



United States
Environmental Protection
Agency

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and Emergency Response
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Environmental Fact Sheet

The Superfund Enforcement Process: How It Works

INTRODUCTION

In 1980, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly called Superfund. This law provides the U.S. Environmental Protection Agency (EPA) with the authority and necessary tools to respond directly or to compel potentially responsible parties (PRPs) to respond to releases or threatened releases of hazardous substances, pollutants or contaminants. CERCLA created two parallel and complementary programs aimed at achieving this goal.

The first program involves the creation of a trust fund financed through a special tax on the chemical and petroleum industries. This trust fund, known as the Superfund, may be available for site remediation when no viable PRPs are found or when PRPs fail to take necessary response actions. PRPs are defined as parties identified as having owned or operated hazardous substance sites, or who have transported or arranged for disposal or treatment of hazardous substances, pollutants or contaminants at such sites. The second program provides EPA with the authority to negotiate settlements, to issue orders to PRPs directing them to take necessary response actions, or to sue PRPs to repay the costs of such actions when the Trust Fund has been used for these purposes. The actions EPA takes to reach settlement or to compel responsible parties to pay for or undertake the remediation of sites are referred to as the Superfund enforcement process. CERCLA was reauthorized and amended on October 17, 1986, by the Superfund Amendments and Reauthorization Act (SARA). SARA provides EPA with new authorities and tools that strengthen the enforcement program.

LIST OF ACRONYMS

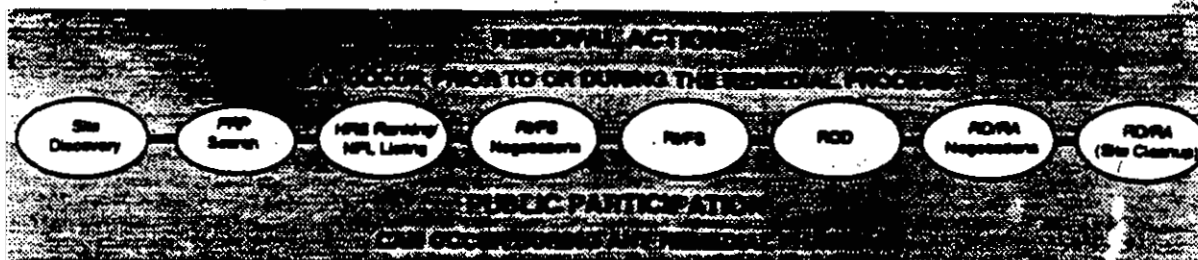
CERCLA:	Comprehensive Environmental Response, Compensation and Liability Act of 1980
IAG:	Interagency Agreement
NBAR:	Non-binding Allocation of Responsibility
NPL:	National Priorities List
PRP:	Potentially Responsible Party
RCRA:	Resource Conservation and Recovery Act, as Amended
RD/RA:	Remedial Design/Remedial Action
RI/FS:	Remedial Investigation/Feasibility Study
ROD:	Record of Decision
SARA:	Superfund Amendments and Reauthorization Act of 1986

This fact sheet describes the enforcement authorities and the process that is followed under the Superfund program. It describes the options available to EPA for remediating hazardous waste sites; the tools and mechanisms that EPA may use in negotiating settlements with PRPs, and describes the decision-making process at enforcement sites.

OVERVIEW OF THE ENFORCEMENT PROGRAM

A major goal of the Superfund program is to encourage PRPs to remediate hazardous waste sites. The enforcement process normally used by EPA to enlist PRP involvement may include five major efforts.

SUPERFUND REMEDIAL/ENFORCEMENT PROCESS



To understand the enforcement process, it is necessary to understand the Superfund remedial process. Under the remedial program, EPA takes long-term actions to stop or substantially reduce releases or threats of releases of hazardous substances that are serious but not immediately life-threatening. Removal actions, which are short-term, immediate actions intended to stabilize a hazardous incident or remove contaminants from a site that pose a threat to human health or welfare or the environment, may be taken at any point in the remedial process.

The Superfund process begins with a preliminary assessment/site inspection (PA/SI). This usually is conducted by the State, to determine whether the site poses a significant enough potential hazard to warrant further study and investigation.

