

## CONSTRUCTION CONTRACTS AND HAZARDOUS MATERIALS RISKS

Every construction project poses some level of hazardous materials risk. Given the dozens of federal and state environmental statutes and regulations governing the construction industry, it can be difficult for a construction company to determine its potential environmental liability.<sup>1</sup> To identify environmental risks, contractors need a bit of basic knowledge.

Beginning in the 1950s, the Federal Government started regulating air pollution. As the nation's environmental consciousness grew, so too did the volume of State and Federal environmental legislation. In some instances, states enacted more stringent environmental legislation, but the major player in environmental law remains the Federal Government. Of all the Federal environmental statutes, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Superfund Amendments and Reauthorization Act ("SARA") seem to cause the most concern among contractors and sureties.<sup>2</sup> (CERCLA and SARA are referred to collectively as the "Superfund").

To address Superfund concerns, contractors should consider including hazardous materials indemnity clauses in their contracts. A contractor friendly indemnity clause is always desirable, but sometimes negotiating such a clause is very difficult or impossible. In such situations, contractors can achieve similar levels of protection by negotiating an acknowledgment of responsibility provision. As between a project owner and a contractor, it is only fair for a project owner to acknowledge its responsibility for preexisting, onsite, hazardous materials. After all, absent performing work for the project owner, a contractor probably has no prior involvement with the site.

Determining whether an acknowledgment is an acceptable alternative to an indemnity clause requires an analysis of a project's hazardous materials risks. As such, contractors must perform environmental due diligence so that they can answer a few basic questions:<sup>3</sup>

- (1) Have they reviewed all available environmental records and documents?
- (2) Where is the project located in relation to known hazardous materials?
- (3) What impact do hazardous materials have on the project's design?
- (4) Have they discussed hazardous materials liability with the project owner?
- (5) Have they evaluated their CERCLA liability?
- (6) What steps are they taking to minimize their potential liability?

If contractors cannot answer these questions, they probably have not considered hazardous materials risks and more due diligence is necessary.

### Disclaimer

This paper is for general informational purposes only. None of it constitutes legal advice, nor is it intended to create any attorney-client relationship between you and the author. You should not act or rely on this information concerning the meaning, interpretation, or effect of particular contractual language or the resolution of any particular demand, claim, or suit without seeking the advice of your own attorney.

<sup>1</sup> The focus of this whitepaper is CERCLA, but Appendix A contains a list of additional environmental statutes with which contractors should be familiar. Several online resources may also be helpful: i) A list of major environmental laws is located at: [www.epa.gov/epahome/laws.htm](http://www.epa.gov/epahome/laws.htm); ii) The Construction Industry Compliance Assistance Center Website ([www.cicacenter.org](http://www.cicacenter.org)) explains most of the major environmental laws that affect contractors; iii) The National Environmental Compliance Assistance Clearinghouse ([www.epa.gov/clearinghouse](http://www.epa.gov/clearinghouse)) provides links to compliance assistance materials; and iv) EPA also maintains a significant database of compliance materials and publications at: [www.epa.gov/compliance/resources/publications/assistance/sectors/construction/index.cfm](http://www.epa.gov/compliance/resources/publications/assistance/sectors/construction/index.cfm).

<sup>2</sup> 42 U.S.C. § 9601 (1982 & 1987).

<sup>3</sup> Appendix B contains a lengthy list of questions, which can be used to assist in analyzing a project's potential environmental hazards.

Many contractors believe that they can avoid CERCLA liability and mitigate hazardous materials risks entirely by subcontracting hazardous materials work to third parties. Subcontracting does have its place, but contractors must understand that subcontracting does not protect them from CERCLA liability. As a party that lets a hazardous materials related subcontract, contractors merely move themselves from one category of potential responsible party to another; i.e. contractors become “arrangers” under CERCLA. This issue is addressed further below, but it suffices to say that subcontracting is not as effective a risk mitigation tool as some believe.

Contractors must be aware of CERCLA risks, and they must identify and mitigate such risks to the best of their abilities. Indemnity clauses and acknowledgment of responsibility clauses are both good methods of mitigating hazardous materials risks. There is no formula that dictates when contractors should use one clause or the other. The goal is to address hazardous materials risks up front. Achieving this goal will depend largely on the project, the owner, and the risks unique to each construction site.

