

# Comprehensive Environmental Response, Compensation, and Liability Act

ELI Western Bootcamp  
May 2024

**J. Tom Boer**

Partner, Hogan Lovells

[Tom.Boer@hoganlovells.com](mailto:Tom.Boer@hoganlovells.com)

**Loren Dunn**

Principal, Beveridge & Diamond PC

[LDunn@bdlaw.com](mailto:LDunn@bdlaw.com)



# Origins: The Valley of the Drums



# Love Canal



## Our Task Today

---

"[W]ading through CERCLA's morass of statutory provisions can often seem as daunting as cleaning up one of the sites the statute is designed to cover."

*Cadlerock Props. Joint Venture v. Schilberg*, No. 3:01CV896 (MRK), 2005 WL 1683494, at \*5 (D. Conn. July 19, 2005)

# Comprehensive Environmental Response, Compensation, and Liability Act a/k/a “Superfund” Program

- EPA to identify “worst” sites
- Create “Superfund” to finance cleanups and EPA program
  - Nov. 2021 Infrastructure Investment and Jobs Act reinstated two long-expired Superfund excise taxes on certain manufactured and imported chemicals (effective July 1, 2022 through December 2031)
- The “petroleum exclusion” deal
- Strict liability for responsible parties
  - Also, joint and several
- Provide for cost recovery
- Cleanup to “protect human health and the environment”
- Suspend judicial review until after cleanup is completed

# The Program Today

as of March 07, 2024

Status	Non-Federal (General)	Federal	Total
<a href="#">Proposed NPL Sites</a>	37	2	39
<a href="#">NPL Sites</a>	1183	157	1340
<a href="#">Deleted NPL Sites</a>	439	18	457
Milestone	Non-Federal (General)	Federal	Total
<a href="#">Partial Deletions at NPL Sites</a>	117	35	152*
<a href="#">Construction Completions at NPL Sites</a>	1161	81	1242**

*	These 152 partial deletions have occurred at 114 sites.
**	Starting in FY14, the universe of potential site-wide CCL sites includes final and deleted NPL sites as well as sites with Superfund Alternative Approach (SAA) agreements. Since FY14, CCL has been achieved at nine sites with SAA agreements. Prior to FY14, CCL was achieved at nine sites with SAA agreements. For more information about SAA sites, see: <a href="http://www.epa.gov/enforcement/superfund-alternative-approach">http://www.epa.gov/enforcement/superfund-alternative-approach</a> .

- Over 1300 sites on EPA’s National Priorities List
- Cleanups “completed” at just over 450 NPL Sites
- Adjustments are slow, e.g., several years ago there were 421 Deleted NPL Sites.
- State-level cleanup programs are allowed, and very active
- State programs very similar to CERCLA
- Recent switch in focus from closing sites to identifying new sites and cleanup priorities

# State Program Differences

---

- Some eliminate petroleum exclusion
- Some add other categories of responsible parties
  - e.g., pesticide manufacturers
- Some have more standardized remedial targets or default remedies
- Generally focused on smaller sites
  - e.g., Underground storage tank programs
  - may include grant funding for certain cleanups
- Some allow recovery of attorneys' fees for prevailing parties
- Most programs are stimulated by bank / transactions review
- Many have developed independent cleanup / pay to play programs



# Today's Sites

## Mayor Wheeler swims across Willamette River for second Annual Mayoral Swim

PORTLAND, OR (KPTV) -Dozens of people, including Mayor Ted Wheeler, put on their swimsuits and jumped into the Willamette River Thursday evening.

It was all part of the second Annual Mayoral Swim promoting public access to the Willamette River and was sponsored by the Human Access Project.

"This is a continuation of the river renaissance, Vera Katz had a vision for the Eastbank Esplanade, we are taking it to the next level," said Mayor Wheeler.

Mayor Wheeler led the swim at the fire station dock near the Hawthorne Bridge. There were synchronized swimmers, as well as people in kayaks all there for the swim.

Everyone taking part swam across the Willamette River to the west side where an after party was being held.





# CERCLA in the Context of Other Statutes

**RCRA** – cradle to grave waste management; corrective action program for closure of facilities

**Clean Water Act** – control discharges to waters of the United States; includes permitting regime; recent hydrologic connection developments in Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2000) – requiring a CWA permit when addition of pollutants into navigable waters is the functional equivalent of direct discharges from a point source – could blur line between CWA and CERCLA in some instances. *But see Guam* SCOTUS decision.

**Clean Air Act** – control air discharges under permit

**“Permit shield”**

## CERCLA

- clean up old / existing releases
- may also address new spills / unpermitted releases
- is a remedial statute, not a penalty enforcement regime

# Key Differences From Other Federal Environmental Statutes

---

- CERCLA is focused on cleanup of past releases
- Not a permitting program for ongoing sources
- Applies retroactive liability for cleanup costs
- No citizen enforcement against responsible parties
- Suspension of administrative appeals

# CERCLA Liability Structure

---

Liability for costs of:

- cleaning up contaminated sites
- restoring damaged natural resources

Liability is strict – not fault based

Joint and several liability

Limited set of liable parties:

- Current Owner of contaminated site
- Current Operator
- Former Owner/Operator
- Arranger for purposes of disposal
- Transporter

Not liable:

- petroleum releases
- product manufacturers

# EPA Enforcement Powers

---

- Conduct “removal action”
- Issue enforcement orders
  - unilateral order
    - “friendly”?
  - agreed order
- Consent Decree settlements
  - DOJ approval
- State programs similarly structured



# Relationship to Common Law

---

CERCLA does not provide private right to recover injuries due to hazardous substances

Common law remedies are preserved

Tort law has frequently been used to address shortfalls in CERCLA cleanup remedies

- Trespass
- Nuisance
- Ultra hazardous activities

Cannot make “collateral attack” on remedy, however

# CERCLA in the Supreme Court

Lots of cases – big \$\$ at issue

Supreme Court attention / interpretation:

- *Best Foods*, 524 U.S. 51 (1998): the liability of a parent corporation under CERCLA determined by its control over a subsidiary's facility – piercing the corporate veil \ particular focus on directing waste decisions
- *Keytronic*, 511 U.S. 809 (1994): held that private parties cannot generally recover attorneys' fees in CERCLA actions (subsequent decisions have held that EPA can recover attorneys' fees)
- *Burlington Northern*, 556 U.S. 599 (2009): must take intentional steps to dispose of a hazardous substance" to qualify as an "arranger" under § 107
- *Cooper v. Aviall*, 543 U.S. 157 (2004): a private party, who has not been sued under CERCLA, could not obtain cleanup contribution from other liable parties under § 113. The Court reasoned that CERCLA made clear that parties could seek contribution only during or following a civil action, not independently
- *Atlantic Research*, 551 U.S. 128 (2007): Unanimous ruling that § 107(a) of CERCLA allows PRPs to sue other PRPs for cost recovery. The Court explained that this would not result in improper overlap between § 113(f) and § 107(a). A party can sue another PRP for contribution under § 113(f), but the party can only sue under § 107(a) for reimbursement of its own clean-up costs.
- *Atlantic Richfield v. Christian*, 140 S.Ct. 1335 (2020): CERCLA does not preempt all similar state law claims like nuisance and trespass. Landowners may pursue state law claims for restoration damages at NPL Superfund sites, but EPA must approve any remedial work beyond originally selected remedy
- *Guam v. United States*, 141 S.Ct. 1608 (2021): Settlement of Clean Water Act claim, including a requirement to close and cover a landfill, does not give rise to a contribution action under § 113(f) (and likewise, a CWA settlement does not start the SOL for a CERCLA contribution claim)

