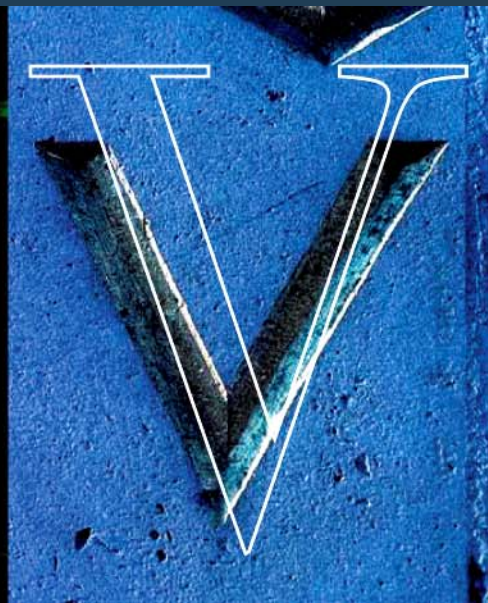
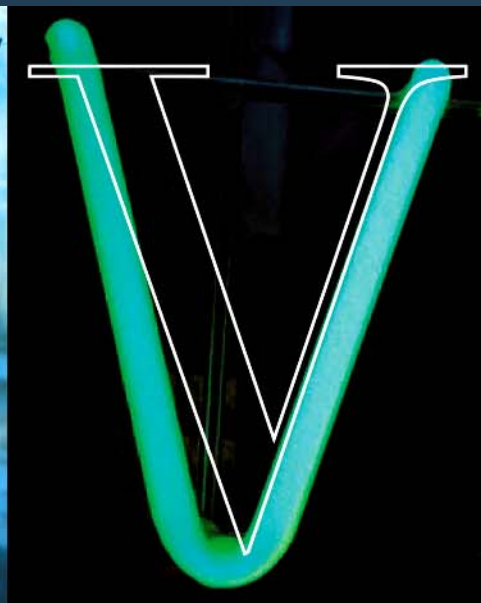
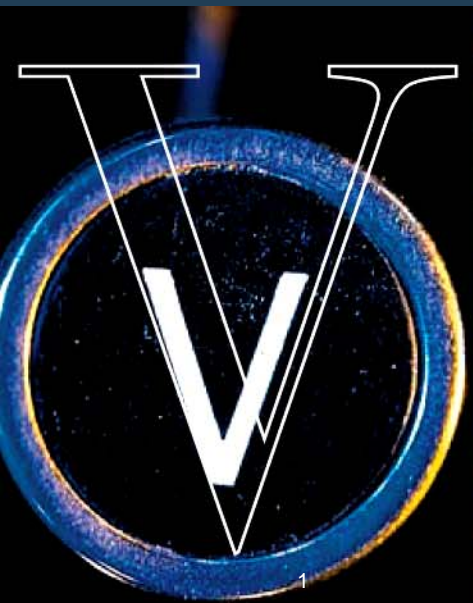


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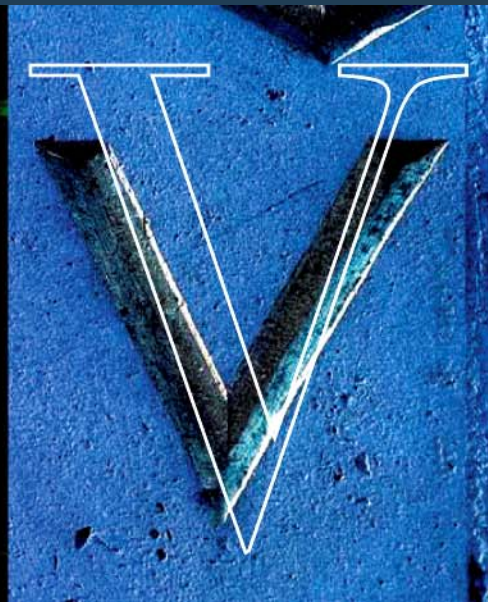
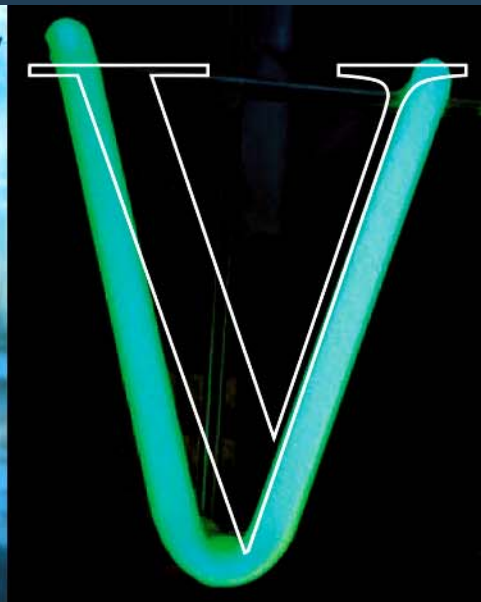
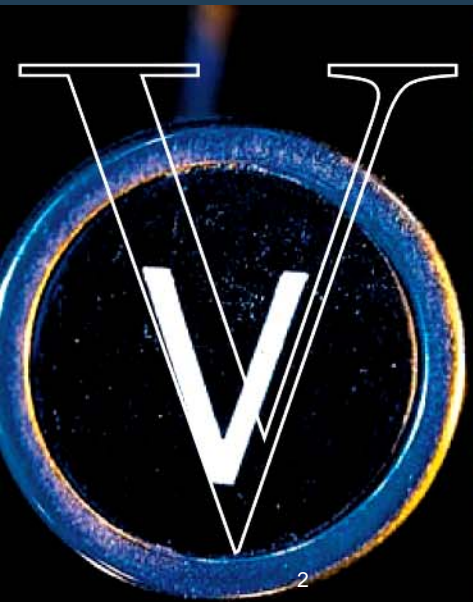
Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)

