of wastes that may be managed in a CAMU; (2) the design standards that apply to CAMUs; (3) the treatment requirements for wastes placed in CAMUs; (4) information submission requirements for CAMU applications; (5) responses to releases from CAMUs; and (6) public participation requirements for CAMU decisions.

In addition, this rule "grandfathers" certain categories of CAMUs and creates new requirements for CAMUs used only for treatment or storage. States currently authorized for the CAMU rule are granted "interim authorization by rule." Expedited authorization is provided for states authorized for corrective action, but not the CAMU rule.

In response to comments, the Agency modified staging pile rules to allow physical treatment in staging piles, expanding the universe of CAMU-eligible wastes to include buried tanks containing wastes, and giving Regional Administrators discretion to choose a leaching test other than the Toxicity Characteristic Leaching Procedure (TCLP) to assess treatment. It also adds a new provision allowing off-site placement of hazardous CAMU-eligible waste in hazardous waste landfills, if they are treated to meet modified CAMU treatment standards. States that are already authorized for the 1993 CAMU Rule have 60 days to notify EPA that they intend to use the revised Corrective Action Management Unit Standards rule as guidance.