# CERCLA Regulations

---

## The “ National Contingency Plan”

- 40 CFR 300
- Detailed regulations
- Example (40 CFR 300.160(a)(1)):
  - “During all phases of response, the lead agency shall complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery. In general, documentation shall be sufficient to provide the source and circumstances of the release, the identity of responsible parties, the response action taken, accurate accounting of federal, state, or private party costs incurred for response actions, and impacts and potential impacts to the public health and welfare and the environment. Where applicable, documentation shall state when the NRC received notification of a release of a reportable quantity”

## Comprehensive guidance documents

- Many such documents — both formal and informal
- Voluminous
- Often allows EPA to have it both ways

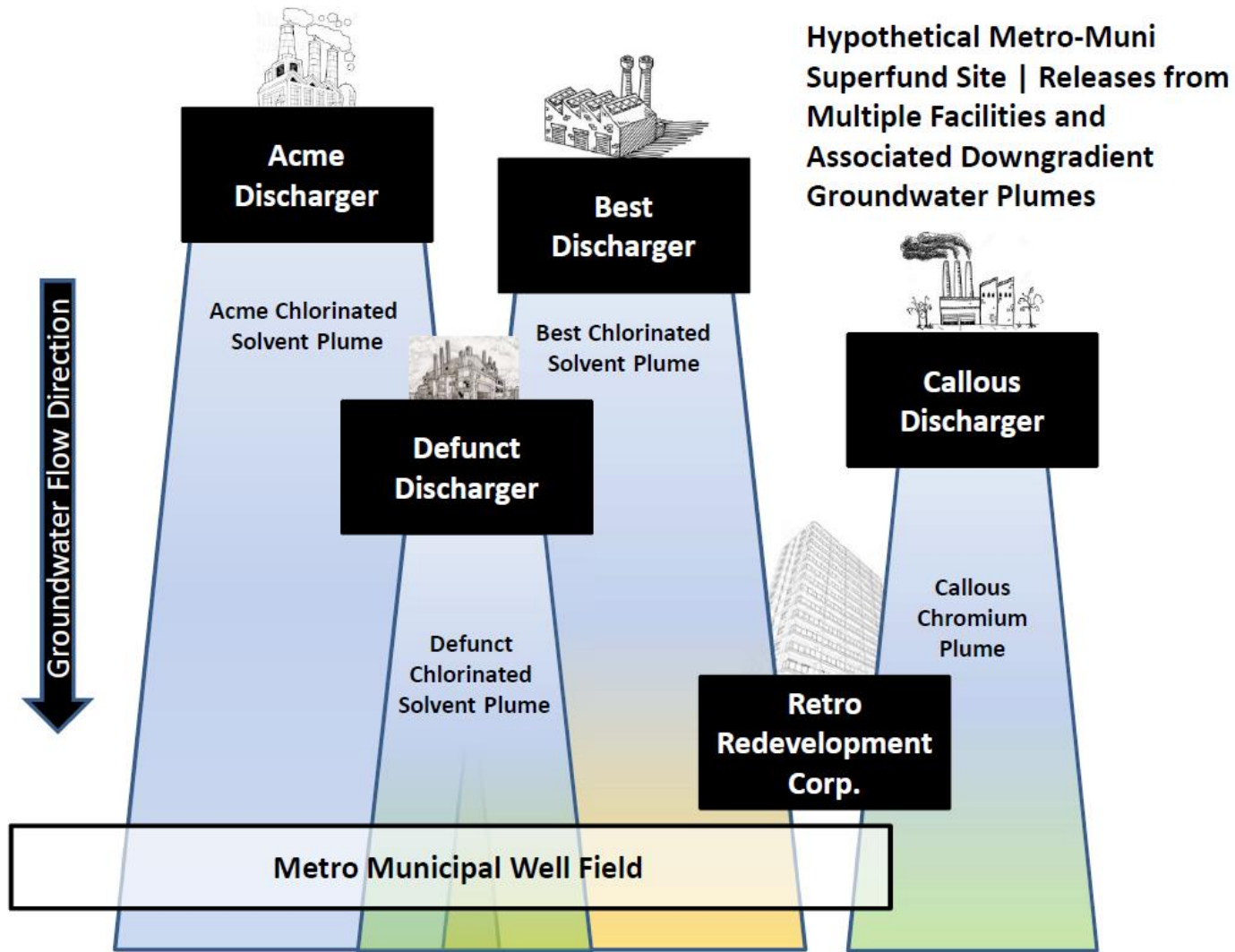
# CERCLA: The Process

---

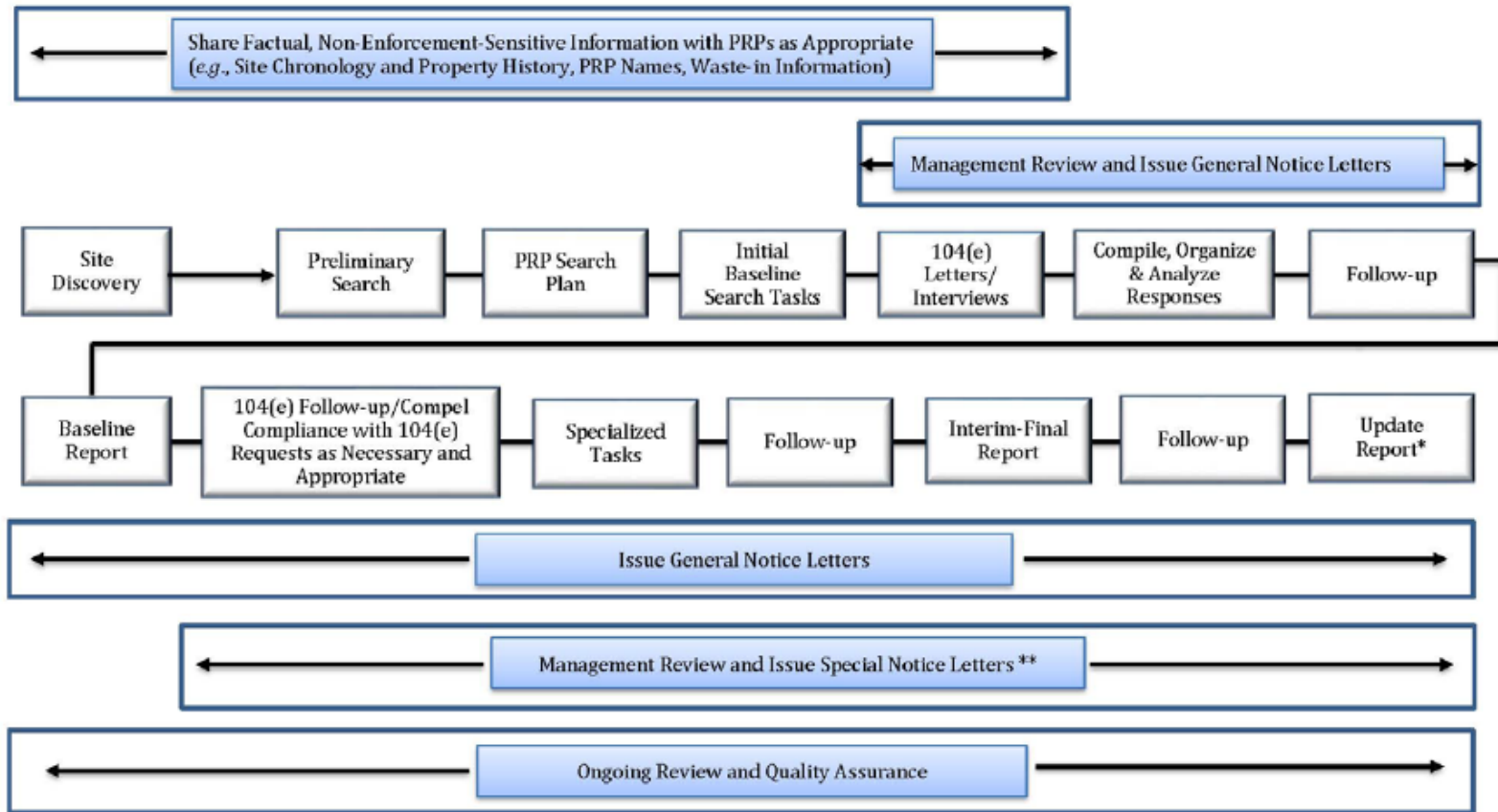
- Site Identified
- Preliminary Investigation
- Search for Responsible Parties
- Remedial Investigation
- Feasibility Study
- Proposed Plan / Public Review
- Record of Decision
- Remedial Design
- Remedy
- Monitoring and Maintenance



# Case Study: Metro Groundwater Contamination Site



# EPA Potentially Responsible Party Search: Process and Timeline



\* Completed at least 90 days prior to issuance of RD/RA Special Notice Letters.

\*\* Timing of special notice is generally dictated by response planning. The baseline phase of the PRP search should be essentially complete for the purpose of RI/FS Special Notice at least 90 days before the planned RI/FS start date. Improved evidence on liability and ability to pay will be collected during the RI/FS and follow-up phase, if necessary. Collection of such improved evidence will be completed, reviewed, and updated, if necessary, prior to issuance of RD/RA Special Notice Letters.

**NOTE:** This exhibit presents an overview of a typical PRP search. It is not intended as a prescribed process for every search. The appropriate process for a particular search is a matter for the professional judgment of the PRP search team.

# EPA Information Gathering and Access Authority

Access to Information (CERCLA § 104(e)(1))	Entry (CERCLA § 104(e)(3))	Inspection & Samples (CERCLA § 104(e)(4))
<p>May require information or documents relating to:</p> <ul style="list-style-type: none"> <li>• identification, nature, and quantity of materials</li> <li>• nature or extent of a release or threatened release</li> <li>• ability of a person to pay for or perform a cleanup</li> </ul> <ul style="list-style-type: none"> <li>• Requires “reasonable notice”</li> <li>• EPA typically uses a template for the request</li> </ul>	<p>May enter vessel, facility, establishment, or other place where:</p> <ul style="list-style-type: none"> <li>• hazardous substances generated, stored, treated, disposed of, or transported</li> <li>• there has been (or may be) a release or threat of release</li> <li>• entry is needed to determine or effectuate a response</li> </ul> <ul style="list-style-type: none"> <li>• Limited to “reasonable times”</li> </ul>	<ul style="list-style-type: none"> <li>• May inspect and obtain samples from any location subject to § 104(e)(3) or any location of any suspected hazardous substances</li> <li>• Requires “reasonable promptness” in inspection or sampling</li> <li>• Must provide a receipt describing samples obtained (and split-samples, if applicable)</li> <li>• Must promptly provide results of any analysis of such samples</li> </ul>

# EPA Information Gathering and Access Authority: Practice Pointers

- **Ask for an Extension.** As a matter of course EPA will ask for a response in 30 days. Not unusual for EPA to provide 30 to 90 day extension. EPA must provide “reasonable notice” of the request.
- **Protect Confidential Business Information.** EPA will release 104(e) responses to the public and other PRPs.
- **Object to Narrow Scope of Response.** EPA is often overly broad in its request. Narrow a party’s response via clearly stated written objections.
- **Opportunity to Influence the Narrative.** A 104(e) response should not be viewed as a document dump; this is often a PRP’s first opportunity to advocate for its narrative—do not miss the opportunity.
- **Be Truthful.** Lying to the government can result in criminal enforcement under 18 U.S.C. § 1001 or for obstruction of justice.

- **Limits to EPA’s Authority.** EPA’s inspection and sampling authority requires a “reasonable basis to believe there may be a release or threat of release.
- **Leveraging EPA’s Authority.** PRPs may ask EPA to exercise its authority to encourage non-PRP property owners to allow sampling or access to “effectuate a response.”

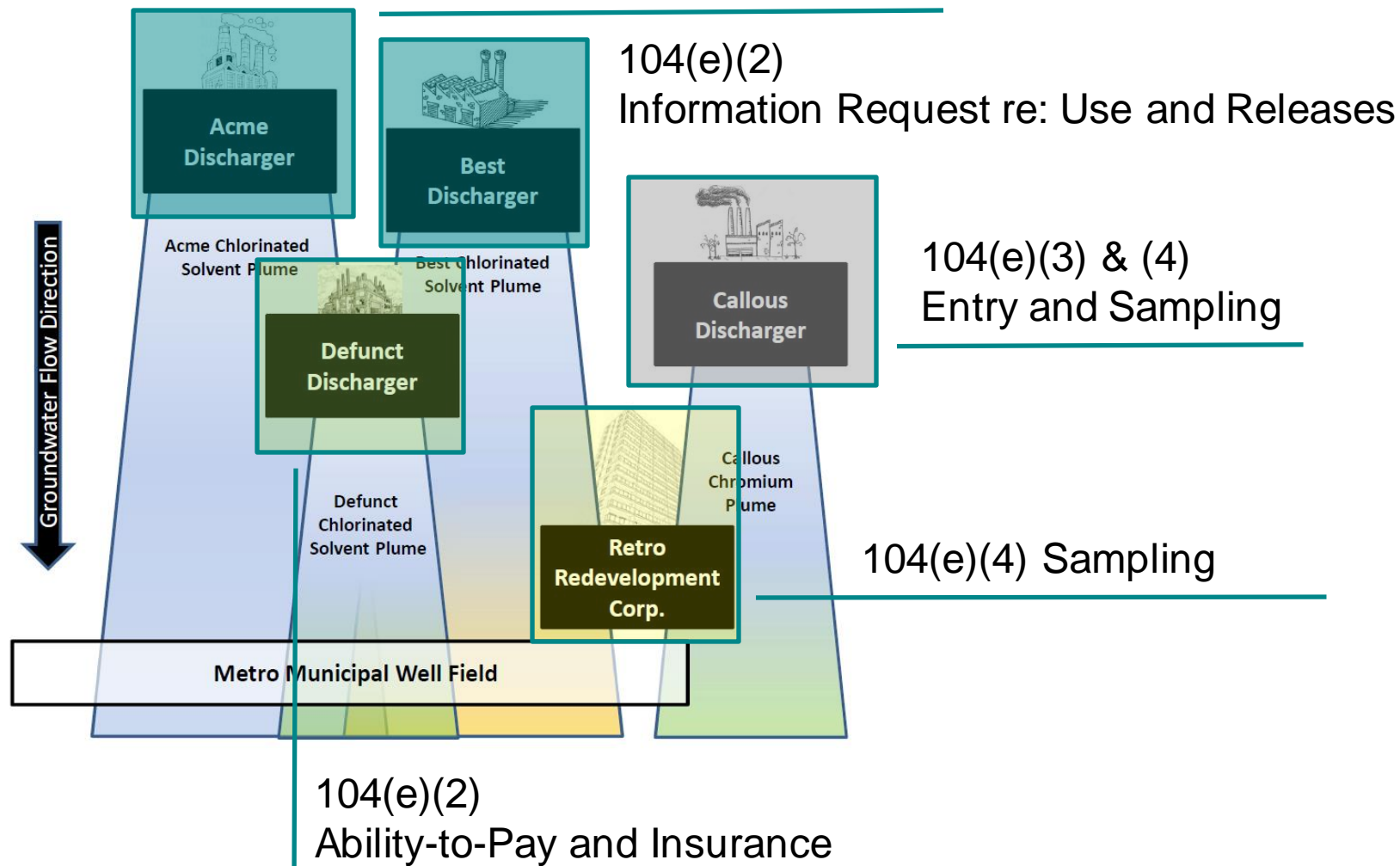
- **Risk of Failure to Cooperate.** EPA may issue an administrative order for compliance or refer to DOJ for a civil action (injunctive relief & civil penalties).