Environmental Law Institute
Washington D.C.
June 30, 2009

Dave Feinberg, Venable LLP



CERCLA or Superfund



CERCLA OVERVIEW

- The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (“CERCLA” or “Superfund”) addresses abandoned hazardous waste sites.
- 42 U.S.C. §9601 et seq.
- “Superfund” is also the name of the trust fund established by CERCLA.
- CERCLA authorizes EPA to clean up such sites and to compel potentially responsible parties (“PRPs”) to perform cleanups or reimburse the government for EPA-lead cleanups.
- Enforcement first policy: In Fiscal Year 2008 alone, EPA secured more than \$1.9 billion in cleanup commitments and cost recoveries from PRPs.



CERCLA OVERVIEW

- EPA's Office of Solid Waste and Emergency Response (“OSWER”) in Washington, D.C. oversees the Superfund program. OSWER then divides Superfund responsibility among:
 - The Office of Emergency Management, which is responsible for short-term responses;
 - The Office of Superfund Remediation and Technology Innovation, which manages the long-term response program; and
 - The Federal Facilities Response and Reuse Office, which manages responses involving federal facilities.
- The Superfund cleanup process is complex and long-term.
- It involves all the steps taken to assess sites, place them on the National Priorities List, and establish and implement appropriate cleanup plans.
- Over the past 25 plus years, EPA has located and analyzed tens of thousands of hazardous waste sites.



CERCLA FACTS

- EPA has stated that 1 in 4 Americans live within 3 miles of a Superfund site.
- EPA reports that in FY 2008 it conducted 681 long-term, ongoing cleanup projects at 423 sites.
- Superfund's emergency response program has taken action at thousands of sites to reduce the immediate threats to human health, including substantial roles in the World Trade Center and Pentagon Attacks, the 2001 Anthrax Attacks, the Columbia Space Shuttle Disaster, and Hurricanes Katrina and Rita.
- Today Superfund sites have become airports, major department stores, soccer fields, golf courses, wildlife refuges and more.
- Each year, Superfund assesses potentially hazardous waste sites and finds previously unknown chemicals and wastes that require research and new technologies to properly address potential threats to human health and the environment.