The site is then ranked using the Hazard Ranking System (HRS), a numerical ranking system used to identify the site's potential hazard to the environment and public health. Sites assigned an

HRS score of 28.5 or above are added to the National Priorities List (NPL).

Next, a remedial investigation (RI) is conducted to assess the extent and nature of the contamination and the potential risks. A feasibility study (FS) is then prepared to examine and evaluate various remedial alternatives.

Following a public comment period on EPA's preferred alternative and the draft FS report, EPA chooses a specific remedial plan and outlines its selection in the Record of Decision (ROD).

Once the remedial design (RD) (which includes engineering plans and specifications) is completed, the actual site work, or remedial action (RA) can begin. After RD/RA activities have been completed, the site is monitored to ensure the effectiveness of the response. Certain measures require ongoing operation or periodic maintenance.

First, EPA attempts to identify PRPs as early in the Superfund process as possible. Once identified, EPA will notify these parties of their potential liability for response work when the site is scheduled for some action. Second, in the course of identifying response work to be done, EPA will encourage PRPs to do the work at a site.

Third, if EPA believes the PRP is willing and capable of doing the work, EPA will attempt to negotiate an enforcement agreement with the PRP(s). The enforcement agreement may be an agreement entered in court (such as a judicial consent decree) or it may be an administrative order (where EPA and the PRP(s) sign an agreement outside of court). Both of these agreements are enforceable in a court of law. Under both agreements EPA oversees the PRP.

Fourth, if a settlement is not reached, EPA can use its authority to issue a unilateral administrative order or directly file suit against the PRP(s). Under either course

of action, PRPs are directed to perform removal or remedial actions at a site. If the PRPs do not respond to an administrative order, EPA has the option of filing a law suit to compel performance.

Fifth, if PRPs do not perform the response action and EPA undertakes the work, EPA will file suit against PRPs, when practicable, to recover money spent by EPA and deposit it in the Superfund Trust Fund. This is called cost recovery, and it is a major priority under the Superfund program.

THE ENFORCEMENT PROCESS FOR REMEDIAL ACTIONS

PRP Search and Notice

EPA is committed to strengthening efforts to reach settlements with PRPs. EPA believes that settlements are most likely to occur when EPA interacts frequently with PRPs.

ENFORCEMENT AUTHORITIES

The original Superfund program was reauthorized and expanded on October 17, 1986, when President Reagan signed into law the Superfund Amendments and Reauthorization Act of 1986 (SARA). These amendments increased the Superfund Trust Fund to \$8.5 billion and clarified and expanded enforcement authorities:

- **Access and Information Gathering** - SARA strengthens EPA's ability to obtain access to investigate sites and to obtain information from parties with knowledge of the site.
- **Settlement Authorities** - CERCLA authorizes EPA to compel a PRP to undertake necessary actions to control the threat of imminent and substantial endangerment to human health or the environment. To accomplish this, EPA may either issue an administrative order or bring a civil action against the PRP in court. SARA outlines specific procedures for negotiating settlements with PRPs to conduct voluntary response actions at hazardous waste sites.
- **Cost Recovery** - Once a Fund-financed response has been undertaken, EPA can recover costs from the responsible parties. Past and present facility owners and operators, as well as hazardous substance generators and transporters, can all be liable under Superfund for response costs and for damage to natural resources. EPA may recover Federal response costs from any or all of the responsible parties involved in a remedial action. The monies recovered go back into the Fund for use in future response actions.
- **Criminal Authorities** - SARA increases criminal penalties for failure to provide notice of a release and makes submitting false information a criminal offense.

- **Citizen Suits** - SARA authorizes a citizen to sue any person, the United States, or an individual State for any violation of standards and requirements of the law, under certain conditions.

Federal Facilities

SARA also adds a section dealing with releases of hazardous substances at Federal facilities. This provision clarifies that Superfund applies to Federal agencies and that they must comply with its requirements. SARA clearly defines the process Federal agencies must follow in undertaking remedial responses. At NPL sites, EPA makes the final selection of the remedy if the Federal agency and EPA disagree. A Federal agency must remediate a Federal facility through an interagency agreement (IAG), except in emergency situations. IAGs are enforceable agreements between Federal agencies that are subject to the citizen suit provisions in SARA and to section 109 penalties, if the responding agency does not comply with the terms of the agreement.