INFORMATION  
REQUESTS

ACCESS &  
SAMPLING



# EPA Information Gathering and Access Authority: Illustrative Examples



# EPA Site Listing and Cleanup Actions

---

Is listing required for a cleanup?

- EPA removal actions
- Private party cleanups
  - Consistency with National Contingency Plan

Is it good for a site to be listed?

- Federal resources
- Carries stigma
- Bigger / longer process than under state supervision
- EPA has better enforcement capabilities
- EPA's system is less flexible
- More stringent standards (most of the time)
- More expensive cleanup


# EPA Notice Letters

## General Notice Letters inform recipients they are:

- identified as PRPs at a Superfund site, and
- potentially liable for cleanup costs at the site
- Also explains the process for negotiating the cleanup
- Includes information on Superfund and the site
- May include a request for additional information (pursuant to § 104(e))

## Special Notice Letters sent when EPA is ready to negotiate with PRPs:

- Provides PRPs information on why EPA thinks they are liable and EPA's plans for the cleanup of the site
- Invites PRPs to participate in negotiations with EPA to conduct future cleanup work and pay past costs
- Triggers the start of a "negotiation moratorium," during which EPA will not unilaterally order the PRP to conduct the cleanup

 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
21 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8900  
August 19, 2008

Site: LWD, Inc.  
Break: 117  
Other: V.27

4SD-SEIMB

**GENERAL NOTICE LETTER**  
**URGENT LEGAL MATTER**  
**PROMPT REPLY NECESSARY**  
**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Pittsburgh Air Force Base (AFB)  
56 Mary L. Walker, General Counsel  
HQ, Department of the Air Force  
Office of General Counsel  
1740 Air Force Pentagon  
Room 4E856  
Washington, D.C. 20330-1740

Re: General Notice Letter for the LWD, Inc. Site in Calvert City, Kentucky

Dear Ms. Walker:

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the federal "Superfund" law, the U.S. Environmental Protection Agency (EPA) is responsible for responding to the release or threat of release of hazardous substances, pollutants or contaminants into the environment – that is, for stopping further contamination from occurring and for cleaning up or otherwise addressing any contamination that has already occurred. EPA has documented that such a release has occurred at the LWD, Inc., Superfund Site (the Site) located in Calvert City, Kentucky. EPA has spent public funds to investigate and control releases of hazardous substances or potential releases of hazardous substances at the Site. Based on information presently available to EPA, EPA has determined that you may be responsible under CERCLA for costs EPA has incurred in cleaning up the Site. Accordingly, your company is one of over 400 companies, and government agencies or departments receiving this notice letter, the purpose of which is to recover EPA's costs spent at the Site. For your information, Enclosure 1 is a list of parties receiving this Notice Letter.

**EXPLANATION OF POTENTIAL LIABILITY**

Under CERCLA, specifically Section 107(a), potentially responsible parties (PRPs) are responsible for costs incurred by EPA in cleaning up the Site, absent other statutory defenses. PRPs include current and former owners and operators of a Site, as well as persons who arranged for treatment and/or disposal of any hazardous substances found at the site, and persons who accepted hazardous substances for transport and selected the site to which the hazardous substances were delivered.

Internet Address (URL) • <http://www.epa.gov>  
Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 30% Postconsumer)

10088939

## PRACTICE TIP

Notify Insurers Upon Receipt of a General Notice Letter

# Remedial Investigation

---

Goal: characterize releases and site conditions

- History of site operations
- Breadth and depth of contamination
- Type of contaminants
- Pathways for contaminant migration
- Often performed in multiple rounds of sampling
- Risk assessments:
  - Human health
  - Ecological



# Remedial Investigation [RI]

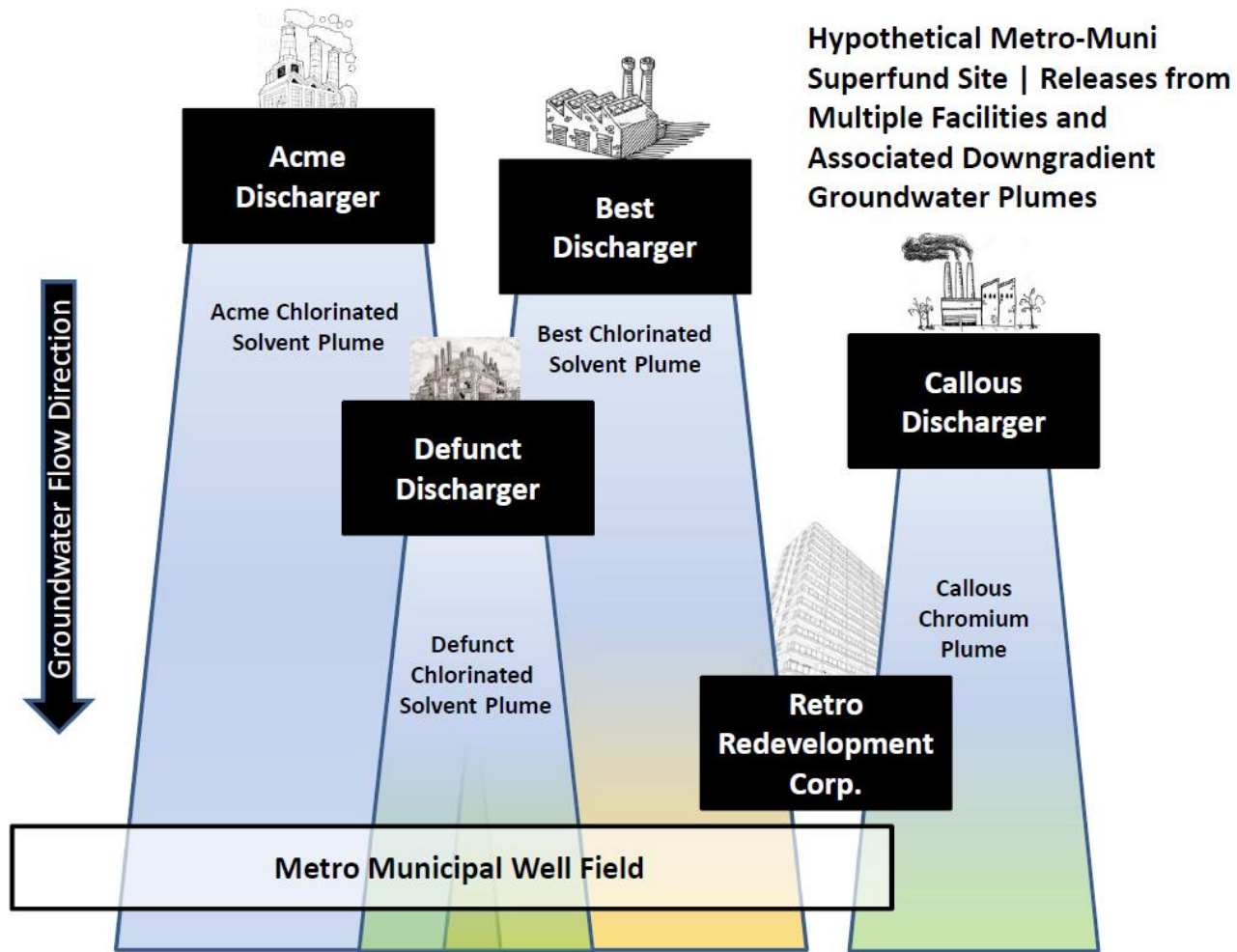
---

Selecting what studies to perform:

- Often a competitive endeavor
- Differences over:
  - What locations to investigate
  - What contaminants to analyze
  - What sensitivity to use in testing
  - What populations to consider
- Both sides sometimes avoid types of investigations
- Interpretation of studies often controversial

Frankly, a quasi-political process

# What Would You Do To Investigate Here?



# Feasibility Study [FS]

---

Identifies possible remedial technologies

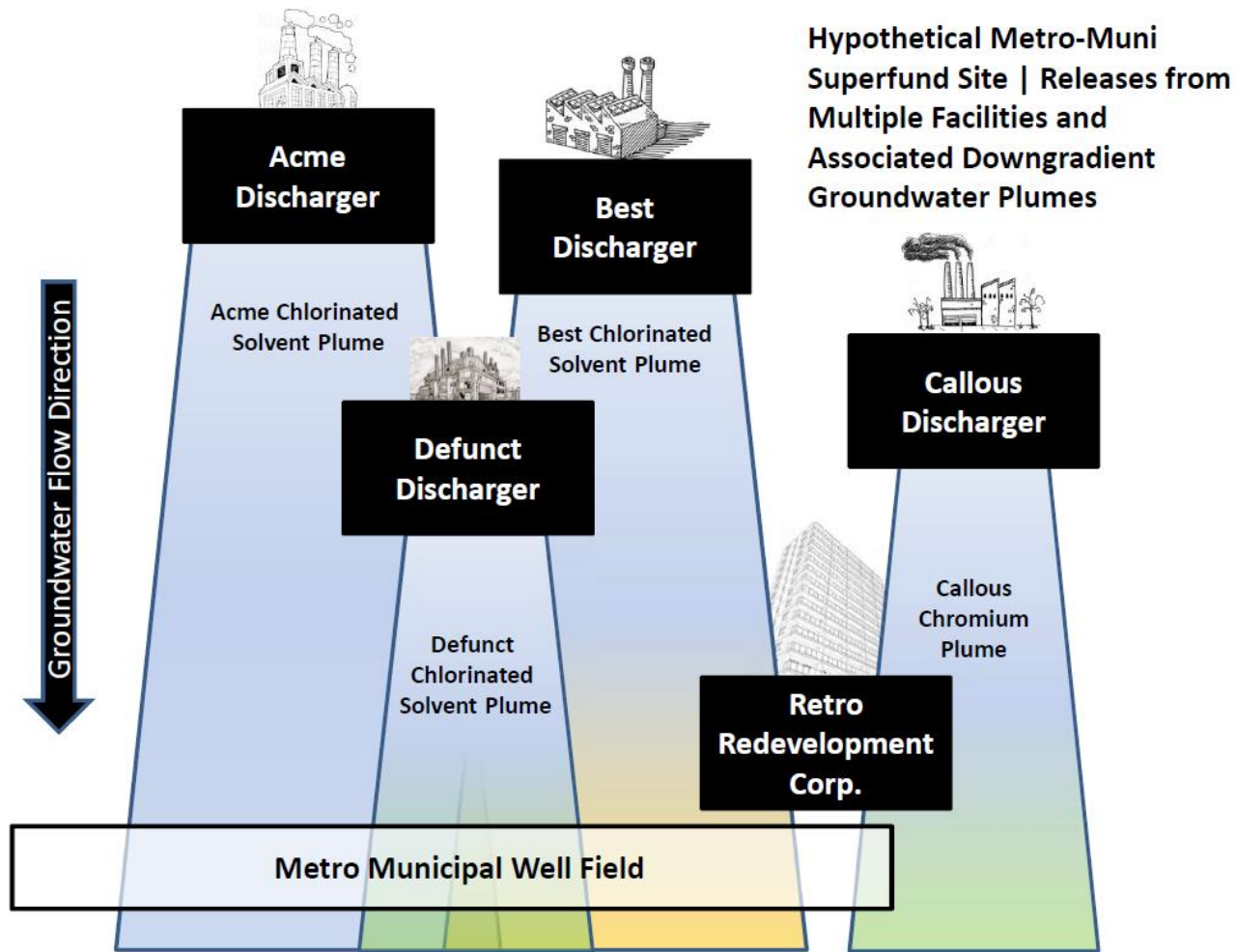
Develops possible combinations of remedial actions

Tests the possible combinations against effectiveness and remedial action goals

Considers key attributes of remedies:

- Protectiveness
- Permanence
- Preference for treatment
- Cost

# What Remedies Should Be Considered?



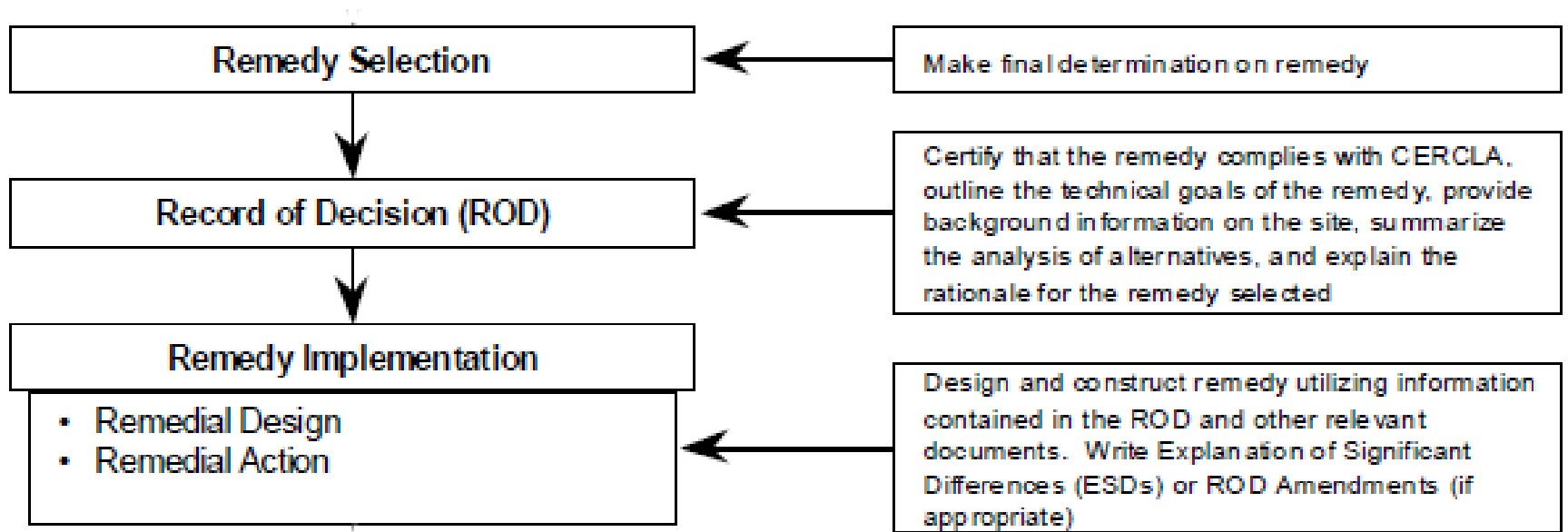
## Who performs?

- EPA
- Responsible parties

## Who pays?

- Remedy Selection – EPA and the public
- Which public?

# Record of Decision – the “ROD”



- Although PRPs may draft the RI/FS, the ROD is almost always drafted by the lead agency (i.e., EPA).
- Typically, ROD must be signed by the Regional Administrator or EPA HQ.
- ROD must be noticed in newspaper of general circulation and made available to the public.



# Applicable or Relevant and Appropriate Requirements (ARARs)

**Applicable Requirements.** Cleanup standards, standards of control, and other substantive environmental protection requirements, criteria, or limitations under Federal or State law that specifically address a hazardous substance, remedial action, or other circumstances at a CERCLA site.

**Example:** Maximum contaminant levels under the Safe Drinking Water Act for setting groundwater cleanup standards. However, if a state has a more restrictive groundwater cleanup level, it will control.

**Relevant and Appropriate Requirements.** Cleanup standards, standards of control, and other substantive environmental protection requirements, criteria, or limitations under Federal or State law that, while not “applicable” nonetheless address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.

**Example:** RCRA Subtitle C closure requirements may be determined relevant and appropriate, even if the Superfund Site does not otherwise meet the RCRA criteria.

# ARARs: Continued

## PRACTICE NOTES

**ARARs can be waived by EPA.** CERCLA § 121(d) allows EPA to waive otherwise applicable ARARs. Bases for waiving an ARAR may include: interim measures, greater risk to health or the environment, technical impracticability, equivalent standards of performance, inconsistent application of state requirements, EPA Superfund balancing (threat to other sites).

**Permits not required.** CERCLA § 121(e) exempts any response actions at NPL Sites, conducted entirely on-site, from having to obtain a Federal, State, or local permit.

**Consider the National Remedy Review Board (NRRB).** The NRRB is a peer review group that reviews proposed Superfund cleanup decisions to ensure they are consistent with Superfund law, regulations and guidance. Review criteria typically consists of: (i) remedial actions costing more than \$25 million; (ii) non-time critical removal actions (non-federal facility) costing more than \$25 million; or (iii) following release of a Proposed Plan, a different or modified alternative selected for the ROD increases costs at least 20% above the Proposed Plan (and those costs are above \$25 million).

# Changes to the Remedy

Post Decision Document File	Explanation of Significant Differences (ESD)	ROD Amendment
<p>Appropriate for “non-significant” or minor changes.</p> <p><b>Example:</b> Testing during remediation shows that the volume of soil requiring treatment has increased from 60,000 cubic yards to 75,000 cubic yards.</p>	<p>Appropriate for documenting “significant” changes made to the remedy</p> <p>Procedures specified in NCP § 300.435(c)(2)(i)</p> <p>EPA must publish a notice of availability and brief description of the ESD in a local newspaper and place the ESD in the Administrative Record.</p> <p><b>Example:</b> Testing during remediation determines that residual wastes must be sent to a hazardous waste facility rather than be disposed on-site.</p>	<p>Appropriate for documenting a fundamental change to the selected remedy, often in response to new information identified post-ROD.</p> <p>Requires public documentation and <u>participation</u> for adoption.</p> <p><b>Example:</b> A change in the remedy, e.g., a move from in-situ soil treatment to excavation and thermal treatment.</p>

# EPA 106 Orders

---

- Require performance by responsible parties
- If responsible parties refuse to perform, EPA may perform and recover later
- Risk of “treble damages” for non-performance
  - Must have “good reasons”
- Generally EPA orders are NOT reviewable immediately
- But, if EPA initiates litigation, then PRP may challenge

# Administrative Orders on Consent

---

- Agreement between EPA and PRP to perform element of process
- EPA uses rigid form
- Prescribes work and time horizons through appended Scope of Work
- Contains provisions for stipulated penalties
- Generally illusory “appeals” rights
- Advantages?

# Cost Recovery: Litigation

---

Responsible parties jointly and severally liable – to EPA, not other PRPs

Party who has expended resources on cleanup may seek contribution:

- From other responsible parties
- For their “fair share”

Expenses must be “not inconsistent with national contingency plan”

- low bar to clear
- limits ability to defend against cost recovery actions



# Cost Allocation Factors

---

Contribution recovery is based on equitable factors

The “Gore factors”:

- Discharge of hazardous substances
- Amount
- Degree of toxicity
- Involvement in generation and disposal / discharge
- Degree of care exercised
- Degree of cooperation with officials to limit harm

Other equitable considerations available to courts

Judges can do “whatever they want”!?

The problem of “orphan shares”

# Settlements With Other PRPs

---

- Performing party vs. “cash out”
  - Cash out premium
- Covering orphan shares
- Indemnities
- Insurance availability

# PRP Led Allocations

---

EPA non-binding allocation of responsibility

- 40 USC § 9622(e)(3)
- Never done!

Non-judicial allocations can be very effective

Typically similar to civil litigation procedures

- Expert allocator
- Based on facts and circumstances
- Voluntary disclosure process
- No depositions or “trial”

Can be expensive and lengthy / time consuming

Need a defined remedy for allocation to be effective

Risk of “black box” mediation

# Forming PRP Allocation Groups

---

- Private allocation process agreements are well developed
- Negotiating them can be very exhaustive process
- Selection of allocation team very important
- EPA provides support for processes
  - EPA recognizes that private allocation eases its job

# Settling a Case with EPA: How and Who

## Mechanisms for Settling with EPA

**Administrative Agreement.** A formal agreement to reimburse EPA for past costs or future costs.

**Administrative Order on Consent.** A formal agreement to address some or all of a parties' responsibility. Often used for removal activity, investigation, and RI/FS work.

**Consent Decree.** Legal agreement entered by a federal court. Only settlement type that EPA uses for the final cleanup phase settlements (otherwise: EPA likely to issue UAO).

## Types of Parties and Settlements Relevant in Evaluating Settlement Options

**De Minimis (§ 122(g)).** Typically generators that contributed  $\leq 1\%$  of waste, although can apply where amount and toxicity are comparatively minimal. Can apply to property owner under narrow circumstances.