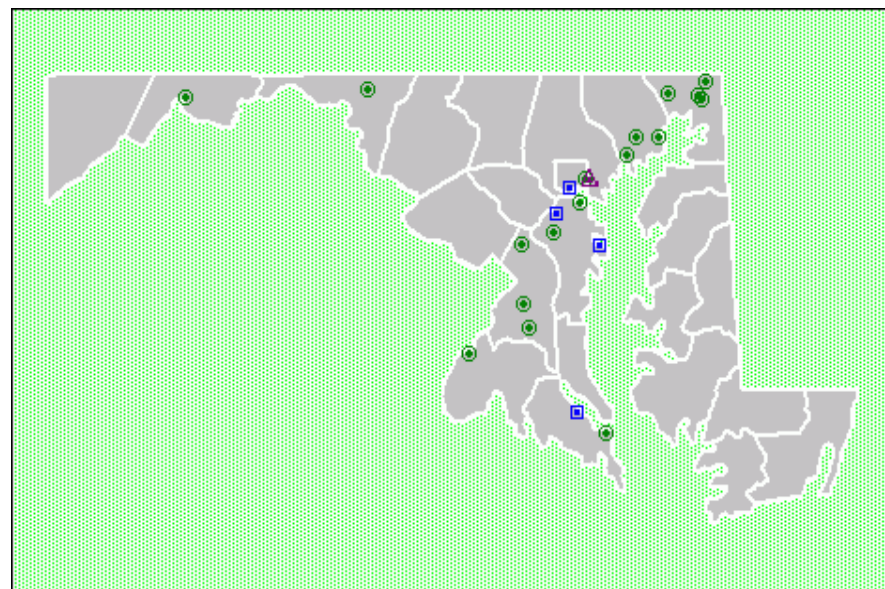
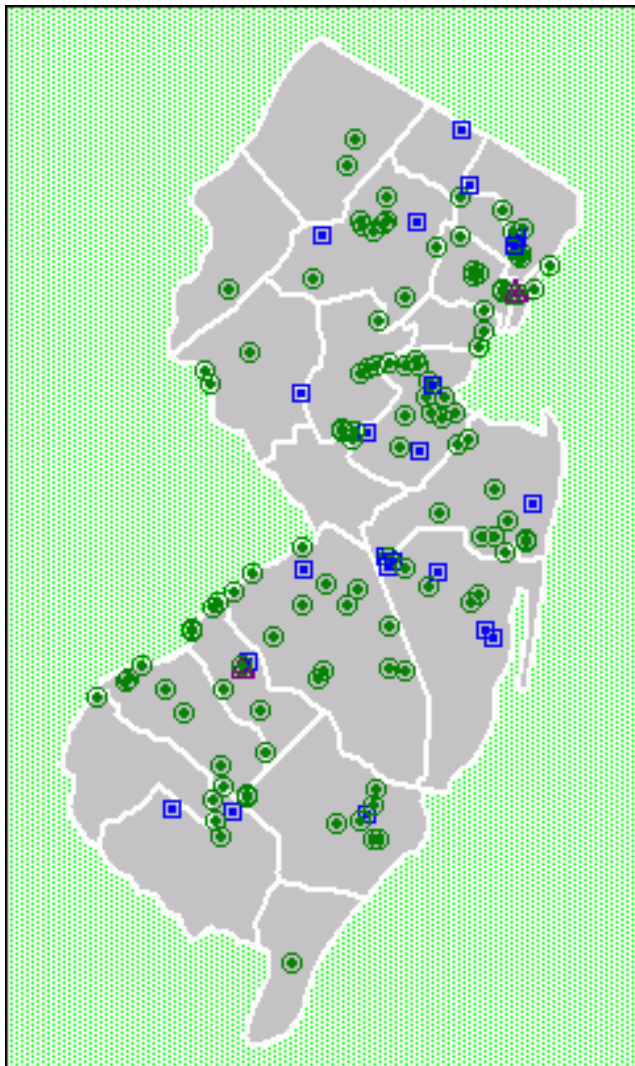


Love Canal

Niagara Falls, New York



Superfund Sites



(U.S. EPA)



Accomplishments

- The “Superfund Redevelopment Program.”
- EPA touts that as of December 2005, 550 Superfund Sites “are ready for reuse or have returned to productive uses,” including:
 - 56 sites in ecological use
 - 68 sites in recreational use
 - 40 sites in public service use
 - 108 sites in industrial use
 - 50 sites in residential use
 - 21 sites in agricultural use
 - 117 sites in commercial use

(U.S. EPA)





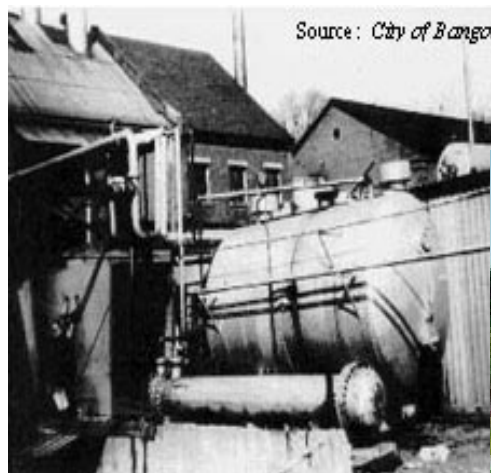
Old Works/East Anaconda Smelter Anaconda, Montana



(U.S. EPA)



Bangor Gas Works Bangor, Maine (coal gasification plant)



(U.S. EPA)



Luminous Processors Athens, Georgia



Source: U.S. EPA

Using funds from Superfund, workers from the State of Georgia cleanup the radioactive contamination at the site in 1982.



Source: U.S. EPA

A McDonald's fast food restaurant and playground now occupies the former hazardous waste site, providing many positive benefits to the community.