## 1) CERCLA and SARA – History and Background<sup>4</sup>

On December 11, 1980, Congress enacted CERCLA, which provided the Environmental Protection Agency (“EPA”) with the authority it needed to cleanup hazardous waste sites. In addition, CERCLA made those persons responsible for releases of hazardous waste liable for cleanup costs. When EPA cannot locate responsible parties, it pays for cleanup activities with the proceeds of a trust fund. Congress created the trust fund through a tax on the chemical and petroleum industries. This dedicated trust fund is the source of CERCLA’s nickname – the “Superfund.”

Under CERCLA, EPA has authority to respond to releases or threatened releases of hazardous substances directly. EPA conducts two kinds of response actions. Short-term actions address releases or threatened releases that require prompt responses. Long-term remedial response actions address releases or threatened releases of hazardous substances that are serious but not immediately life threatening. Long-term remedial responses significantly reduce the dangers of sites contaminated by hazardous substances. Long-term remedial actions only take place at sites named on the EPA’s National Priorities List (“NPL”).<sup>5</sup>

On October 17, 1986, Congress Amended CERCLA. This legislation, known as the Superfund Amendments and Reauthorization Act (“SARA”), reflects EPA’s experience administering the Superfund program and makes several changes to the CERCLA program. Generally, SARA stresses the importance of permanent remedies and encourages innovative cleanup technologies. SARA also requires consideration of standards and requirements found in other Federal environmental laws and increases State involvement in cleanup efforts. Finally, SARA increased the size of the trust fund, and provided EPA with new enforcement authorities.

While SARA<sup>6</sup> can be viewed as a housekeeping statute, the enactment of SARA was an opportunity for Response Action Contractors (“RAC”) and their sureties to lobby for legislative changes. Broadly, a RAC is any person who enters into an agreement<sup>7</sup> to provide any services relating to a response action under CERCLA.<sup>8</sup> The limited defenses available under CERCLA were a source of concern for RACs and discouraged many contractors from entering agreements to perform cleanup activities. To address this problem, Congress exempted RACs from strict liability. Unless a RAC causes a release through its own negligence, gross negligence or intentional misconduct, the contractor is not liable under CERCLA for releases or threatened releases of hazardous substances.<sup>9</sup> However, this exemption only applies to federal law, which leaves RACs susceptible to prosecution under state law and common law standards.

Furthermore, many sureties would not bond RACs because of the potentially unlimited liability associated with Superfund projects. To assuage sureties’ concerns, Congress removed the threat of third party actions against sureties by eliminating bodily injury and property damage as grounds for suit. In addition, Congress recognized that a

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<sup>4</sup> CERCLA & SARA Link: [www.access.gpo.gov/uscode/title42/chapter103\\_.html](http://www.access.gpo.gov/uscode/title42/chapter103_.html).

<sup>5</sup> NPL Link: [www.epa.gov/superfund/sites/npl/npl.htm](http://www.epa.gov/superfund/sites/npl/npl.htm).

<sup>6</sup> Pub. L. No. 99-499, 100 Stat. 1613 (1986).

<sup>7</sup> A “Response Action Contract” is defined at 42 U.S.C. §9619(e)(1).

<sup>8</sup> 42 U.S.C. § 9619(e)(2).

<sup>9</sup> 42 U.S.C. §9619(a).

bond's penal sum constituted the sureties' maximum, potential exposure, and Congress added "surety" to the list of entities defined as RACs.<sup>10</sup> The new section, "(g) Surety Bonds," reads in part as follows:

- (1) If under sections 3131 to 3133 of Title 40 [the Miller Act], surety bonds are required for any direct Federal procurement of any response action contract and are not waived pursuant to section 3134 of Title 40, they shall be issued in accordance with such sections 3131 to 3133 of Title 40.
- (2) If under applicable Federal law surety bonds are required for any direct Federal procurement of any response action contract, no right of action shall accrue on the performance bond issued on such response action contract to or for the use of any person other than the obligee named in the bond.
- (3) If under applicable Federal law surety bonds are required for any direct Federal procurement of any response action contract, unless otherwise provided for by the procuring agency in the bond, in the event of a default, the surety's liability on a performance bond shall be only for the cost of completion of the contract work in accordance with the plans and specifications less the balance of funds remaining to be paid under the contract, up to the penal sum of the bond. The surety shall in no event be liable on bonds to indemnify or compensate the obligee for loss or liability arising from personal injury or property damage whether or not caused by a breach of the bonded contract.
- (4) Nothing in this subsection shall be construed as preempting, limiting, superseding, affecting, applying to, or modifying any State laws, regulations, requirements, rules, practices or procedures. Nothing in this subsection shall be construed as affecting, applying to, modifying, limiting, superseding, or preempting any rights, authorities, liabilities, demands, actions, causes of action, losses, judgments, claims, statutes of limitation, or obligations under Federal or State law, which do not arise on or under the bond. (Emphasis added).

In total, these amendments insure that sureties are afforded the same level of indemnification as their principals.

Again, SARA's amendments only apply to long term cleanup projects at NPL sites and short term cleanup projects, where the threat to health and the environment demands more immediate action. Furthermore, most contractors that encounter hazardous materials are not acting as RACs. Therefore, the safeguards granted to contractors and sureties under SARA apply in limited circumstances.

## **2) Superfund Liability Generally**

Congress enacted CERCLA with two goals in mind. First, Congress wanted to provide EPA with the means to control the spread of hazardous materials from inactive and abandoned waste disposal sites.<sup>11</sup> Second, Congress wanted to make the parties responsible for contamination pay cleanup costs.<sup>12</sup> Courts construe CERCLA and SARA liberally to achieve these goals.<sup>13</sup>

For a court to find a party liable under CERCLA, the plaintiff must establish four elements. First, the site in question must be a "Facility." A "Facility" is "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." A Facility includes any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft.<sup>14</sup>

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<sup>10</sup> See, 42 U.S.C. 9619.

<sup>11</sup> *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991).

<sup>12</sup> *Id.*

<sup>13</sup> *3550 Stevens Creek Assoc. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1363 (9th Cir. 1990).

<sup>14</sup> 42 U.S.C. §9601(9) (1987 Supp.).

Second, a release or a threatened release of a hazardous substance must have actually occurred. A "Release" is "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment."<sup>15</sup> CERCLA defines "Hazardous Substances" by referring to many other statutes, and virtually any substance that could harm human health or the environment may be deemed hazardous.<sup>16</sup>

Third, the defendant must be a "Responsible Person." There are four categories of responsible persons:<sup>17</sup>

- (1) The owner and operator of a vessel or a facility,
- (2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for:
  - (A) All costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
  - (B) Any other necessary costs of response incurred by any other person consistent with the national contingency plan;
  - (C) Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
  - (D) The costs of any health assessment or health effects study carried out under section 9604(i) of this title. (Emphasis added).

It is a mistake to assume that a contractor can avoid CERCLA liability because the contractor falls outside the strict definition of a "Responsible Person." Courts interpret CERCLA broadly, and it is better to err on the side of caution and address potential CERCLA risks up front.

An "Owner or Operator" is any person owning or operating a facility.<sup>18</sup> Because of the circularity of this definition, courts determined that Congress wanted CERCLA's terms to be given their ordinary meanings, rather than unusual or

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<sup>15</sup> 42 U.S.C. §9601(22) (1987 Supp.).

<sup>16</sup> 42 U.S.C. 9601(14) defines a "Hazardous Substance" as:

- (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33,
- (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title,
- (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901 et seq.] has been suspended by Act of Congress),
- (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)],
- (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and
- (F) Any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to 7 of the Toxic Substances Control Act [15 U.S.C. 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

<sup>17</sup> 42 U.S.C. §9607(a).

<sup>18</sup> 42 U.S.C. §9601(20)(A).

technical meanings.<sup>19</sup> There is little guidance as to what constitutes an “Arranger,”<sup>20</sup> but because courts interpret CERCLA broadly they extend arranger liability “well beyond those parties who intentionally sent wastes to a Superfund site for disposal.”<sup>21</sup> A construction contract that requires a general contractor to retain third parties to address any hazardous materials issues could give rise to arranger liability; general contractors should be particularly aware of this risk. Finally a “Transporter” is one who moves hazardous substances by any means,<sup>22</sup> including by pipeline.<sup>23</sup> If a carrier accepts a hazardous substance for transportation, the term “transport” or “transportation” includes any temporary stops incidental to the transportation.<sup>24</sup> However, such stops do not constitute storage of the hazardous substance.<sup>25</sup>

The fourth element of CERCLA liability is damages. The plaintiff must show that the release or threatened release caused the plaintiff to incur response costs.<sup>26</sup> Typically, costs include all remediation and abatement work. If the release is a continuing problem, containment of ground water contamination for example, the abatement costs may be significant in relation to the actual work done because the duration of the abatement is not finite.

### **i) Strict Liability**

Under CERCLA, responsible persons are strictly, jointly and severally liability for cleanup costs. Generally, strict liability does not depend on a parties’ negligence or intent. As such, once a party falls within CERCLA’s definition of responsible person, it is exceedingly difficult to avoid liability. Furthermore, if there are multiple responsible persons, all of the responsible persons are liable for one hundred percent of the cleanup costs. This means that the EPA can pursue collection of cleanup costs from one responsible person rather than allocating the costs and pursuing collection of cleanup costs from the responsible persons separately.

Strict, joint and several liability stems from CERCLA’s use of the Federal Water Pollution Control Act’s<sup>27</sup> liability standards. Cases interpreting §311 of the Water Pollution Control Act hold that strict liability applies.<sup>28</sup> Accordingly, courts hold that CERCLA imposes strict liability<sup>29</sup> for the costs of responding to a release or threatened release of hazardous substances from a facility.<sup>30</sup>

There are three potential defenses to CERCLA liability.<sup>31</sup> The first two defenses, acts of God and acts of war, are relatively narrow. The third defense, acts or omissions of third parties, is more complicated because it only comes into play if an act or omission of a third party causes the release, and the third party may not have a direct or indirect contractual relationship with the defendant. Furthermore, the defendant must establish that it exercised due care and took precautions against foreseeable acts and omissions of the third party.<sup>32</sup>

For most contractors, the discovery of preexisting, hazardous materials involves contaminated soil encountered while excavating and grading. Under CERCLA, courts have ruled that contractors in these types of situations are operators,

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<sup>19</sup> See, *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988).

<sup>20</sup> *Reading Co. v. City of Philadelphia*, 1992 WL 392595 (Not Reported in F. Supp., E.D. Pa., 1992).

<sup>21</sup> *Id.* Citing to, COOKE, *THE LAW OF HAZARDOUS WASTE*, § 14.01[5][d].

<sup>22</sup> 42 U.S.C. §9601(26).

<sup>23</sup> See, 49 U.S.C. §60101(a) for a definition of hazardous liquid pipeline facility.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F. 3d 321, 325 (7th Cir. 1994).

<sup>27</sup> 33 U.S.C. § 1321 (1982, 1987 Supp.). See, 42 U.S.C. § 9601 (32) (1987 Supp.).

<sup>28</sup> See, *Burgess v. M/V Tamano*, 564 F.2d 964 (1st Cir. 1977), cert. denied, 435 U.S. 941 (1978).

<sup>29</sup> See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

<sup>30</sup> 45 U.S.C. § 9607 (1982 & 1987 Supp.).

<sup>31</sup> 42 U.S.C. § 9607(b) (1982 & 1987 Supp.).

<sup>32</sup> *Id.*

arrangers, and transporters.<sup>33</sup> If a contractor uncovers hazardous material, and the contractor moves it (knowingly or unknowingly) or disposes of it improperly, CERCLA liability comes into play.

Contractors that encounter hazardous materials, should stop work and notify the project owner. If the owner agrees to abate the hazardous materials, the contractor's CERCLA liability risks are minor. However, the owner may refuse to abate the hazardous materials and order the contractor to perform the work. Many construction contracts include change and work directive clauses that allow project owners to order the contractor to perform cleanup work.<sup>34</sup> Generally, so long as a change order is incidental to the contract and is not a fundamental change to the contract, sureties are also bound by change orders and work directives.<sup>35</sup> Differing site conditions clauses, scope of work clauses, performance specifications, permits, and clauses that require compliance with applicable federal, state, and local laws may all be read as requiring the contractor to abate hazardous materials.

To combat CERCLA liability, contractors should negotiate provisions that assign liability for preexisting hazardous materials to the project owner. Absent such a provision, the contractor may have to choose between assuming CERCLA liability and breaching its contract. While CERCLA liability and contractual breach are both unappealing, both options are preferable to improperly handling or disposing of hazardous materials. In those CERCLA cases that involve contractors, courts seem to be more lenient with contractors that stop work and try to address hazardous materials appropriately.<sup>36</sup> Contractors that notify the project owner and cooperate with authorities seem less likely to incur severe fines and penalties. It is important that the contract allow work stoppages so that the contractor and owner can address hazardous materials properly.

#### ii) Potential Surety Liability

In 1990, after Congress enacted SARA, there were no reported cases where a government entity or a private party asserted hazardous waste liability claims against a surety issuing a performance bond.<sup>37</sup> This situation has not changed dramatically.<sup>38</sup> The lack of reported cases is probably a function of the surety industry's caution in addressing hazardous materials, and the industry's general reluctance to take over projects that pose hazardous materials risks. Amendments to CERCLA regarding RACs and their sureties undoubtedly contributed to the general lack of case law. There may be few reported cases, but the possibility for liability still exists.

### 3) Acknowledgment of Responsibility

Before a parcel of property becomes a construction site, someone probably lived or operated a business on the property. If that prior user released hazardous materials at the site, the prior user should be responsible for cleanup costs. Similarly, as between a project owner and a contractor that has never had anything to do with a site, it is reasonable for the owner to acknowledge responsibility for preexisting, onsite, hazardous materials.

As a general rule, once a party falls within the confines of CERCLA, the party cannot contract away its liability. However, a liable party may enter into an agreement for another party to insure, hold harmless, or indemnify the liable party. These tenants are set out in 42 U.S.C. 9607(e), which reads in part as follows:

(e) Indemnification ...

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<sup>33</sup> See, Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988) (contractor engaged in fill and grading work encountered hazardous substances); Brookfield-North Riverside Water Comm'n v. Martin Oil Mktg., Ltd., 1995 WL 733439 (N.D. Ill.) (unreported case - contractor unknowingly installed water main through soil that had been contaminated by hazardous substances from underground storage tank); Jersey City Redev. Auth. v. PPG Indus., 655 F. Supp. 1257 (D. N.J. 1987) (contractor transported contaminated soil from one project for use as fill on another project).

<sup>34</sup> See, Active Fire Sprinkler Corp., 85-1 B.C.A. (CCH) ¶17,869 (GSBCA 1988) (contractor required to remove asbestos under change clause).

<sup>35</sup> See e.g., Employers Ins. v. Construction Management Eng'rs of Fla., Inc., 377 S.E. 2d 119 (S.C. Ct. App. 1989); M. Michael Egan, *Discharge of the Performance Bond Surety*, in *THE LAW OF SURETYSHIP* 12-8 (E.G. Gallagher, ed., 1993).

<sup>36</sup> See, Hazardous Materials Checklist.

<sup>37</sup> See Ryan and Wright, *Hazardous Waste Liability and the Surety*, 25 Tort & Ins. L. J. 663, 689-702 (1990).

<sup>38</sup> The author reviewed various sources and found very few reported cases that address a surety's liability under CERCLA.

- (1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.
- (2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

Based on the above, a contractor may insert indemnification and hold harmless language into a construction contract, which shifts the financial risks of CERCLA liability to the project owner. This type of contractual language will not render the contractor immune from prosecution under CERCLA, but it will give the contractor the right to seek indemnification from the project owner.

Occasionally, general contractors try to appease project owners by accepting responsibility for preexisting hazardous materials. Usually, these general contractors then try to shift these risks to their subcontractors. However, general contractors are subject to the same types of statutory liability as are owners, and a general contractor cannot shed its CERCLA liability through a subcontract.<sup>39</sup> The best way for a contractor to avoid hazardous materials liability is to negotiate a fair and reasonable hazardous materials provision. Alas, many project owners are not interested in such provisions.

Commonly, construction contracts shift all hazardous materials risks to the general contractor. An owner may shift the risk with an explicit hazardous materials provision, or the owner may shift the risk with a broad indemnification provision that indirectly encompasses hazardous materials, but does not actually use the words "hazardous materials." Either way, the intent is usually the same; the owner wants the contractor to deal with all hazardous materials.

Contractors should try to negotiate contractual protections. The goal is a provision that requires project owners to defend, indemnify and hold harmless contractors from and against all costs, losses and damages associated with any preexisting, onsite, hazardous materials. However, the contractor's position with respect to hazardous materials is frequently in diametric opposition to the owner's position, and it can be difficult to find middle ground. As such, in some instances, it can be useful to shift the dialogue away from indemnity and toward an acknowledgment of responsibility. The bells and whistles of an indemnity clause may be absent, but an acknowledgment of responsibility provision can still be an effective risk shifting tool.

The goal of an acknowledgment of responsibility provision is for the owner, not the contractor, to address all known and unknown onsite, preexisting, hazardous materials. The basic elements of such a provision follow:

- (1) As between the contractor and the project owner, the project owner acknowledges responsibility for onsite, preexisting, hazardous materials and the contractor acknowledges responsibility for hazardous materials it brings to the site.
- (2) The contractor must notify the owner when it encounters any preexisting materials that it believes may be hazardous, and the contractor must minimize disturbance of the material.
- (3) The project owner must:
  - (A) Pay all costs, fees and fines associated with the hazardous materials;
  - (B) Test the material to determine whether it is hazardous;

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<sup>39</sup> Environmental Transportation Systems, Inc. v. Ensco, Inc., 763 F. Supp. 284 (C.D. Ill. 1991) (a waste transporter was involved in a traffic accident and a hazardous materials spill resulted; the transporter sued its general contractor to recover cleanup costs, and the Court held the general contractor liable as an "arranger" under CERCLA).

- (C) Notify the appropriate governmental authorities;
- (D) Perform all abatement and/or remediation work;
- (E) Dispose or render harmless all preexisting hazardous materials; and
- (F) Sign all transportation manifests as the “generator” and assume all tail liability.

Under an acknowledgement of responsibility provision, it is not uncommon for a project owner to insist that if the contractor exacerbates a preexisting hazardous condition, the contractor must assume responsibility. If possible, the contractor should avoid this type of requirement. However, if the contractor succeeds in arguing for a fair and reasonable acknowledgement of responsibility provision, it is difficult to argue that the contractor should not be responsible when it exacerbates a known environmental hazard. As such, it may not be possible for the contractor to avoid this type of risk.

Operating under this type of regimen requires a proactive contractor with diligent field supervisors. The contractor's field employees must know what to look for, and the contractor must have controls in place to address hazardous materials problems as they arise; training is critical. Furthermore, contractors must purchase appropriate insurance. While many contractors carry some form of pollution coverage, either as a stand alone policy or as a rider to their general liability policy, projects that pose known hazardous materials risks require project specific policies with a tail period of an appropriate length (5 years +). A project specific policy should be there when needed, whereas a rider or blanket policy could be exhausted when a contractor needs it most.

#### **4) Assessing Hazardous Materials Exposure**

##### **i) Projects**

Projects with hazardous materials exposures contain uncertain risks. Still, it is possible to assess the probability that a hazardous material exposure will materialize by considering the amount and severity of the hazard, the contractual responsibility for addressing the hazard, the strength of available indemnification, insurance protection and other factors. Whenever possible, contractors should avoid scenarios where they do not anticipate encountering hazardous materials and fail to secure the contractual right to stop work and avoid the contamination.

Many construction projects are located at sites on the National Priorities List.<sup>40</sup> The NPL is a list of hazardous waste sites that are eligible for long term remediation financed under the Superfund. EPA regulations outline the process for assessing hazardous waste sites and placing them on the NPL. The NPL contains many military installations and industrial properties. Traditionally, many contractors have been reluctant to build projects at NPL sites because of the potential environmental liability associated with these types of projects.<sup>41</sup> However, there are some benefits to an NPL site: (i) Usually EPA has studied the site in detail and knows the type of contamination present and its location; (ii) Many NPL sites, especially military sites, are massive and owners can locate their projects away from areas of contamination; and (iii) a remediation plan is probably already in place, and the site may already be clean. Therefore, before a project is rejected because of its NPL status, due consideration should be given to the proposed project in relation to the known contamination and the status of the cleanup activities.

In one sense, working at an NPL site can be an advantage because the hazards are quantified and extensively documented. On the other hand, NPL status raises the possibility that the contractor will encounter hazardous materials, and it is highly unlikely that a court would accept that a contractor working at an NPL site was surprised to find contaminants. As such, it is much more important for contractors to have adequate contractual protections.

Contractors that work at NPL sites should require written confirmation from the owner that the project is located in a clean area of the site.<sup>42</sup> If the contractor encounters hazardous materials, the contractor should have the right to stop

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<sup>40</sup> NPL Link: [www.epa.gov/superfund/sites/npl/npl.htm](http://www.epa.gov/superfund/sites/npl/npl.htm).

<sup>41</sup> References to projects at NPL sites are meant to describe new construction or redevelopment, not remediation work.

<sup>42</sup> Ideally, the underlying construction contract should include a clause similar to the following:

work. Finally, the owner should acknowledge its responsibility for all preexisting hazardous materials, and the owner should indemnify the contractor against any exposure that may result from encountering such hazardous materials.

If a contractor enters into a contract on an NPL site that involves limited hazardous materials exposure (i.e. moving a small amount of contaminated soil), the risk may be minor, insurable, and adequately handled contractually, but the contractor should not forget that it cannot escape potential liability entirely. These types of projects pose significant risks, and should be approached very cautiously.

Regardless of a site's superfund status, Contractors should take steps to address hazardous materials exposures because CERCLA liability is always a risk. Many projects involve remediation of material such as lead paint, or the demolition of structures that contain PCB's or asbestos. Ideally, project owners will remove such substances under separate contracts. However, if contractors must handle hazardous materials as part of their overall scope of work, they should seek good contractual protection. Furthermore, they should have a thorough understanding of the materials to be handled, appropriate pollution insurance coverage, adequate financial strength, technical expertise and experience. Frequently, general contractors subcontract remediation work to third parties. These subcontractors should be thoroughly vetted, and at a minimum, general contractors should ensure that these subcontractors hold all necessary licenses, carry appropriate insurance and have the ability to provide performance bonds for the work they agree to perform.

Perhaps the most concerning projects are those where no one expects hazardous materials, and the contractor is responsible for all site conditions, including any hazardous materials. In this scenario, if a contractor encounters hazardous materials, the contractor must choose between breaching the contract (to avoid handling the hazardous material), or assuming responsibility for the handling and disposal of the materials, which entails potentially immeasurable liability.

## **ii) Other Contractual Provisions**

Generally, transportation of hazardous materials requires the execution of special shipping manifests. These documents specify the party that is responsible for the hazardous materials. The responsible party is the "generator" of the hazardous materials. Contractors should not execute agreements that require them to sign hazardous materials manifests, nor should contractors agree to assume generator or co-generator status. Project owners should sign all hazardous materials manifests, and ideally, the construction contract should specify the project owner as the generator of all preexisting hazardous materials at the site.

## **iii) Bond Forms**

No matter how remote the risk, on projects that could give rise to CERCLA liability, some surety companies may not wish to assume the role of a completing contractor. Generally, this reluctance stems from a desire to avoid potentially unknowable and unquantifiable costs and losses associated with CERCLA liability. Therefore, on a project with CERCLA risks, some surety companies may settle valid performance claims by either paying the cost to complete or, in worst case scenarios, paying the full bond penalties.

For projects with environmental risks, many sureties will review the performance bond to ensure that they can discharge their obligations without assuming the role of a completing contractor. The bond form must give the surety the ability to settle claims by paying the bond penalty or the cost to complete the project. Some bond forms require sureties to complete projects or give the owner the right to dictate the surety's actions. Many sureties will object to such forms on any project, but such forms will certainly cause sureties to object on a project with a hazardous materials component.

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Owner and Contractor recognize that the Project is located within the confines of an NPL site. Notwithstanding the NPL designation, Owner warrants, represents and decrees that the portion of the site upon which the Project is located is free from hazardous materials.

There is no "magic language" that a contractor must include, and the above clause is only a suggestion. Ultimately, the contractor's goal is to get the project owner to make a statement regarding the absence of preexisting hazardous materials at the site.

## 5) Conclusion

Hazardous materials liability under CERCLA poses a significant risk to contractors and their sureties. More often than not, project owners try to shift hazardous materials risks to contractors. Often times, contractors try to shift these risks downstream, but it is important to remember that contractors cannot shed their potential CERCLA liability by subcontracting hazardous materials work to third parties. Subcontracting merely places the contractor into the category of an "Arranger" under CERCLA. As such, contractors should seek complete indemnification from owners for hazardous materials risks. This goal is becoming increasingly difficult to achieve. Nonetheless, contractors should seek indemnification, but they must also be prepared to address those situations when they cannot get an owner's indemnity.



## APPENDIX A

In addition to CERCLA and SARA, there are many other federal, environmental statutes that apply to contractors and construction activities. The following table summarizes some of these statutes. Additional information is located on the EPA's webpage. See, <http://www.epa.gov/> and/or <http://cfpub.epa.gov/compliance/resources/publications/assistance/sectors/construction/index.cfm>

STATUTE	DESCRIPTION
<b>Clean Air Act</b> ("CAA")	<p>The Clean Air Act regulates emissions from area, stationary, and mobile sources and authorizes EPA to establish National Ambient Air Quality Standards ("NAAQS"). Some states have their own versions of the Clean Air Act, which are more stringent than Federal statutes.</p> <p><b>Link:</b> <a href="http://www.access.gpo.gov/uscode/title42/chapter85_.html">www.access.gpo.gov/uscode/title42/chapter85_.html</a></p>
<b>Emergency Planning and Community Right-to-Know Act</b> ("EPCRA")	<p>EPCRA requires each state to create action plans to address hazardous material releases. EPCRA also requires regulates materials safety data sheets.</p> <p><b>Link:</b> <a href="http://www.access.gpo.gov/uscode/title42/chapter116_.html">www.access.gpo.gov/uscode/title42/chapter116_.html</a></p>
<b>Endangered Species Act</b> ("ESA")	<p>The U.S. Fish and Wildlife Service implements the ESA in conjunction with state entities. The ESA authorizes Fish and Wildlife to list species as either "endangered" or "threatened," and prohibits unauthorized taking (hunting, trapping, etc.), possession, sale, and transport of endangered species. The ESA contains a citizen suit provision that allows citizens to sue the government to enforce the law.</p> <p><b>Link:</b> <a href="http://epw.senate.gov/esa73.pdf">http://epw.senate.gov/esa73.pdf</a></p>
<b>Federal Water Pollution Control Act</b> ("Clean Water Act")	<p>The Clean Water Act regulates point source and non-point source discharges into the navigable U.S. waters. A factory's wastewater discharge pipe is an example of a "point source." Examples of "non-point sources" include feedlots or mining operations where pollutants enter waterways through seepage rather than an identifiable point.</p> <p><b>Link:</b> <a href="http://www.access.gpo.gov/uscode/title33/chapter26_.html">www.access.gpo.gov/uscode/title33/chapter26_.html</a></p>
<b>National Environmental Policy Act</b> ("NEPA")	<p>The National Environmental Policy Act applies to federally funded projects and projects that require Federal oversight or approval. Prior to taking any "major" or "significant" action, the Act requires Federal agencies to consider environmental impacts and mandates the preparation of Environmental Impact Statements ("EIS").</p> <p><b>Link:</b> <a href="http://ceq.eh.doe.gov/nepa/regs/nepa/nepaeqia.htm">http://ceq.eh.doe.gov/nepa/regs/nepa/nepaeqia.htm</a></p>

STATUTE	DESCRIPTION
<b>Oil Pollution Act</b> <b>("OPA")</b>	<p>The Oil Pollution Act of 1990 strengthened the EPA's ability to prevent and respond to catastrophic oil spills. The OPA requires oil storage facilities and vessels to comply with Federal spill response plans. The OPA also requires development of Area Contingency Plans that govern regional spill responses.</p> <p><b>Link:</b> <a href="http://www.access.gpo.gov/uscode/title33/chapter40_.html">www.access.gpo.gov/uscode/title33/chapter40_.html</a></p>
<b>Resource Conservation and Recovery Act</b> <b>("RCRA")</b>	<p>Under RCRA, the EPA has authority to control generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also created a framework for the management of non-hazardous wastes.</p> <p><b>Link:</b> <a href="http://www.access.gpo.gov/uscode/title42/chapter82_.html">www.access.gpo.gov/uscode/title42/chapter82_.html</a></p>
<b>Toxic Substances Control Act</b> <b>("TSCA")</b>	<p>The Toxic Substances Control Act gave the EPA the ability to track industrial chemicals produced domestically and imported into the U.S. If necessary, the EPA can ban the manufacture and importation of chemicals that pose an unreasonable risk to the environment or human health.</p> <p><b>Link:</b> <a href="http://www.access.gpo.gov/uscode/title15/chapter53_.html">http://www.access.gpo.gov/uscode/title15/chapter53_.html</a></p>