**De Micromis (§ 107(o)).** Amount of material containing hazardous substance is less than 110 gallons of liquid or 200 pounds of solid that is disposed, treated, or transported before April 1, 2001 and where materials contributed significantly (individually or in aggregate) to the cost of response or NRD.

**Cash-Out.** Settlement to resolve past and future costs to resolve all liability at a Site to EPA and provide PRP with contribution protection. *Be prepared:* cash-out premiums.

**Municipal Solid Waste Settlements.** Special procedures, offering a standard per-ton settlement figure, for MSW generators/transporters at solid waste landfill sites.

**Various Classes of Parties.** Owner/Operator, Generator, Arranger groups at larger sites.

# Settling with EPA: Practice Pointers

**Timing.** Relevant issues: is this a cash-out or a work agreement? Cash-out parties prefer earlier resolution but EPA is unlikely to settle prior to ROD (or will charge excessive premium).

**Work Performance.** EPA prefers that PRPs do the work. Who is going to do it? If no one is stepping up, there is a risk of a UAO.

**PRP Lead Work.** EPA lead remedial actions are almost universally more expensive than PRP-lead. Consider, e.g., indirect costs.

**Contribution Protection.** What is the breadth of contribution protection?

**Scope of Release.** How broad are the government releases? What about NRD? State?

**Scope of Reopeners.** When is EPA allowed to re-open: Misrepresentation? New information? Cost overruns?

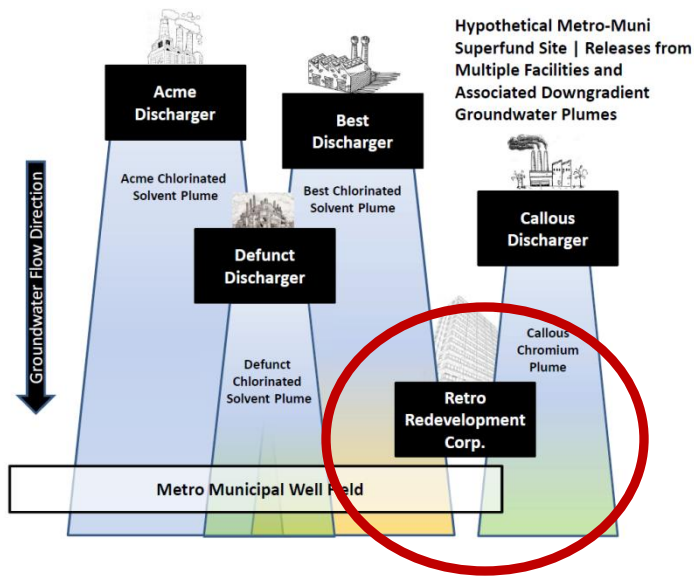
**Limitation of Contribution from Third-Parties.** Many *de minimis* and small-party settlements may prohibit actions for contribution. Also consider SOL issues for partial settlements.

**Cash-Out Premium.** Under EPA guidance, premiums for cash-out are generally 50% - 100% of estimated allocation. Amount will depend upon scope of contribution protection and reopeners.

**Orphan Shares.** How are these allocated by EPA; can be issue for small parties at large sites.



# Brownfields: Bona Fide Prospective Purchasers & Others



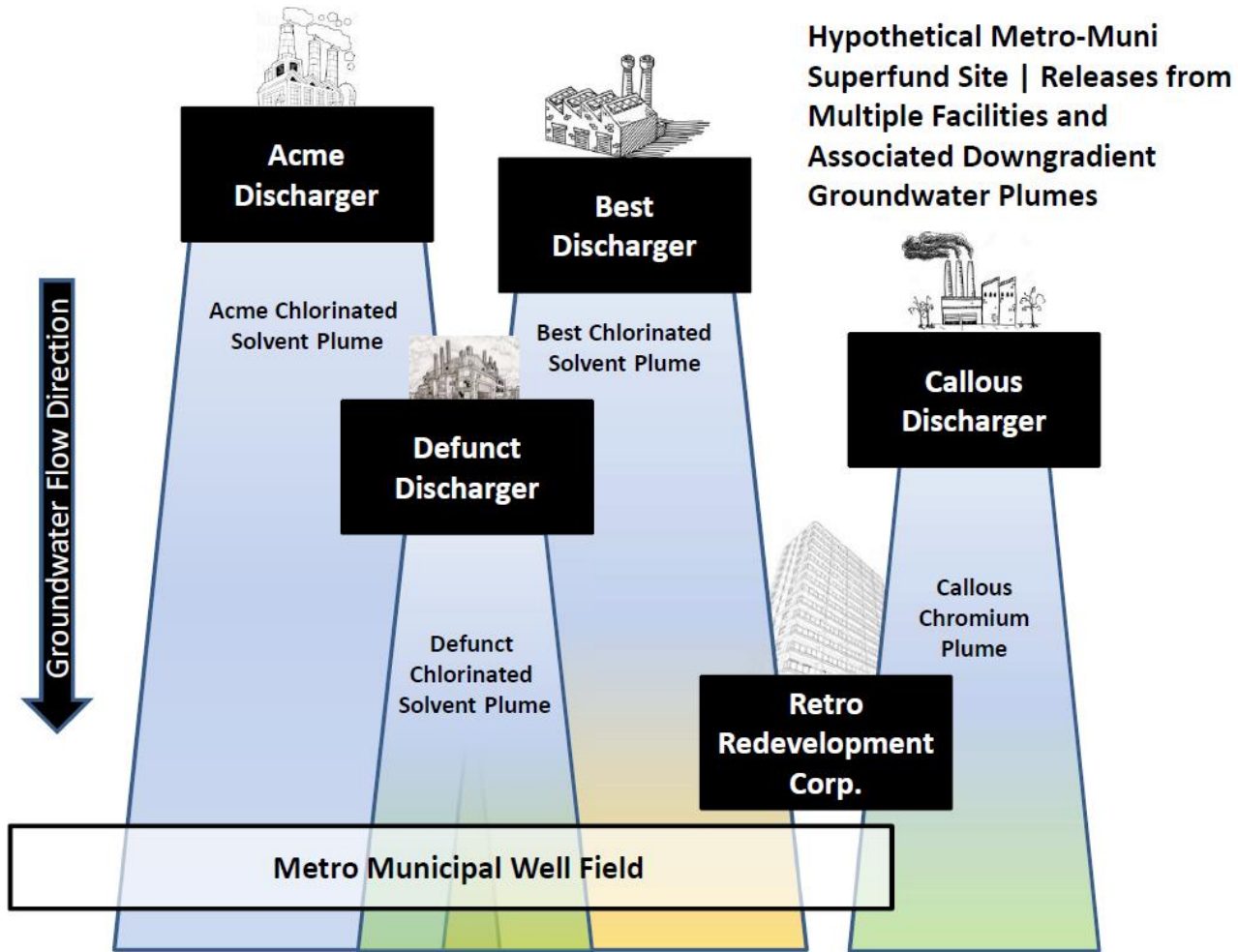
<i>Common Element among the Brownfields Amendments Landowner Provisions</i>	Bona Fide Prospective Purchaser	Contiguous Property Owner	Section 101 (35)(A)(i) Innocent Landowner
All Appropriate Inquiry	• •	• •	• •
No affiliation demonstration	• •	• •	• •
Compliance with land use restrictions and institutional controls	• •	• •	• •
Taking reasonable steps	• •	• •	• •
Cooperation, assistance, access	• •	• •	• •
Compliance with information requests and administrative subpoenas	• •	• •	• • •
Providing legally required notices	• •	• •	• • • • •

**Source:** *Interim Guidance Re: Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003)*

## CERCLA provides certain protection to:

- Bona fide prospective purchasers (§§ 107(r), 101(40))
- Contiguous property owners (§ 107(q))
- Innocent landowners: innocent purchasers, government acquisition by escheat, or inheritance (§§ 107(b)(3), 101(35))

# How to Allocate Our Example?



# Natural Resource Damages

---

- CERCLA authorizes recovery of costs to restore / replace publicly owned natural resources
  - fish
  - wildlife
  - biota
  - land
  - water
  - groundwater
- Claims may be brought by Resource Trustees, not EPA
- May only recover damages caused by hazardous substances releases
- Typically sought following EPA selection of remedy
- Case law is not well established

# Emerging Issues: Vapor Intrusion

## Vapor Intrusion

Vapor Intrusion Home

About Vapor Intrusion

Vapor Intrusion at Superfund Sites

Resources

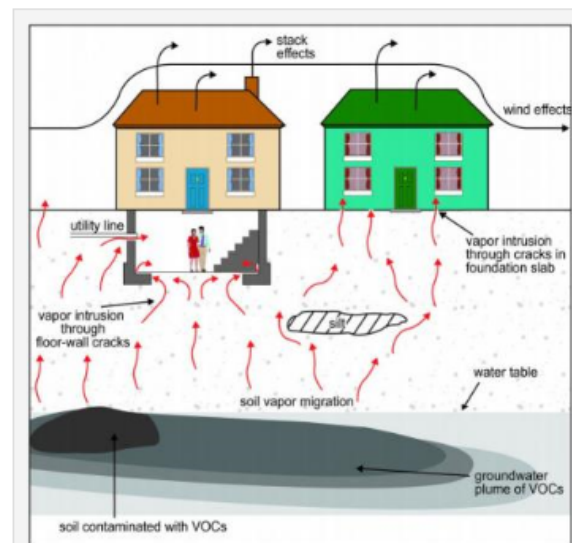
Vapor Intrusion Database

## What is Vapor Intrusion?

Vapor intrusion occurs when there is a migration of vapor-forming chemicals from any subsurface source into an overlying building. Recognition of soil vapor intrusion to buildings and other enclosed spaces occurred in the 1980s with concerns over radon intrusion. Subsequently, there was an increasing awareness that anthropogenic chemicals (e.g., petroleum hydrocarbons and chlorinated solvents) in soil, ground water, and sewers and drainlines could also pose threats to indoor air quality via the vapor intrusion pathway.

Vapor-forming chemicals may include:

- volatile organic compounds (VOCs), such as trichloroethylene and benzene.
- select semivolatile organic compounds, such as naphthalene.
- elemental mercury.
- some polychlorinated biphenyls and pesticides.



**Figure 1: Migration of Soil Vapors to Indoor Air**

This figure depicts the migration of vapors in soil gas from contaminated soil and groundwater into buildings. Vapors in soil gas are shown to enter buildings through cracks in the foundation and openings for utility lines. Atmospheric conditions and building ventilation are shown to influence soil gas intrusion.

# Vapor Intrusion: Key Issues to Know

## How does a focus on VI arise?

### OSWER Directive 9200.2-84: Five Year Review Guidance

Assess protectiveness where a VI remedy has not been implemented and (1) VI pathway never adequately characterized; or (2) changes in site conditions have led to a complete VI pathway.

### June 2015 OSWER technical Guide

(1) applies to all VOCs sites; (2) NCP compliant cleanups must use guidance; (3) imposes 2-stage assessment – preliminary assessment and multiple lines of evidence; (4) geographic boundary includes 100-foot VI buffer and preferential pathways

- Issues with consistency between regions on EPA policy on VI exposure
- EPA Region 9 originally took the lead with 2014 Technical Guidance
- Exceedance of acute exposure thresholds can trigger evacuation
- Significant dispute over underlying science for acute exposure triggers
- VI remedies moving from engineered remedies to source removal

# Potential new hazardous substance designations

- PFAS

- Per- and polyfluoroalkyl substances used in industrial manufacturing, consumer products, and aqueous film-forming foam; consist of thousands of compounds
- February 2019: EPA issues PFAS Action Plan.
- October 2021: EPA announces EPA's PFAS Strategic Roadmap
- August 2022: EPA proposes listing certain PFAS compounds as hazardous substances.
- March 2023: EPA proposes National Primary Drinking Water Regulation for six PFAS compounds.
- April 2024: EPA designates PFOA and PFOS as hazardous substances. EPA also issues a *PFAS Enforcement Discretion and Settlement Policy Under CERCLA*. Enforcement policy indicates that EPA will not pursue CERCLA actions, for PFAS, against community water systems, POTWs, MS4s, public landfills, airports, and fire departments, and farms (with biosolid application).

- 6PPD

- P-phenylenediamine additive to protect rubber
- December 3, 2020: Peer-reviewed scientific study linking 6PPD to coho salmon mortality in the Pacific Northwest

# Your Presenters



**Loren R. Dunn**  
**Principal**  
**Beveridge & Diamond**  
**Seattle, WA**  
**206-315-4810**  
**ldunn@bdlaw.com**

Loren's practice focuses on hazardous site cleanups, natural resource damages, and clean water litigation. He has extensive experience with environmental issues in the following industries: manufactured gas facilities, regulated utilities, smelters and metals refineries, and steel mills. He is co-chair of the ADR process of one the largest Superfund sites in the country located in the Pacific Northwest, and co-chair of Beveridge & Diamond's contaminated sites cleanup practice group.

Before entering private practice, Loren worked for the U.S. Environmental Protection Agency headquarters office as a senior policy economist from 1980-84. He helped to develop the Agency's hazardous waste program and its regulations. Through his pro bono work, he also played a significant role in the development of the state of Washington's environmental regulatory system and its "little Superfund" cleanup program.



**J. Tom Boer**  
**Partner**  
**Hogan Lovells**  
**San Francisco, CA**  
**415-374-2336**  
**tom.boer@hoganlovells.com**

Tom represents companies, municipal utilities, and individuals in connection with site cleanup and cost recovery, federal and state environmental litigation, in defense of environmental enforcement actions and citizen suits, and in response to catastrophic environmental emergencies and chemical releases. At Hogan Lovells, Tom serves as co-lead of the Chemicals and Industrial Products/Services sub-sector group and on the Environmental, Social, and Governance Board.

Before entering private practice, Tom spent seven years as a trial attorney in the Environmental Enforcement Section at the U.S. Department of Justice and two and a half years as an attorney in the Office of General Counsel at the U.S. Environmental Protection Agency.



# Questions

---

## Comprehensive Environmental Response, Compensation, and Liability Act

ELI Western Bootcamp  
May 2024

### **J. Tom Boer**

Partner, Hogan Lovells

[Tom.Boer@hoganlovells.com](mailto:Tom.Boer@hoganlovells.com)

### **Loren Dunn**

Principal, Beveridge & Diamond PC

[LDunn@bdlaw.com](mailto:LDunn@bdlaw.com)