(U.S. EPA)



Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)

42 U.S.C. §§ 9601-9675
40 C.F.R. Part 300

- *Empowered federal government to address sites contaminated by hazardous substances
- *Empowered states and third parties to sue
- *Empowered federal government, states and third parties to seek costs of remediation from responsible parties
- *Firmly allocated liability for contamination (with several key exceptions)



Definitions (§ 101)

- Hazardous Substance
 - Very Broadly Defined
 - “Petroleum Exclusion”

- Release or Threatened Release
 - “Spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment”
 - No minimum quantity threshold
 - Limited Exclusions



Liability (§ 107)

- When there is a
 - “release” or
 - a “threatened” release
 - of a “hazardous substance”
 - from a “facility,”
 - PRPs are liable for all costs of response incurred by the US, a state, an “Indian Tribe,” or “any other person”
 - if consistent with the National Contingency Plan.

- Defenses are specified in CERCLA and are quite limited.



Liability under CERCLA

- 1. Who is a PRP?
- 2. Standard of Liability
- 3. Liability defenses and exceptions



PRPs

- Current owners and operators
- Former owners and operators at time of disposal
- Arrangers/Generators
- Transporters
- “Person” includes corporate and government entities



(NYC)



Standard of Liability

- Retroactive
- Strict
- Joint and several (though not in every case, see Burlington Northern & Santa Fe Railway v. United States, 556 U.S. – (May 4, 2009))
- No causation between a PRP's actions and the actual cleanup costs has to be shown



Site Investigation and Cleanup

- EPA may implement a response action, then look for PRPs
- EPA may order PRP to implement a remedial action (§ 106)
- EPA may enter into a settlement with PRP
- A would-be PRP can voluntarily begin response/remediation, and then look for PRPs
- Citizen suit provision



Major Defenses to Liability

Where the release or threatened release is caused solely by:

- An act of God
- An act of War
- An act or omission of a contractually unrelated third party, and (i) where the defendant exercised due care and (ii) took appropriate precautions (e.g., an innocent landowner)



Other Liability Exceptions

- Innocent purchasers
- Bona-fide prospective purchasers
- Municipal solid waste
- Secured creditors
- Response contractors
- De-micromis polluters
- Contiguous owners



Managing CERCLA Liability

- **Environmental Insurance**
- Specialized insurance for environmental risks now exists
- Can cover remediation costs, tort liability, and off-site transportation and disposal
- **Risk Transfer**
- It is also possible to transfer liability by contract to a third party
- Provides cost certainty for PRPs and minimizes litigation



Contribution and Cost Recovery Actions

- Cost Recovery Actions under § 107
- Contribution Actions under § 113



Cost Recovery Actions Under §107

- §107(a) identifies the types of PRPs that can be held liable
- §107(a)(4)(A) states that U.S., state, or an “Indian Tribe” that has incurred removal / remediation can seek reimbursement from PRPs
- §107(a)(4)(B) “any other person” can seek “any other necessary costs of response” from PRPs
- Voluntary cleanup -> sue other PRPs



Contribution Actions under § 113

- A PRP may also bring a suit for contribution against other PRPs under § 113(f).
- § 113(f)(1) allows a party to seek contribution "during or following any civil action" under §106 or §107.
- § 113(f)(3)(B) allows a party to an approved settlement to seek contribution.



Contribution Actions under § 113

- Cost Allocation based on “equitable” or Gore Factors.
- Causation is considered.



Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004)

- The Court held that § 113(f)(1) does not allow a PRP to seek recovery of cleanup costs from another PRP unless it has first been subjected to a "civil action" brought under either § 106 or § 107.
- The Court's decision left unanswered whether a party that voluntarily undertakes remediation can seek cost recovery pursuant to § 107.



US v. Atlantic Research Corp., 551 U.S. 128 (2007)

- In a unanimous opinion issued on June 11, 2007, the Court held that § 107(a) provides PRPs with a cause of action to recover costs from other PRPs.
- Under the plain terms of § 107, a PRP can recover incurred cleanup costs from other PRPs where there is no corresponding legal action (suit or settlement) by EPA or a state under CERCLA §§ 106 or 107.



Burlington Northern and Santa Fe Railway Co. v. US, 556 U.S. – (May 4, 2009)

- Interprets “arranger” liability
- Arranger: “Any person who by contract...arranged for disposal or treatment...of hazardous substances...” §107(a)(3).
- For “arranger” liability to attach, putative PRP must have intended that at least a portion of the product would be disposed of during the transfer process



Burlington Northern and Santa Fe Railway Co. v. US, 556 U.S. – (May 4, 2009)

- Also firms up the law relating to apportionment of liability
- Joint and several liability is appropriate when multiple PRPs cause a single and indivisible environmental harm
- Apportionment – dividing up into % shares – is appropriate if there is “a reasonable basis” for dividing up the contributions of each PRP to a single harm
- Distinguish apportionment (§107) from contribution (§113)



Questions?

(And thanks for coming.)