SARA also provides a schedule for response actions at Federal facilities, including a schedule for preliminary assessments, listing on the National Priorities List, remedial investigations/feasibility studies, and remedial actions. States and local officials also must be given the opportunity to participate in the planning and selection of any remedy, including the review of all data. States are given a formal opportunity to review remedies to ensure that they incorporate State standards. Public participation in addressing releases at Federal facilities is enhanced by SARA, which establishes a Federal Agency Hazardous Waste Compliance Docket. This docket functions as a repository of information for the public and is available for public inspection. Every six months after establishment of the docket, EPA will publish in the Federal Register a list of the Federal facilities that have been included in the docket during the preceding six-month period.

This interaction is important because it provides the opportunity to share information about the site and may reduce delays in conducting response actions.

The enforcement process begins with the search for PRPs, concurrent with NPL listing.

Once identified, PRPs are typically issued a general notice letter. The general notice informs PRPs of their potential liability. The general notice also may include a request for and a release of information on PRPs and the substances at the site. The overall purposes of the general notice are to provide PRPs and the public with advance notice of possible future negotiations with EPA, to open the lines of commu-

nication between EPA and PRPs, and to advise PRPs of potential liability.

In addition to the general notices, EPA may issue a "special notice," which involves a temporary moratorium on certain EPA remedial and enforcement activities. An RI/FS special notice initiates a 90-day moratorium and an RD/RA special notice initiates a 120-day moratorium. The moratorium provides a period of time during which EPA and PRPs negotiate. The goal of negotiations is for EPA and PRPs to reach a settlement where the PRPs agree to conduct and/or finance response activities. Negotiations may be terminated after 60 days for either the RI/FS or RD/RA if PRPs do not provide EPA with a "good faith" settlement offer.

Negotiations for the RI/FS

The PRP may conduct the RI/FS if EPA determines the PRP is qualified to conduct the RI/FS and if the PRP agrees to reimburse EPA for the cost of oversight. The terms of this agreement to conduct the RI/FS are outlined in either an Administrative Order on Consent or a Consent Decree, both of which are enforceable in court. If negotiations do not result in an order or a decree, EPA may use Trust Fund monies to perform the RI/FS and seek reimbursement for its costs.

Negotiations for the RD/RA

Where a special notice is used, the moratorium for RD/RA may be extended to a total of 120 days. The terms of the agreement to conduct the RD/RA are outlined in a Consent Decree, which all parties sign and is entered in court. If negotiations do not result in a settlement, EPA may conduct the remedial activity using Trust Fund monies, and sue for reimbursement of its costs with the assistance of the Department of Justice (DOJ). Or EPA may issue a unilateral administrative order or directly file suit to force the PRPs to conduct the remedial activity.

Administrative Record

The information used by EPA to select a remedy at a site must be made available to the public. This information, including public comments, is compiled and maintained in the administrative record files. The administrative record serves two main purposes. First, it ensures an opportunity for public involvement in the selection of a remedy at a site. Second, it provides a basis for judicial review of the selection.

TOOLS FOR ENFORCEMENT

In addition to outlining the procedures for the enforcement process, CERCLA provides tools that are designed to help EPA achieve settlements. The CERCLA settlement authorities may be used by EPA to foster negotiations with PRPs instead of taking them to court. EPA believes that PRPs should be involved early in the Superfund process at a site. It is in the best interest of PRPs to negotiate with EPA and to conduct the RI/FS, as this can keep the process smooth and costs can be controlled. EPA actively promotes settlements with PRPs using tools in SARA and is continuing to work towards improvements in the settlement process itself. These new SARA tools include, but are not limited to:

Mixed Funding

CERCLA authorizes the use of "mixed funding." In mixed funding, settling PRPs and EPA share the costs of the response action and EPA pursues viable non-settlers for the costs EPA incurred. Through guidance, EPA discusses the use of three types of mixed funding arrangements. These are "preauthorization," where the PRPs conduct the remedial action and EPA agrees to reimburse the PRPs for a portion of their response costs; "cash-outs," where PRPs pay for a portion of the remedial costs and EPA conducts the work; and "mixed work," where EPA and PRPs both agree to conduct and finance discrete portions of a remedial action. EPA prefers a "preauthorized" mixed-funding agreement, where PRPs conduct the work.

EPA encourages the use of mixed funding to promote settlement and site remediation, but will continue to seek 100 percent of response costs from PRPs where possible. Use of mixed funding does not change EPA's approach to determining liability. PRPs may be held jointly and severally liable and EPA will seek to recover EPA's mixed funding share from non-settling PRPs whenever possible.

De Minimis Settlements

De minimis settlements are smaller agreements separate from the larger settlement for the chosen remedy. Under de minimis settlements, relatively small contributors of waste to a site, or certain "innocent" landowners, may resolve their liability. Innocent landowners are parties who bought property without knowing that it was used for hazardous waste handling. Or EPA may enter into de minimis settlement agreements with a party where the settlement includes only a minor portion of the response costs and when the amount of waste represents a relatively minor amount and is not highly toxic, compared to other hazardous substances at the facility. De minimis settlements also may be used where the PRP is a site owner who did not conduct or permit waste management or contribute to the release of hazardous substances. De minimis settlements are typically used in conjunction with covenant not to sue agreements. These agreements generally will be in the form of administrative orders on consent and are available for public comment.

Covenants Not To Sue

A covenant not to sue may be used to limit the present and future liability of PRPs, thus encouraging them to reach a settlement early. However, agreements generally include "reopener" that would allow EPA to hold parties liable for

conditions unknown at the time of settlement or for new information indicating that the remedial action is not protective of human health and the environment. In some cases, such as de minimis settlements, releases may be granted without reopeners. Covenants not to sue are likely to be used only in instances where the negotiating PRP is responsible for only a very small portion of a site, and, therefore, EPA is assured that any future problems with the site are not likely to be the result of that PRP's contribution

Non-binding Allocations of Responsibility (NBAR)

NBAR is a process for EPA to propose a way for PRPs to allocate costs among themselves. EPA may decide to prepare an NBAR when the Agency determines this allocation is likely to promote settlement. An NBAR does not bind the government or PRPs and cannot be admitted as evidence or reviewed in any judicial proceeding, including citizen suits. Since each PRP may be held liable for the entire cost of response, regardless of the size of its contribution to a site, knowing EPA's proposed allocation scheme may encourage the PRPs to settle out of court rather than run the risk of being held fully responsible.

STATE PARTICIPATION

The Superfund program allows for and encourages State participation in enforcement activities. First, EPA is required to notify the State of negotiations with PRPs and provide the opportunity for the State to participate. States may be a party to any settlement in which they participate. In addition, EPA is authorized to provide funds to States to allow State participation in enforcement activities and to finance certain State-lead enforcement actions.

PUBLIC PARTICIPATION/COMMUNITY RELATIONS

EPA policy and the Superfund law establish a strong program of public participation in the decision-making process at both Fund-lead and enforcement sites. The procedures and policy for public participation at enforcement sites are basically the same as for non-enforcement sites. This fact sheet is limited to those special differences in community relations when the Agency is negotiating with or pursuing litigation against PRPs. The contact listed below has numerous fact sheets on the Superfund program, including a fact sheet on Public Involvement.

Community relations at enforcement-lead sites may differ from community relations activities at Fund-lead sites because negotiations between EPA, DOJ and PRPs generally focus on the issue of liability. The negotiation process, thus, requires that some information be kept confidential and is not usually open to the public.

When these discussions deal with new technical information that changes or modifies remedial decisions, this information will be documented and placed in the administrative record files. This process provides the public with critical information and enables the Agency to move quickly towards settlement. Information on enforcement strategy; details of the negotiations, such as the behavior, attitudes, or legal positions of responsible parties; and evidence or attorney work product material developed during negotiations, must remain confidential.

FOR MORE INFORMATION: