No. 24-5565

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, and THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, and the STATE OF WASHINGTON,

Plaintiff-Appellant,

v.

TECK COMINCO METALS LTD., a Canadian corporation,

Defendant-Appellee,

On Appeal from the United States District Court
for the Eastern District of Washington
No. 2:04-cv-00256-SAB
Hon. Stanley Bastian

ADDENDUM

Paul J. Dayton, WSBA #12619
Daniel J. Vecchio, WSBA #44632
Daniel F. Shickich, WSBA #46479
Alexandrea M. Smith, WSBA #57460
OGDEN MURPHY WALLACE, P.L.L.C.
701 Fifth Avenue, Suite 5600
Seattle, Washington 98104
206-447-7000

Attorneys for Appellant The Confederated Tribes of the Colville Reservation

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§9601. Definitions

For purpose of this subchapter-

(1) The term "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(2) The term "Administrator" means the Administrator of the United States Environmental Protection Agency.

(3) The term "barrel" means forty-two United States gallons at sixty degrees Fahrenheit.

(4) The term "claim" means a demand in writing for a sum certain.

(5) The term "claimant" means any person who presents a claim for compensation under this chapter.

(6) The term "damages" means damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title.

(7) The term "drinking water supply" means any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act [42 U.S.C. 300f et seq.]) or as drinking water by one or more individuals.

(8) The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(9) The term "facility" means (A) 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, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

(10) The term "federally permitted release" means (A) discharges in compliance with a permit under section 402 of the Federal Water Pollution Control Act [33 U.S.C. 1342], (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 402 of the Federal Water Pollution Control Act and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the Federal Water Pollution Control Act, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 404 of the Federal Water Pollution Control Act [33 U.S.C. 1344], (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 U.S.C. 6925(a)–(d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 1412 of title 33 of [1] section 1413 of title 33, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act [42 U.S.C. 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C. 7411], section 112 [42 U.S.C. 7412], title I part C [42 U.S.C. 7470 et seq.], title I part D [42 U.S.C. 7501 et seq.], or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C. 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production

of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 307(b) or (c) of the Clean Water Act [33 U.S.C. 1317(b), (c)] and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 402 of such Act [33 U.S.C. 1342], and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.], in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

(11) The term "Fund" or "Trust Fund" means the Hazardous Substance Superfund established by section 9507 of title 26.

(12) The term "ground water" means water in a saturated zone or stratum beneath the surface of land or water.

(13) The term "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this chapter.

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1321(b)(2)(A)], (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 section 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).

(15) The term "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas.

(16) The term "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.]), any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

(17) The term "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.

(18) The term "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States.

(19) The term "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party.

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

(B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

(C) In the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a

State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

(E) Exclusion of certain alaska native villages and native corporations.-

(i) In general.-The term "owner or operator" does not include, with respect to a facility conveyed to a Native village or Native Corporation (as those terms are defined in section 3 of the Alaska Native Claims Settlement Act [43 U.S.C. 1602]) under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]-

(I) the Native village or Native Corporation that received the facility from the United States Government; or

(II) a successor in interest to which the facility was conveyed under section 14(c) of such Act [43 U.S.C. 1613(c)].

(ii) Limitation.-The exclusion provided under this subparagraph shall not apply to any entity described in clause (i) that causes or contributes to a release or threatened release of a hazardous substance from the facility conveyed as described in such clause.

(F) Exclusion of lenders not participants in management.-

(i) Indicia of ownership to protect security.-The term "owner or operator" does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.

(ii) Foreclosure.-The term "owner or operator" does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person-

(I) forecloses on the vessel or facility; and

(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a response action under section 9607(d)(1) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,

if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(G) Participation in management.-For purposes of subparagraph (F)-

(i) the term "participate in management"-

(I) means actually participating in the management or operational affairs of a vessel or facility; and

(II) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations;

(ii) a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility shall be considered to participate in management only if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person-

(I) exercises decisionmaking control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or

(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility-

(aa) for the overall management of the vessel or facility encompassing day-to-day decisionmaking with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance;

(iii) the term "participate in management" does not include performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility; and

(iv) the term "participate in management" does not include-

(I) holding a security interest or abandoning or releasing a security interest;

(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(IV) monitoring or undertaking 1 or more inspections of the vessel or facility;

(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(IX) conducting a response action under section 9607(d) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan,

if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).

(H) OTHER TERMS.-As used in this chapter:

(i) EXTENSION OF CREDIT.-The term "extension of credit" includes a lease finance transaction-

(I) in which the lessor does not initially select the leased vessel or facility and does not during the lease term control the daily operations or maintenance of the vessel or facility; or

(II) that conforms with regulations issued by the appropriate Federal banking agency or the appropriate State bank supervisor (as those terms are defined in section 1813 of title 12) or with regulations issued by the National Credit Union Administration Board, as appropriate.

(ii) FINANCIAL OR ADMINISTRATIVE FUNCTION.-The term "financial or administrative function" includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

(iii) FORECLOSURE; FORECLOSE.-The terms "foreclosure" and "foreclose" mean, respectively, acquiring, and to acquire, a vessel or facility through-

(I)(aa) purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;

(bb) a deed in lieu of foreclosure, or similar conveyance from a trustee; or

(cc) repossession,

if the vessel or facility was security for an extension of credit previously contracted;

(II) conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

(III) any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a vessel or facility in order to protect the security interest of the person.

(iv) LENDER.-The term "lender" means-

(I) an insured depository institution (as defined in section 1813 of title 12);

(II) an insured credit union (as defined in section 1752 of title 12);

(III) a bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.);

(IV) a leasing or trust company that is an affiliate of an insured depository institution;

(V) any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

(VI) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;

(VII) a person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and

(VIII) a person that provides title insurance and that acquires a vessel or facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

(v) OPERATIONAL FUNCTION.-The term "operational function" includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

(vi) SECURITY INTEREST.-The term "security interest" includes a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

(22) The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42

U.S.C. 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

(23) The terms "remove" or "removal" means [2] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.].

(24) The terms "remedy" or "remedial action" means [2] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means [2] remove, removal, remedy, and remedial action;,[3] all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

(26) The terms "transport" or "transportation" means [2] the movement of a hazardous substance by any mode, including a hazardous liquid pipeline facility (as defined in section 60101(a) of title 49), and in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier, the term "transport" or "transportation" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance.

(27) The terms "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

(28) The term "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

(29) The terms "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. 6903].

(30) The terms "territorial sea" and "contiguous zone" shall have the meaning provided in section 502 of the Federal Water Pollution Control Act [33 U.S.C. 1362].

(31) The term "national contingency plan" means the national contingency plan published under section 311(c) [4] of the Federal Water Pollution Control Act or revised pursuant to section 9605 of this title.

(32) The terms "liable" or "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act [33 U.S.C. 1321].

(33) The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; except that the term "pollutant or contaminant" shall 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 paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

(34) The term "alternative water supplies" includes, but is not limited to, drinking water and household water supplies.

(35)(A) The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

(B) REASON TO KNOW.-

(i) ALL APPROPRIATE INQUIRIES.-To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that-

(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

(II) the defendant took reasonable steps to-

(aa) stop any continuing release;

(bb) prevent any threatened future release; and

(cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

(ii) STANDARDS AND PRACTICES.-Not later than 2 years after January 11, 2002, the Administrator shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under clause (i).

(iii) CRITERIA.-In promulgating regulations that establish the standards and practices referred to in clause (ii), the Administrator shall include each of the following:

(I) The results of an inquiry by an environmental professional.

(II) Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.

(III) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.

(IV) Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.

(V) Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.

(VI) Visual inspections of the facility and of adjoining properties.

(VII) Specialized knowledge or experience on the part of the defendant.

(VIII) The relationship of the purchase price to the value of the property, if the property was not contaminated.

(IX) Commonly known or reasonably ascertainable information about the property.

(X) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

(iv) INTERIM STANDARDS AND PRACTICES.-

(I) PROPERTY PURCHASED BEFORE MAY 31, 1997.-With respect to property purchased before May 31, 1997, in making a determination with respect to a defendant described in clause (i), a court shall take into account-

(aa) any specialized knowledge or experience on the part of the defendant;

(bb) the relationship of the purchase price to the value of the property, if the property was not contaminated;

(cc) commonly known or reasonably ascertainable information about the property;

(dd) the obviousness of the presence or likely presence of contamination at the property; and

(ee) the ability of the defendant to detect the contamination by appropriate inspection.

(II) PROPERTY PURCHASED ON OR AFTER MAY 31, 1997.-With respect to property purchased on or after May 31, 1997, and until the Administrator promulgates the regulations described in clause (ii), the procedures of the American Society for Testing and Materials, including the document known as "Standard E1527–97", entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process", shall satisfy the requirements in clause (i).

(v) SITE INSPECTION AND TITLE SEARCH.-In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

(36) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(37)(A) The term "service station dealer" means any person-

(i) who owns or operates a motor vehicle service station, filling station, garage, or similar retail establishment engaged in the business of selling, repairing, or servicing motor vehicles, where a significant percentage of the gross revenue of the establishment is derived from the fueling, repairing, or servicing of motor vehicles, and

(ii) who accepts for collection, accumulation, and delivery to an oil recycling facility, recycled oil that (I) has been removed from the engine of a light duty motor vehicle or household appliances by the owner of such vehicle or appliances, and (II) is presented, by such owner, to such person for collection, accumulation, and delivery to an oil recycling facility.

(B) For purposes of section 9614(c) of this title, the term "service station dealer" shall, notwithstanding the provisions of subparagraph (A), include any government agency that establishes a facility solely for the purpose of accepting recycled oil that satisfies the criteria set forth in subclauses (I) and (II) of subparagraph (A)(ii), and, with respect to recycled oil that satisfies the criteria set forth in subclauses (I) and (II), owners or operators of refuse collection services who are compelled by State law to collect, accumulate, and deliver such oil to an oil recycling facility.

(C) The President shall promulgate regulations regarding the determination of what constitutes a significant percentage of the gross revenues of an establishment for purposes of this paragraph.

(38) The term "incineration vessel" means any vessel which carries hazardous substances for the purpose of incineration of such substances, so long as such substances or residues of such substances are on board.

(39) BROWNFIELD SITE.-

(A) IN GENERAL.-The term "brownfield site" means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

(B) EXCLUSIONS.-The term "brownfield site" does not include-

(i) a facility that is the subject of a planned or ongoing removal action under this subchapter;

(ii) a facility that is listed on the National Priorities List or is proposed for listing;

(iii) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties under this chapter;

(iv) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties, or a facility to which a permit has been issued by the United States or an authorized State under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1321) [33 U.S.C. §1251 et seq.], the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

(v) a facility that-

(I) is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u), 6928(h)); and

(II) to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;

(vi) a land disposal unit with respect to which-

(I) a closure notification under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted; and

(II) closure requirements have been specified in a closure plan or permit;

(vii) a facility that is subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe;

(viii) a portion of a facility-

(I) at which there has been a release of polychlorinated biphenyls; and

(II) that is subject to remediation under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); or

(ix) a portion of a facility, for which portion, assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of title 26.

(C) SITE-BY-SITE DETERMINATIONS.-Notwithstanding subparagraph (B) and on a site-by-site basis, the President may authorize financial assistance under section 9604(k) of this title to an eligible entity at a site included in clause (i), (iv), (v), (vi), (viii), or (ix) of subparagraph (B) if the President finds that financial assistance will protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

(D) ADDITIONAL AREAS.-For the purposes of section 9604(k) of this title, the term "brownfield site" includes a site that-

(i) meets the definition of "brownfield site" under subparagraphs (A) through (C); and

(ii)(I) is contaminated by a controlled substance (as defined in section 802 of title 21);

(II)(aa) is contaminated by petroleum or a petroleum product excluded from the definition of "hazardous substance" under this section; and

(bb) is a site for which there is no viable responsible party and that is determined by the Administrator or the State, as appropriate, to be a site that will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleaning up the site under this chapter or any other law pertaining to the cleanup of petroleum products; and

(cc) is not subject to any order issued under section 9003(h) of the Solid Waste Disposal Act (42 U.S.C. 6991b(h)); or

(III) is mine-scarred land.

(40) BONA FIDE PROSPECTIVE PURCHASER.-

(A) IN GENERAL.-The term "bona fide prospective purchaser" means, with respect to a facility-

(i) a person who-

(I) acquires ownership of the facility after January 11, 2002; and

(II) establishes by a preponderance of the evidence each of the criteria described in clauses (i) through (viii) of subparagraph (B); and

(ii) a person-

(I) who acquires a leasehold interest in the facility after January 11, 2002;

(II) who establishes by a preponderance of the evidence that the leasehold interest is not designed to avoid liability under this chapter by any person; and

(III) with respect to whom any of the following conditions apply:

(aa) The owner of the facility that is subject to the leasehold interest is a person described in clause (i).

(bb)(AA) The owner of the facility that is subject to the leasehold interest was a person described in clause (i) at the time the leasehold interest was acquired, but can no longer establish by a preponderance of the evidence each of the criteria described in clauses (i) through (viii) of subparagraph (B) due to circumstances unrelated to any action of the person who holds the leasehold interest; and

(BB) the person who holds the leasehold interest establishes by a preponderance of the evidence each of the criteria described in clauses (i), (iii), (iv), (v), (vi), (vii), and (viii) of subparagraph (B).

(cc) The person who holds the leasehold interest establishes by a preponderance of the evidence each of the criteria described in clauses (i) through (viii) of subparagraph (B).

(B) CRITERIA.-The criteria described in this subparagraph are as follows:

(i) DISPOSAL PRIOR TO ACQUISITION.-All disposal of hazardous substances at the facility occurred before the person acquired the facility.

(ii) INQUIRIES.-

(I) IN GENERAL.-The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with subclauses (II) and (III).

(II) STANDARDS AND PRACTICES.-The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) shall be considered to satisfy the requirements of this clause.

(III) RESIDENTIAL USE.-In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this clause.

(iii) NOTICES.-The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.

(iv) CARE.-The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to-

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

(v) COOPERATION, ASSISTANCE, AND ACCESS.-The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).

(vi) INSTITUTIONAL CONTROL.-The person-

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.

(vii) REQUESTS; SUBPOENAS.-The person complies with any request for information or administrative subpoena issued by the President under this chapter.

(viii) NO AFFILIATION.-The person is not-

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through-

(aa) any direct or indirect familial relationship; or

(bb) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed, by a tenancy, by the instruments by which a leasehold interest in the facility is created, or by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable.

(41) ELIGIBLE RESPONSE SITE.-

(A) IN GENERAL.-The term "eligible response site" means a site that meets the definition of a brownfield site in subparagraphs (A) and (B) of paragraph (39), as modified by subparagraphs (B) and (C) of this paragraph.

(B) INCLUSIONS.-The term "eligible response site" includes-

(i) notwithstanding paragraph (39)(B)(ix), a portion of a facility, for which portion assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of title 26; or

(ii) a site for which, notwithstanding the exclusions provided in subparagraph (C) or paragraph (39)(B), the President determines, on a site-by-site basis and after consultation with the State, that limitations on enforcement under section 9628 of this title at sites specified in clause (iv), (v), (vi) or (viii) of paragraph (39)(B) would be appropriate and will-

(I) protect human health and the environment; and

(II) promote economic development or facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes.

(C) EXCLUSIONS.-The term "eligible response site" does not include-

(i) a facility for which the President-

(I) conducts or has conducted a preliminary assessment or site inspection; and

(II) after consultation with the State, determines or has determined that the site obtains a preliminary score sufficient for possible listing on the National Priorities List, or that the site otherwise qualifies for listing on the National Priorities List; unless the President has made a determination that no further Federal action will be taken; or

(ii) facilities that the President determines warrant particular consideration as identified by regulation, such as sites posing a threat to a sole-source drinking water aquifer or a sensitive ecosystem.

(Pub. L. 96–510, title I, §101, Dec. 11, 1980, 94 Stat. 2767 ; Pub. L. 96–561, title II, §238(b), Dec. 22, 1980, 94 Stat. 3300 ; Pub. L. 99–499, title I, §§101, 114(b), 127(a), title V, §517(c)(2), Oct. 17, 1986, 100 Stat. 1615 , 1652, 1692, 1774; Pub. L. 100–707, title I, §109(v), Nov. 23, 1988, 102 Stat. 4710 ; Pub. L. 103–429, §7(e)(1), Oct. 31, 1994, 108 Stat. 4390 ; Pub. L. 104–208, div. A, title I, §101(a) [title II, §211(b)], title II, §2502(b), Sept. 30, 1996, 110 Stat. 3009 , 3009-41, 3009-464; Pub. L. 104–287, §6(j)(1), Oct. 11, 1996, 110 Stat. 3399 ; Pub. L. 106–74, title IV, §427, Oct. 20, 1999, 113 Stat. 1095 ; Pub. L. 107–118, title II, §§211(a), 222(a), 223, 231(a), Jan. 11, 2002, 115 Stat. 2360 , 2370, 2372, 2375; Pub. L. 115–141, div. N, §§2–5(a), Mar. 23, 2018, 132 Stat. 1052 , 1053.)

Editorial Notes

References in Text

This chapter, referred to in pars. (5), (13), (20)(D), (G), (35)(C), (D), (39)(B)(iii), (D)(ii)(II)(bb), and (40)(A)(ii)(II), (B)(vii), was in the original "this Act", meaning Pub. L. 96–510, Dec. 11, 1980, 94 Stat. 2767 , known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. For complete classification of this Act to the Code, see Short Title note below and Tables.

The Safe Drinking Water Act, referred to in pars. (7), (10), and (39)(B)(iv), is title XIV of act July 1, 1944, as added Dec. 16, 1974, Pub. L. 93–523, §2(a), 88 Stat. 1660 , as amended, which is classified generally to subchapter XII (§300f et seq.) of chapter 6A of this title. Part C of the Safe Drinking Water Act is classified generally to part C (§300h et seq.) of subchapter XII of chapter 6A of this title. For complete classification of this Act to the Code, see Short Title note set out under section 201 of this title and Tables.

The Magnuson-Stevens Fishery Conservation and Management Act, referred to in pars. (8) and (16), is Pub. L. 94–265, Apr. 13, 1976, 90 Stat. 331 , which is classified principally to chapter 38 (§1801 et seq.) of Title 16, Conservation. The fishery conservation zone established by this Act, referred to in par. (16), was established by section 101 of this Act (16 U.S.C. 1811), which as amended generally by Pub. L. 99–659, title I, §101(b), Nov. 14, 1986, 100 Stat. 3706 , relates to United States sovereign rights and fishery management authority over fish within the exclusive economic zone as defined in section 1802 of Title 16. For complete classification of this Act to the Code, see Short Title note set out under section 1801 of Title 16 and Tables.

The Clean Air Act, referred to in par. (10), is act July 14, 1955, ch. 360, as amended generally by Pub. L. 88–206, Dec. 17, 1963, 77 Stat. 392 , and later by Pub. L. 95–95, Aug. 7, 1977, 91 Stat. 685 . The Clean Air Act was originally classified to chapter 15B (§1857 et seq.) of this title. On enactment of Pub. L. 95–95, the Act was reclassified to chapter 85 (§7401 et seq.) of this title. Parts C and D of title I of the Clean Air Act are classified generally to parts C (§7470 et seq.) and D (§7501 et seq.), respectively, of subchapter I of chapter 85 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of this title and Tables.

The Atomic Energy Act of 1954, referred to in pars. (10) and (22), is act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, §1, 68 Stat. 919 , which is classified principally to chapter 23 (§2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

The Solid Waste Disposal Act, referred to in pars. (14), (39)(B)(iv), (vi)(I), (ix), and (41)(B)(i), is title II of Pub. L. 89–272, Oct. 20, 1965, 79 Stat. 997 , as amended generally by Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2795 , which is classified generally to chapter 82 (§6901 et seq.) of this title. Subtitles C and I of the Act are classified generally to subchapters III (§6921 et seq.) and IX (§6991 et seq.), respectively, of chapter 82 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

The Alaska Native Claims Settlement Act, referred to in par. (20)(E), is Pub. L. 92–203, Dec. 18, 1971, 85 Stat. 688 , which is classified generally to chapter 33 (§1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.

The Farm Credit Act of 1971, referred to in par. (20)(H)(iv)(III), is Pub. L. 92–181, Dec. 10, 1971, 85 Stat. 583 , which is classified generally to chapter 23 (§2001 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see Short Title note set out under section 2001 of Title 12 and Tables.

The Disaster Relief and Emergency Assistance Act, referred to in par. (23), is Pub. L. 93–288, May 22, 1974, 88 Stat. 143 , known as the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which is classified principally to chapter 68 (§5121 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5121 of this title and Tables.

The Federal Water Pollution Control Act, referred to in pars. (31) and (39)(B)(iv), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 816 , also known as the Clean Water Act, which is classified generally to chapter 26 (§1251 et seq.) of Title 33, Navigation and Navigable Waters. Section 311(c) of the Act was amended generally by Pub. L. 101–380, title IV, §4201(a), Aug. 18, 1990, 104 Stat. 523 , and no longer contains provisions directing the publishing of a National Contingency

Plan. However, such provisions are contained in section 1321(d) of Title 33. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The Toxic Substances Control Act, referred to in par. (39)(B)(iv), (viii)(II), is Pub. L. 94–469, Oct. 11, 1976, 90 Stat. 2003 , which is classified generally to chapter 53 (§2601 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of Title 15 and Tables.

Amendments

2018-Par. (20)(D). Pub. L. 115–141, §2, substituted "ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by virtue" for "ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue".

Par. (20)(E), (F). Pub. L. 115–141, §3(1), (2), added subpar. (E) and redesignated former subpar. (E) as (F). Former subpar. (F) redesignated (G).

Par. (20)(G). Pub. L. 115–141, §3(1), (3), redesignated subpar. (F) as (G) and substituted "subparagraph (F)" for "subparagraph (E)" in introductory provisions. Former subpar. (G) redesignated (H).

Par. (20)(H). Pub. L. 115–141, §3(1), (4), redesignated subpar. (G) as (H) and substituted "of title 12) or" for "of title 12 or" in cl. (i)(II).

Par. (39)(D)(ii)(II)(bb). Pub. L. 115–141, §4, amended item (bb) generally. Prior to amendment, item (bb) read as follows: "is a site determined by the Administrator or the State, as appropriate, to be-

"(AA) of relatively low risk, as compared with other petroleum-only sites in the State; and

"(BB) a site for which there is no viable responsible party and which will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleaning up the site; and".

Par. (40). Pub. L. 115–141, §5(a), made numerous amendments to structure of par. (40), resulting in substitution of subpar. (A) for former introductory provisions, insertion of subpar. (B) designation, heading, and introductory provisions, redesignation of former subpars. (A) to (H) as cls. (i) to (viii), respectively, of subpar. (B), redesignation of cls. and subcls. within former subpars. (A) to (H) as subcls. and items, respectively, within cls. (i) to (viii), and realignment of margins.

Par. (40)(B). Pub. L. 115–141, §5(a)(1)(B)–(D), just prior to redesignation of subpar. (B) as cl. (ii) of subpar. (B), substituted "subclauses (II) and (III)" for "clauses (ii) and (iii)" in subcl. (I) and "clause" for "subparagraph" in subcls. (II) and (III).

Par. (40)(H)(i)(II). Pub. L. 115–141, §5(a)(4)(A)(i), just prior to redesignation of subpar. (H)(i)(II) as cl. (viii)(I)(bb) of subpar. (B), inserted ", by a tenancy, by the instruments by which a leasehold interest in the facility is created," after "financed".

2002-Par. (35)(A). Pub. L. 107–118, §223(1), in introductory provisions substituted "deeds, easements, leases, or" for "deeds or" and in concluding provisions substituted "the defendant has satisfied" for "he has satisfied" and inserted before period at end ", provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action".

Par. (35)(B). Pub. L. 107–118, §223(2), added subpar. (B) and struck out former subpar. (B) which read as follows: "To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection."

Par. (39). Pub. L. 107–118, §211(a), added par. (39).

Par. (40). Pub. L. 107–118, §222(a), added par. (40).

Par. (41). Pub. L. 107–118, §231(a), added par. (41).

1999-Par. (20)(D). Pub. L. 106–74, which directed the amendment of subpar. (D) by inserting "through seizure or otherwise in connection with law enforcement activity" before "involuntary" the first place it appears, could not be executed because the word "involuntary" does not appear in subpar. (D).

1996-Pars. (8), (16). Pub. L. 104–208, §101(a) [title II, §211(b)], substituted "Magnuson-Stevens Fishery" for "Magnuson Fishery".

Par. (20)(E) to (G). Pub. L. 104–208, §2502(b), added subpars. (E) to (G).

Par. (26). Pub. L. 104–287 substituted "section 60101(a) of title 49" for "the Pipeline Safety Act".

1994-Par. (26). Pub. L. 103–429 substituted "a hazardous liquid pipeline facility" for "pipeline".

1988-Par. (23). Pub. L. 100–707 substituted "Disaster Relief and Emergency Assistance Act" for "Disaster Relief Act of 1974".

1986-Pub. L. 99–499, §101(f), struck out ", the term" after "subchapter" in introductory text.

Pars. (1) to (10). Pub. L. 99–499, §101(f), inserted "The term" and substituted a period for the semicolon at end.

Par. (11). Pub. L. 99–499, §517(c)(2), amended par. (11) generally. Prior to amendment, par. (11) read as follows: "The term 'Fund' or 'Trust Fund' means the Hazardous Substance Response Fund established by section 9631 of this title or, in the case of a hazardous waste disposal facility for which liability has been transferred under section 9607(k) of this title, the Post-closure Liability Fund established by section 9641 of this title."

Pub. L. 99–499, §101(f), inserted "The term" and substituted a period for the semicolon at end.

Pars. (12) to (15). Pub. L. 99–499, §101(f), inserted "The term" and substituted a period for the semicolon at end.

Par. (16). Pub. L. 99–499, §101(a), (f), inserted "The term", struck out "or" after "local government," inserted ", any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe", and substituted a period for the semicolon at end.

Pars. (17) to (19). Pub. L. 99–499, §101(f), inserted "The term" and substituted a period for the semicolon at end.

Par. (20)(A). Pub. L. 99–499, §101(f), inserted "The term".

Pub. L. 99–499, §101(b)(2), amended cl. (iii) generally. Prior to amendment, cl. (iii) read as follows: "in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment."

Pub. L. 99–499, §101(b)(3), in provisions following subcl. (iii), substituted a period for the semicolon at end.

Par. (20)(B), (C). Pub. L. 99–499, §101(b)(3), substituted "In the case" for "in the case" and a period for the semicolon at end.

Par. (20)(D). Pub. L. 99–499, §101(b)(1), (f), added subpar. (D). The part of §101(f) of Pub. L. 99–499 which directed the amendment of par. (20) by changing the semicolon at end to a period could not be executed in view of the prior amendment of par. (20) by §101(b)(1) of Pub. L. 99–499 which added subpar. (D) ending in a period.

Par. (21). Pub. L. 99–499, §101(f), inserted "The term" and substituted a period for the semicolon at end.

Par. (22). Pub. L. 99–499, §101(c), (f), inserted "The term" and "(including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)", substituted a period for the semicolon at end.

Par. (23). Pub. L. 99–499, §101(f), inserted "The terms" and substituted a period for the semicolon at end.

Par. (24). Pub. L. 99–499, §101(d), (f), inserted "The terms" and substituted "and associated contaminated materials" for "or contaminated materials" and "welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials." for "welfare. The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.], hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials;". The part of §101(f) of Pub. L. 99–499 which directed amendment of par. (24) by changing the semicolon at end to a period could not be executed in view of prior amendment of par. (24) by §101(d) of Pub. L. 99–499 which substituted language at end of par. (24) ending in a period for former language ending in a semicolon.

Par. (25). Pub. L. 99–499, §101(e), (f), inserted "The terms" and ", all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." The part of §101(f) of Pub. L. 99–499 which directed amendment of par. (25) by changing the semicolon at end to a period could not be executed in view of prior amendment of par. (25) by §101(e) of Pub. L. 99–499 inserting language and a period at end of par. (25).

Pars. (26), (27). Pub. L. 99–499, §101(f), inserted "The terms" and substituted a period for the semicolon at end.

Par. (28). Pub. L. 99–499, §101(f), inserted "The term" and substituted a period for the semicolon at end.

Par. (29). Pub. L. 99–499, §101(f), inserted "The terms" and substituted a period for the semicolon at end.

Par. (30). Pub. L. 99–499, §101(f), inserted "The terms".

Par. (31). Pub. L. 99–499, §101(f), inserted "The term" and substituted a period for "; and".

Par. (32). Pub. L. 99–499, §101(f), inserted "The terms".

Pars. (33) to (36). Pub. L. 99–499, §101(f), added pars. (33) to (36).

Par. (37). Pub. L. 99–499, §114(b), added par. (37).

Par. (38). Pub. L. 99–499, §127(a), added par. (38).

1980-Pars. (8), (16). Pub. L. 96–561 substituted "Magnuson Fishery Conservation and Management Act" for "Fishery Conservation and Management Act of 1976".

Statutory Notes and Related Subsidiaries

Effective Date of 1996 Amendment

Pub. L. 104–208, div. A, title I, §101(a) [title II, §211(b)], Sept. 30, 1996, 110 Stat. 3009 , 3009-41, provided that the amendment made by that section is effective 15 days after Oct. 11, 1996.

Amendment by section 2502(b) of Pub. L. 104–208 applicable with respect to any claim that has not been finally adjudicated as of Sept. 30, 1996, see section 2505 of Pub. L. 104–208, set out as a note under section 6991b of this title.

Effective Date of 1986 Amendment

Pub. L. 99–499, §4, Oct. 17, 1986, 100 Stat. 1614 , provided that: "Except as otherwise specified in section 121(b) of this Act [set out as an Effective Date note under section 9621 of this title] or in any other provision of titles I, II, III, and IV of this Act [see Tables for classification], the amendments made by titles I through IV of this Act [enacting subchapter IV of this chapter and sections 9616 to 9626, 9658 to 9660, and 9661 of this title and sections 2701 to 2707 and 2810 of Title 10, Armed Forces, amending sections 6926, 6928, 6991 to 6991d, 6991g, 9601 to 9609, 9611 to 9614, 9631, 9651, 9656, and 9657 of this title and section 1416 of Title 33, Navigation and Navigable Waters, and renumbering former section 2701 of Title 10 as section 2721 of Title 10] shall take effect on the enactment of this Act [Oct. 17, 1986]."

Amendment by section 517(c)(2) of Pub. L. 99–499 effective Jan. 1, 1987, see section 517(e) of Pub. L. 99–499, set out as an Effective Date note under section 9507 of Title 26, Internal Revenue Code.

Effective Date of 1980 Amendment

Pub. L. 96–561, title II, §238(b), Dec. 22, 1980, 94 Stat. 3300 , provided that the amendment made by that section is effective 15 days after Dec. 22, 1980.

Short Title of 2018 Amendment

Pub. L. 115–141, div. N, §1, Mar. 23, 2018, 132 Stat. 1052 , provided that: "This division [amending this section and sections 9604, 9607, and 9628 of this title] may be cited as the 'Brownfields Utilization, Investment, and Local Development Act of 2018' or the 'BUILD Act'."

Pub. L. 115–141, div. S, title XI, §1101, Mar. 23, 2018, 132 Stat. 1147 , provided that: "This title [amending section 9603 of this title and enacting provisions set out as a note under section 9603 of this title] may be cited as the 'Fair Agricultural Reporting Method Act' or the 'FARM Act'."

Short Title of 2002 Amendments

Pub. L. 107–118, §1, Jan. 11, 2002, 115 Stat. 2356 , provided that: "This Act [enacting section 9628 of this title, amending this section and sections 9604, 9605, 9607, and 9622 of this title, and enacting provisions set out as notes under this section and section 9607 of this title] may be cited as the 'Small Business Liability Relief and Brownfields Revitalization Act'."

Pub. L. 107–118, title I, §101, Jan. 11, 2002, 115 Stat. 2356 , provided that: "This title [amending sections 9607 and 9622 of this title and enacting provisions set out as a note under section 9607 of this title] may be cited as the 'Small Business Liability Protection Act'."

Pub. L. 107–118, title II, §201, Jan. 11, 2002, 115 Stat. 2360 , provided that: "This title [enacting section 9628 of this title and amending this section and sections 9604, 9605, and 9607 of this title] may be cited as the 'Brownfields Revitalization and Environmental Restoration Act of 2001'."

Short Title of 1996 Amendment

Pub. L. 104–208, div. A, title II, §2501, Sept. 30, 1996, 110 Stat. 3009–462 , provided that: "This subtitle [subtitle E (§§2501–2505) of title II of div. A of Pub. L. 104–208, amending this section and sections 6991b and 9607 of this title and enacting provisions set out as a note under section 6991b of this title] may be cited as the 'Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996'."

Short Title of 1992 Amendment

Pub. L. 102–426, §1, Oct. 19, 1992, 106 Stat. 2174 , provided that: "This Act [amending section 9620 of this title and enacting provisions set out as a note under section 9620 of this title] may be cited as the 'Community Environmental Response Facilitation Act'."

Short Title of 1986 Amendment

Pub. L. 99–499, §1, Oct. 17, 1986, 100 Stat. 1613 , provided that: "This Act [enacting subchapter IV of this chapter and sections 9616 to 9626, 9658 to 9662, 11001 to 11005, 11021 to 11023, and 11041 to 11050 of this title, sections 2701 to 2707 and 2810 of Title 10, Armed Forces, and sections 59A, 4671, 4672, 9507, and 9508 of Title 26, Internal Revenue Code, amending this section, sections 6926, 6928, 6991 to 6991d, 6991g, 9602 to 9609, 9611 to 9614, 9631, 9651, 9656, and 9657 of this title, sections 26, 164, 275, 936, 1561, 4041, 4042, 4081, 4221, 4611, 4612, 4661, 4662, 6154, 6416, 6420, 6421, 6425, 6427, 6655, 9502, 9503, and 9506 of Title 26, and section 1416 of Title 33, Navigation and Navigable Waters, renumbering former section 2701 of Title 10 as section 2721 of Title 10, repealing sections 9631 to 9633, 9641, and 9653 of this title and sections 4681 and 4682 of Title 26, and enacting provisions set out as notes under this section, sections 6921, 6991b, 7401, 9620, 9621, 9658, 9660, 9661, and 11001 of this title, section 2703 of Title 10, sections 1, 26, 4041, 4611, 4661, 4671, 4681, 9507, and 9508 of Title 26, and section 655 of Title 29, Labor] may be cited as the 'Superfund Amendments and Reauthorization Act of 1986'."

Short Title

Pub. L. 96–510, §1, Dec. 11, 1980, 94 Stat. 2767 , provided: "That this Act [enacting this chapter, section 6911a of this title, and sections 4611, 4612, 4661, 4662, 4681, and 4682 of Title 26, Internal Revenue Code, amending section 6911 of this title, section 1364 of Title 33, Navigation and Navigable Waters, and section 11901 of Title 49, Transportation, and enacting provisions set out as notes under section 6911 of this title and sections 1 and 4611 of Title 26] may be cited as the 'Comprehensive Environmental Response, Compensation, and Liability Act of 1980'."

Definitions

Pub. L. 99–499, §2, Oct. 17, 1986, 100 Stat. 1614 , provided that: "As used in this Act [see Short Title of 1986 Amendment note above]-

"(1) CERCLA.-The term 'CERCLA' means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.).

"(2) Administrator.-The term 'Administrator' means the Administrator of the Environmental Protection Agency."

Executive Documents

Transfer of Functions

For transfer of certain functions from Nuclear Regulatory Commission to Chairman thereof, see Reorg. Plan No. 1 of 1980, 45 F.R. 40561, 94 Stat. 3585, set out as a note under section 5841 of this title.

Territorial Sea and Contiguous Zone of United States

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

[1] *So in original. Probably should be "or".*

[2] *So in original. Probably should be "mean".*

[3] *So in original.*

[4] *See References in Text note below.*

42 USC 9607: Liability
Text contains those laws in effect on November 20, 2024

From Title 42-THE PUBLIC HEALTH AND WELFARE
CHAPTER 103-COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
SUBCHAPTER I-HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

Jump To:

§9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-

(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.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by-

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed-

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of title 49), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of title 49 or vessels subject to the provisions of title 33 or 46, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Rendering care or advice

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(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.

(f) Natural resources liability; designation of public trustees of natural resources

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging

to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: *Provided, however*, That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a), where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this title the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this chapter and such section 1321 of title 33 for those natural resources under their trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of title 33.

(g) Federal agencies

For provisions relating to Federal agencies, see section 9620 of this title.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) [1] or the absence of any physical damage to the proprietary interest of the claimant.

(i) Application of a registered pesticide product

No person (including the United States or any State or Indian tribe) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition,

costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of title 33.

(k) Transfer to, and assumption by, Post-Closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 9641 [1] of this title when-

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act [42 U.S.C. 6926(b)]) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 [1] of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 [1] of this title may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II [1] of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II [1] of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) SUSPENSION OF LIABILITY TRANSFER.-Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 9611 of this title, no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund established by section 9641 [1] of this title prior to completion of the study required under paragraph (6) of

this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) STUDY OF OPTIONS FOR POST-CLOSURE PROGRAM.-

(A) STUDY.-The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the protection of human health and the environment.

(B) PROGRAM ELEMENTS.-The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and close such facilities in a manner which assures protection of human health and the environment.

(C) ASSESSMENTS.-The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act [42 U.S.C. 6925] and the likelihood of future insolvency on the part of owners and operators of such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to-

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) PROCEDURES.-In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) CONSIDERATION OF OPTIONS.-In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (B) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to-

(i) revisions to closure, post-closure, and financial responsibility requirements under subtitles C and I of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq., 6991 et seq.];

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 9641 [1] of this title, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) RECOMMENDATIONS.-The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appropriate committees of Congress for additional authority to implement such program.

(l) Federal lien

(1) In general

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a)) shall constitute a lien in favor of the United States upon all real property and rights to such property which-

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 9613 of this title.

(3) Notice and validity

The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of title 26.

(4) Action in rem

The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) Maritime lien

All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(n) Liability of fiduciaries

(1) In general

The liability of a fiduciary under any provision of this chapter for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.

(2) Exclusion

Paragraph (1) does not apply to the extent that a person is liable under this chapter independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity.

(3) Limitation

Paragraphs (1) and (4) do not limit the liability pertaining to a release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

(4) Safe harbor

A fiduciary shall not be liable in its personal capacity under this chapter for-

(A) undertaking or directing another person to undertake a response action under subsection (d)(1) or under the direction of an on scene coordinator designated under the National Contingency Plan;

(B) undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the vessel or facility;

(C) terminating the fiduciary relationship;

(D) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

(E) monitoring or undertaking 1 or more inspections of the vessel or facility;

(F) providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

(G) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

(H) administering, as a fiduciary, a vessel or facility that was contaminated before the fiduciary relationship began; or

(I) declining to take any of the actions described in subparagraphs (B) through (H).

(5) Definitions

As used in this chapter:

(A) Fiduciary

The term "fiduciary"-

(i) means a person acting for the benefit of another party as a bona fide-

(I) trustee;
(II) executor;
(III) administrator;
(IV) custodian;
(V) guardian of estates or guardian ad litem;
(VI) receiver;
(VII) conservator;
(VIII) committee of estates of incapacitated persons;
(IX) personal representative;
(X) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or
(XI) representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in subclauses (I) through (X); and

(ii) does not include-

(I) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or
(II) a person that acquires ownership or control of a vessel or facility with the objective purpose of avoiding liability of the person or of any other person.

(B) Fiduciary capacity

The term "fiduciary capacity" means the capacity of a person in holding title to a vessel or facility, or otherwise having control of or an interest in the vessel or facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(6) Savings clause

Nothing in this subsection-

(A) affects the rights or immunities or other defenses that are available under this chapter or other law that is applicable to a person subject to this subsection; or
(B) creates any liability for a person or a private right of action against a fiduciary or any other person.

(7) No effect on certain persons

Nothing in this subsection applies to a person if the person-

(A)(i) acts in a capacity other than that of a fiduciary or in a beneficiary capacity; and
(ii) in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or
(B)(i) is a beneficiary and a fiduciary with respect to the same fiduciary estate; and
(ii) as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(8) Limitation

This subsection does not preclude a claim under this chapter against-

(A) the assets of the estate or trust administered by the fiduciary; or
(B) a nonemployee agent or independent contractor retained by a fiduciary.

(o) De micromis exemption

(1) In general

Except as provided in paragraph (2), a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under this chapter if liability is based solely on paragraph (3) or (4) of subsection (a), and the person, except as provided in paragraph (4) of this subsection, can demonstrate that-

(A) the total amount of the material containing hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation); and
(B) all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.

(2) Exceptions

Paragraph (1) shall not apply in a case in which-

(A) the President determines that-

(i) the materials containing hazardous substances referred to in paragraph (1) have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or

(ii) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility; or

(B) a person has been convicted of a criminal violation for the conduct to which the exemption would apply, and that conviction has not been vitiated on appeal or otherwise.

(3) No judicial review

A determination by the President under paragraph (2)(A) shall not be subject to judicial review.

(4) Nongovernmental third-party contribution actions

In the case of a contribution action, with respect to response costs at a facility on the National Priorities List, brought by a party, other than a Federal, State, or local government, under this chapter, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraph (1)(A) and (B) of this subsection are not met.

(p) Municipal solid waste exemption

(1) In general

Except as provided in paragraph (2) of this subsection, a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under paragraph (3) of subsection (a) for municipal solid waste disposed of at a facility if the person, except as provided in paragraph (5) of this subsection, can demonstrate that the person is-

(A) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility;

(B) a business entity (including a parent, subsidiary, or affiliate of the entity) that, during its 3 taxable years preceding the date of transmittal of written notification from the President of its potential liability under this section, employed on average not more than 100 full-time individuals, or the equivalent thereof, and that is a small business concern (within the meaning of the Small Business Act (15 U.S.C. 631 et seq.)) from which was generated all of the municipal solid waste attributable to the entity with respect to the facility; or

(C) an organization described in section 501(c)(3) of title 26 and exempt from tax under section 501(a) of such title that, during its taxable year preceding the date of transmittal of written notification from the President of its potential liability under this section, employed not more than 100 paid individuals at the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

For purposes of this subsection, the term "affiliate" has the meaning of that term provided in the definition of "small business concern" in regulations promulgated by the Small Business Administration in accordance with the Small Business Act (15 U.S.C. 631 et seq.).

(2) Exception

Paragraph (1) shall not apply in a case in which the President determines that-

(A) the municipal solid waste referred to in paragraph (1) has contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility;

(B) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter; or

(C) the person has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility.

(3) No judicial review

A determination by the President under paragraph (2) shall not be subject to judicial review.

(4) Definition of municipal solid waste

(A) In general

For purposes of this subsection, the term "municipal solid waste" means waste material-

(i) generated by a household (including a single or multifamily residence); and

(ii) generated by a commercial, industrial, or institutional entity, to the extent that the waste material-

(I) is essentially the same as waste normally generated by a household;

(II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and

(III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

(B) Examples

Examples of municipal solid waste under subparagraph (A) include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

(C) Exclusions

The term "municipal solid waste" does not include-

(i) combustion ash generated by resource recovery facilities or municipal incinerators; or

(ii) waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households.

(5) Burden of proof

In the case of an action, with respect to response costs at a facility on the National Priorities List, brought under this section or section 9613 of this title by-

(A) a party, other than a Federal, State, or local government, with respect to municipal solid waste disposed of on or after April 1, 2001; or

(B) any party with respect to municipal solid waste disposed of before April 1, 2001, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraphs (1) and (4) for exemption for entities and organizations described in paragraph (1)(B) and (C) are not met.

(6) Certain actions not permitted

No contribution action may be brought by a party, other than a Federal, State, or local government, under this chapter with respect to circumstances described in paragraph (1)(A).

(7) Costs and fees

A nongovernmental entity that commences, after January 11, 2002, a contribution action under this chapter shall be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees, if the defendant is not liable for contribution based on an exemption under this subsection or subsection (o).

(q) Contiguous properties

(1) Not considered to be an owner or operator

(A) In general

A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if-

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not-

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(iii) the person takes reasonable steps to-

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person-

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under this chapter;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) at the time at which the person acquired the property, the person-

(I) conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

(B) Demonstration

To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(C) Bona fide prospective purchaser

Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 9601(40) of this title if the person is otherwise described in that section.

(D) Ground water

With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

(2) Effect of law

With respect to a person described in this subsection, nothing in this subsection-

(A) limits any defense to liability that may be available to the person under any other provision of law; or

(B) imposes liability on the person that is not otherwise imposed by subsection (a).

(3) Assurances

The Administrator may-

(A) issue an assurance that no enforcement action under this chapter will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 9613(f) of this title.

(r) Prospective purchaser and windfall lien

(1) Limitation on liability

Notwithstanding subsection (a)(1), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the bona fide prospective purchaser being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) Lien

If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

(3) Conditions

The conditions referred to in paragraph (2) are the following:

(A) Response action

A response action for which there are unrecovered costs of the United States is carried out at the facility.

(B) Fair market value

The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

(4) Amount; duration

A lien under paragraph (2)-

(A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3); and

(D) shall continue until the earlier of-

(i) satisfaction of the lien by sale or other means; or

(ii) notwithstanding any statute of limitations under section 9613 of this title, recovery of all response costs incurred at the facility.

(Pub. L. 96–510, title I, §107, Dec. 11, 1980, 94 Stat. 2781 ; Pub. L. 99–499, title I, §§107(a)–(d)(2), (e), (f), 127(b), (e), title II, §§201, 207(c), Oct. 17, 1986, 100 Stat. 1628–1630 , 1692, 1693, 1705; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095 ; Pub. L. 103–429, §7(e)(2), Oct. 31, 1994, 108 Stat. 4390 ; Pub. L. 104–208, div. A, title II, §2502(a), Sept. 30, 1996, 110 Stat. 3009–462 ; Pub. L. 104–287, §6(j)(2), Oct. 11, 1996, 110 Stat. 3400 ; Pub. L. 107–118, title I, §102(a), title II, §§221, 222(b), Jan. 11, 2002, 115 Stat. 2356 , 2368, 2371; Pub. L. 115–141, div. N, §5(b), Mar. 23, 2018, 132 Stat. 1054 .)

Editorial Notes

References in Text

This chapter, referred to in text, was in the original "this Act", meaning Pub. L. 96–510, Dec. 11, 1980, 94 Stat. 2767 , known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 9601 of this title and Tables.

Such amendments, referred to in the last sentence of subsec. (a), probably means the amendments made by Pub. L. 99–499, Oct. 17, 1986, 100 Stat. 1613 , known as the "Superfund Amendments and Reauthorization Act of 1986". For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 9601 of this title and Tables.

Act of March 3, 1851 (46 U.S.C. 183ff), referred to in subsec. (h), is act Mar. 3, 1851, ch. 43, 9 Stat. 635 , which was incorporated into the Revised Statutes as R.S. §§4282, 4283, 4284 to 4287 and 4289, which were classified to sections 182, 183, and 184 to 188 of the former Appendix to Title 46, Shipping, prior to being repealed and restated in chapter 305 of Title 46 by Pub. L. 109–304, §§6(c), 19, Oct. 6, 2006, 120 Stat. 1509 , 1710. For disposition of sections of the former Appendix to Title 46, see Disposition Table preceding section 101 of Title 46.

The Federal Insecticide, Fungicide, and Rodenticide Act, referred to in subsec. (i), is act June 25, 1947, ch. 125, as amended generally by Pub. L. 92–516, Oct. 21, 1972, 86 Stat. 973 , which is classified generally to subchapter II (§136 et seq.) of chapter 6 of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 136 of Title 7 and Tables.

The Solid Waste Disposal Act, referred to in subsec. (k)(1), (3), (6)(E)(i), is title II of Pub. L. 89–272, Oct. 20, 1965, 79 Stat. 997 , as amended generally by Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2795 . Subtitles C and I of the Solid Waste Disposal Act are classified generally to subchapters III (§6921 et seq.) and IX (§6991 et seq.), respectively, of chapter 82 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

Section 9641 of this title, referred to in subsec. (k), was repealed by Pub. L. 99–499, title V, §514(b), Oct. 17, 1986, 100 Stat. 1767 .

Subchapter II of this chapter, referred to in subsec. (k)(4)(A) and (C), was in the original "title II of this Act", meaning title II of Pub. L. 96–510, Dec. 11, 1980, 94 Stat. 2796 , known as the Hazardous Substance Response Revenue Act of 1980, which enacted subchapter II of this chapter and sections 4611, 4612, 4661, 4662, 4681, and 4682 of Title 26, Internal Revenue Code. Sections 221 to 223 and 232 of Pub. L. 96–510, which were classified to sections 9631 to 9633 and 9641 of this title, comprising subchapter II of this chapter, were repealed by Pub. L. 99–499, title V, §§514(b), 517(c)(1), Oct. 17, 1986, 100 Stat. 1767 , 1774. For complete classification of title II to the Code, see Short Title of 1980 Amendment note set out under section 1 of Title 26 and Tables.

The Hazardous and Solid Waste Amendments of 1984, referred to in subsec. (k)(6)(A), (E), is Pub. L. 98–616, Nov. 8, 1984, 98 Stat. 3221 . For complete classification of this Act to the Code, see Short Title of 1984 Amendment note set out under section 6901 of this title and Tables.

The Small Business Act, referred to in subsec. (p)(1), is Pub. L. 85–536, §2(1 et seq.), July 18, 1958, 72 Stat. 384 , which is classified generally to chapter 14A (§631 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 631 of Title 15 and Tables.

Amendments

2018-Subsec. (r)(1). Pub. L. 115–141 substituted "bona fide prospective purchaser being considered" for "purchaser's being considered".

2002-Subsecs. (o), (p). Pub. L. 107–118, §102(a), added subsecs. (o) and (p).

Subsec. (q). Pub. L. 107–118, §221, added subsec. (q).

Subsec. (r). Pub. L. 107–118, §222(b), added subsec. (r).

1996-Subsec. (c)(1)(C). Pub. L. 104–287 substituted "section 60101(a) of title 49" for "the Hazardous Liquid Pipeline Safety Act of 1979".

Subsec. (n). Pub. L. 104–208 added subsec. (n).

1994-Subsec. (c)(1)(C). Pub. L. 103–429 substituted "hazardous liquid pipeline facility" for "pipeline".

1986-Subsec. (a). Pub. L. 99–514, in penultimate sentence, substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", which for purposes of codification was translated as "title 26" thus requiring no change in text.

Pub. L. 99–499, §107(b), inserted concluding provisions relating to accrual and rate of interest on amounts recoverable under this section.

Subsec. (a)(1). Pub. L. 99–499, §107(a), struck out "(otherwise subject to the jurisdiction of the United States)" after "vessel".

Subsec. (a)(3). Pub. L. 99–499, §127(b)(1), inserted "or incineration vessel" after "facility".

Subsec. (a)(4). Pub. L. 99–499, §§107(b), 127(b)(2), 207(c)(1), in introductory provisions, inserted ", incineration vessels" after "vessels", in subpar. (A), inserted "or an Indian tribe" after "State", and added subpar. (D).

Subsec. (c)(1)(A). Pub. L. 99–499, §127(b)(3), inserted ", other than an incineration vessel," after "vessel".

Subsec. (c)(1)(B). Pub. L. 99–499, §127(b)(4), inserted "other than an incineration vessel," after "other vessel,".

Subsec. (c)(1)(D). Pub. L. 99–499, §127(b)(5), inserted "any incineration vessel or" before "any facility".

Subsec. (d). Pub. L. 99–499, §107(c), amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: "No person shall be liable under this subchapter for damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the national contingency plan or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any release of a hazardous substance or the threat thereof. This subsection shall not preclude liability for damages as the result of gross negligence or intentional misconduct on the part of such person. For the purposes of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence."

Subsec. (f)(1). Pub. L. 99–499, §107(d)(1), designated existing provisions as par. (1) and added heading.

Pub. L. 99–499, §207(c)(2)(A), inserted "and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation" after third reference to "State".

Pub. L. 99–499, §207(c)(2)(B), inserted "or Indian tribe" after fourth reference to "State".

Pub. L. 99–499, §207(c)(2)(C), inserted in first sentence ", so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe".

Pub. L. 99–499, §107(d)(2), substituted "Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource" for "Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources".

Pub. L. 99–499, §207(c)(2)(D), which directed the insertion of "or the Indian tribe" after "State government", could not be executed because the prior amendment by section 107(d)(2) of Pub. L. 99–499, struck out third sentence referring to "State government".

Subsec. (f)(2). Pub. L. 99–499, §107(d)(1), added par. (2).

Subsec. (g). Pub. L. 99–499, §107(e), amended subsec. (g) generally. Prior to amendment, subsec. (g) read as follows: "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section."

Subsec. (h). Pub. L. 99–499, §127(e), inserted ", under maritime tort law," after "with this section" and inserted "or the absence of any physical damage to the proprietary interest of the claimant" before the period at end.

Subsec. (i). Pub. L. 99–499, §207(c)(3), inserted "or Indian tribe" after "State".
Subsec. (j). Pub. L. 99–499, §207(c)(4), inserted "or Indian tribe" after first reference to "State".
Subsec. (k)(5), (6). Pub. L. 99–499, §201, added pars. (5) and (6).
Subsec. (l). Pub. L. 99–499, §107(f), added subsec. (l).
Subsec. (l)(3). Pub. L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", which for purposes of codification was translated as "title 26" thus requiring no change in text.
Subsec. (m). Pub. L. 99–499, §107(f), added subsec. (m).

Statutory Notes and Related Subsidiaries

Effective Date of 1996 Amendment

Amendment by Pub. L. 104–208 applicable with respect to any claim that has not been finally adjudicated as of Sept. 30, 1996, see section 2505 of Pub. L. 104–208, set out as a note under section 6991b of this title.

Effect on Concluded Actions

Pub. L. 107–118, title I, §103, Jan. 11, 2002, 115 Stat. 2360 , provided that: "The amendments made by this title [amending this section and section 9622 of this title] shall not apply to or in any way affect any settlement lodged in, or judgment issued by, a United States District Court, or any administrative settlement or order entered into or issued by the United States or any State, before the date of the enactment of this Act [Jan. 11, 2002]."

Central Hazardous Materials Fund

Pub. L. 110–161, div. F, title I, Dec. 26, 2007, 121 Stat. 2116 , as amended by Pub. L. 111–88, div. A, title I, Oct. 30, 2009, 123 Stat. 2924 , provided in part: "That hereafter, notwithstanding 31 U.S.C. 3302, sums recovered from or paid by a party including any fines or penalties, shall be credited to this account, to be available until expended without further appropriation: *Provided further*, That hereafter such sums recovered from or paid by any party are not limited to monetary payments and may include stocks, bonds or other personal or real property, which may be retained, liquidated, or otherwise disposed of by the Secretary and which shall be credited to this account."

Similar provisions were contained in the following prior appropriation acts:
Pub. L. 109–54, title I, Aug. 2, 2005, 119 Stat. 518 .
Pub. L. 108–447, div. E, title I, Dec. 8, 2004, 118 Stat. 3041 .
Pub. L. 108–108, title I, §310, Nov. 10, 2003, 117 Stat. 1243 .
Pub. L. 108–7, div. F, title I, Feb. 20, 2003, 117 Stat. 218 .
Pub. L. 107–63, title I, Nov. 5, 2001, 115 Stat. 416 .
Pub. L. 106–291, title I, Oct. 11, 2000, 114 Stat. 923 .
Pub. L. 106–113, div. B, §1000(a)(3) [title I], Nov. 29, 1999, 113 Stat. 1535 , 1501A-136.
Pub. L. 105–277, div. A, §101(e) [title I], Oct. 21, 1998, 112 Stat. 2681–231 , 2681-233.
Pub. L. 105–83, title I, Nov. 14, 1997, 111 Stat. 1544 .
Pub. L. 104–208, div. A, title I, §101(d) [title I], Sept. 30, 1996, 110 Stat. 3009–181 , 3009-182.
Pub. L. 104–134, title I, §101(c) [title I], Apr. 26, 1996, 110 Stat. 1321–156 , 1321-157; renumbered title I, Pub. L. 104–140, §1(a), May 2, 1996, 110 Stat. 1327 .
Pub. L. 103–332, title I, Sept. 30, 1994, 108 Stat. 2500 .

Recovery of Costs

Pub. L. 104–303, title II, §209, Oct. 12, 1996, 110 Stat. 3681 , provided that: "Amounts recovered under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) for any response action taken by the Secretary in support of the civil works program of the Department of the Army and any other amounts recovered by the Secretary from a contractor, insurer, surety, or other person to reimburse the Department of the Army for any expenditure for environmental response activities in support of the Army civil works program shall be credited to the appropriate trust fund account from which the cost of such response action has been paid or will be charged."

Coordination of Titles I to IV of Pub. L. 99–499

Any provision of titles I to IV of Pub. L. 99–499, imposing any tax, premium, or fee; establishing any trust fund; or authorizing expenditures from any trust fund, to have no force or effect, see section 531 of Pub. L. 99–499, set out as a note under section 1 of Title 26, Internal Revenue Code.

[1] *See References in Text note below.*

42 USC 9613: Civil proceedings
Text contains those laws in effect on November 20, 2024

From Title 42-THE PUBLIC HEALTH AND WELFARE
CHAPTER 103-COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
SUBCHAPTER I-HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

Jump To:

§9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II [1] of this chapter, or to the review of any regulation promulgated under title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution

from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced-

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after-

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run-

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(i) Intervention

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

(j) Judicial review

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures

(1) Administrative record

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures

(A) Removal action

The President shall promulgate regulations in accordance with chapter 5 of title 5 establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regulations in accordance with chapter 5 of title 5 to carry out the requirements of this subparagraph.

(C) Interim record

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this chapter shall not include an adjudicatory hearing.

(D) Potentially responsible parties

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(l) Notice of actions

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

(Pub. L. 96–510, title I, §113, Dec. 11, 1980, 94 Stat. 2795 ; Pub. L. 99–499, title I, §113, Oct. 17, 1986, 100 Stat. 1647 ; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095 .)

Editorial Notes

References in Text

This chapter, referred to in text, was in the original "this Act", meaning Pub. L. 96–510, Dec. 11, 1980, 94 Stat. 2767 , known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 9601 of this title and Tables.

Subchapter II of this chapter, referred to in subsec. (c), was in the original "title II of this Act", meaning title II of Pub. L. 96–510, Dec. 11, 1980, 94 Stat. 2796 , known as the Hazardous Substance Response Revenue Act of 1980, which enacted subchapter II of this chapter and sections 4611, 4612, 4661, 4662, 4681, and 4682 of Title 26, Internal Revenue Code. Sections 221 to 223 and 232 of Pub. L. 96–510, which were classified to sections 9631 to 9633 and 9641 of this title, comprising subchapter II of this chapter, were repealed by Pub. L. 99–499, title V, §§514(b), 517(c)(1), Oct. 17, 1986, 100 Stat. 1767 , 1774. For complete classification of title II to the Code, see Short Title of 1980 Amendment note set out under section 1 of Title 26 and Tables.

The Federal Rules of Civil Procedure, referred to in subsec. (f)(1), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

The Solid Waste Disposal Act, referred to in subsec. (i), is title II of Pub. L. 89–272, Oct. 20, 1965, 79 Stat. 997 , as amended generally by Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2795 , which is classified generally to chapter 82 (§6901 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

Amendments

1986-Subsec. (b). Pub. L. 99–499, §113(c)(1), substituted "subsections (a) and (h)" for "subsection (a)".

Subsec. (c). Pub. L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", which for purposes of codification was translated as "title 26" thus requiring no change in text.

Subsecs. (e) to (l). Pub. L. 99–499, §113(a), (b), (c)(2), added subsecs. (e) to (l).

[1] *See References in Text note below.*

42 USC 9651: Reports and studies
Text contains those laws in effect on November 20, 2024

From Title 42-THE PUBLIC HEALTH AND WELFARE
CHAPTER 103-COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
SUBCHAPTER III-MISCELLANEOUS PROVISIONS

Jump To:

§9651. Reports and studies

(a) Implementation experiences; identification and disposal of waste

(1) The President shall submit to the Congress, within four years after December 11, 1980, a comprehensive report on experience with the implementation of this chapter including, but not limited to-

(A) the extent to which the chapter and Fund are effective in enabling Government to respond to and mitigate the effects of releases of hazardous substances;

(B) a summary of past receipts and disbursements from the Fund;

(C) a projection of any future funding needs remaining after the expiration of authority to collect taxes, and of the threat to public health, welfare, and the environment posed by the projected releases which create any such needs;

(D) the record and experience of the Fund in recovering Fund disbursements from liable parties;

(E) the record of State participation in the system of response, liability, and compensation established by this chapter;

(F) the impact of the taxes imposed by subchapter II [1] of this chapter on the Nation's balance of trade with other countries;

(G) an assessment of the feasibility and desirability of a schedule of taxes which would take into account one or more of the following: the likelihood of a release of a hazardous substance, the degree of hazard and risk of harm to public health, welfare, and the environment resulting from any such release, incentives to proper handling, recycling, incineration, and neutralization of hazardous wastes, and disincentives to improper or illegal handling or disposal of hazardous materials, administrative and reporting burdens on Government and industry, and the extent to which the tax burden falls on the substances and parties which create the problems addressed by this chapter. In preparing the report, the President shall consult with appropriate Federal, State, and local agencies, affected industries and claimants, and such other interested parties as he may find useful. Based upon the analyses and consultation required by this subsection, the President shall also include in the report any recommendations for legislative changes he may deem necessary for the better effectuation of the purposes of this chapter, including but not limited to recommendations concerning authorization levels, taxes, State participation, liability and liability limits, and financial responsibility provisions for the Response Trust Fund and the Post-closure Liability Trust Fund;

(H) an exemption from or an increase in the substances or the amount of taxes imposed by section 4661 of title 26 for copper, lead, and zinc oxide, and for feedstocks when used in the manufacture and production of fertilizers, based upon the expenditure experience of the Response Trust Fund;

(I) the economic impact of taxing coal-derived substances and recycled metals.

(2) The Administrator of the Environmental Protection Agency (in consultation with the Secretary of the Treasury) shall submit to the Congress (i) within four years after December 11, 1980, a report identifying additional wastes designated by rule as hazardous after the effective date of this chapter and pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] and recommendations on appropriate tax rates for such wastes for the Post-closure Liability Trust Fund. The report shall, in addition, recommend a tax rate, considering the quantity and potential danger to human health and the environment posed by the disposal of any wastes which the Administrator, pursuant to subsection 3001(b)(2)(B) and subsection 3001(b)(3)(A) of the Solid Waste Disposal Act of 1980 [42 U.S.C. 6921(b)(2)(B) and 6921(b)(3)(A)], has determined should be subject to regulation under subtitle C of such Act [42 U.S.C. 6921 et seq.], (ii) within three years after December 11, 1980, a report on the necessity for and the adequacy of the revenue raised, in relation to estimated future requirements, of the Post-closure Liability Trust Fund.

(b) Private insurance protection

The President shall conduct a study to determine (1) whether adequate private insurance protection is available on reasonable terms and conditions to the owners and operators of vessels and facilities subject to liability under section 9607 of this title, and (2) whether the market for such insurance is sufficiently competitive to assure purchasers of features such as a reasonable range of deductibles, coinsurance provisions, and exclusions. The President shall

submit the results of his study, together with his recommendations, within two years of December 11, 1980, and shall submit an interim report on his study within one year of December 11, 1980.

(c) Regulations respecting assessment of damages to natural resources

(1) The President, acting through Federal officials designated by the National Contingency Plan published under section 9605 of this title, shall study and, not later than two years after December 11, 1980, shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this chapter and section 1321(f)(4) and (5) of title 33. Notwithstanding the failure of the President to promulgate the regulations required under this subsection on the required date, the President shall promulgate such regulations not later than 6 months after October 17, 1986.

(2) Such regulations shall specify (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short- and long-term injury, destruction, or loss. Such regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

(3) Such regulations shall be reviewed and revised as appropriate every two years.

(d) Issues, alternatives, and policy considerations involving selection of locations for waste treatment, storage, and disposal facilities

The Administrator of the Environmental Protection Agency shall, in consultation with other Federal agencies and appropriate representatives of State and local governments and nongovernmental agencies, conduct a study and report to the Congress within two years of December 11, 1980, on the issues, alternatives, and policy considerations involved in the selection of locations for hazardous waste treatment, storage, and disposal facilities. This study shall include-

(A) an assessment of current and projected treatment, storage, and disposal capacity needs and shortfalls for hazardous waste by management category on a State-by-State basis;

(B) an evaluation of the appropriateness of a regional approach to siting and designing hazardous waste management facilities and the identification of hazardous waste management regions, interstate or intrastate, or both, with similar hazardous waste management needs;

(C) solicitation and analysis of proposals for the construction and operation of hazardous waste management facilities by nongovernmental entities, except that no proposal solicited under terms of this subsection shall be analyzed if it involves cost to the United States Government or fails to comply with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] and other applicable provisions of law;

(D) recommendations on the appropriate balance between public and private sector involvement in the siting, design, and operation of new hazardous waste management facilities;

(E) documentation of the major reasons for public opposition to new hazardous waste management facilities; and

(F) an evaluation of the various options for overcoming obstacles to siting new facilities, including needed legislation for implementing the most suitable option or options.

(e) Adequacy of existing common law and statutory remedies

(1) In order to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment, there shall be submitted to the Congress a study within twelve months of December 11, 1980.

(2) This study shall be conducted with the assistance of the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorneys General with the President of each entity selecting three members from each organization to conduct the study. The study chairman and one reporter shall be elected from among the twelve members of the study group.

(3) As part of their review of the adequacy of existing common law and statutory remedies, the study group shall evaluate the following:

(A) the nature, adequacy, and availability of existing remedies under present law in compensating for harm to man from the release of hazardous substances;

(B) the nature of barriers to recovery (particularly with respect to burdens of going forward and of proof and relevancy) and the role such barriers play in the legal system;

(C) the scope of the evidentiary burdens placed on the plaintiff in proving harm from the release of hazardous substances, particularly in light of the scientific uncertainty over causation with respect to-

(i) carcinogens, mutagens, and teratogens, and

(ii) the human health effects of exposure to low doses of hazardous substances over long periods of time;

(D) the nature and adequacy of existing remedies under present law in providing compensation for damages to natural resources from the release of hazardous substances;

(E) the scope of liability under existing law and the consequences, particularly with respect to obtaining insurance, of any changes in such liability;

(F) barriers to recovery posed by existing statutes of limitations.

(4) The report shall be submitted to the Congress with appropriate recommendations. Such recommendations shall explicitly address-

(A) the need for revisions in existing statutory or common law, and

(B) whether such revisions should take the form of Federal statutes or the development of a model code which is recommended for adoption by the States.

(5) The Fund shall pay administrative expenses incurred for the study. No expenses shall be available to pay compensation, except expenses on a per diem basis for the one reporter, but in no case shall the total expenses of the study exceed $300,000.

(f) Modification of national contingency plan

The President, acting through the Administrator of the Environmental Protection Agency, the Secretary of Transportation, the Administrator of the Occupational Safety and Health Administration, and the Director of the National Institute for Occupational Safety and Health shall study and, not later than two years after December 11, 1980, shall modify the national contingency plan to provide for the protection of the health and safety of employees involved in response actions.

(g) Insurability study

(1) Study by Comptroller General

The Comptroller General of the United States, in consultation with the persons described in paragraph (2), shall undertake a study to determine the insurability, and effects on the standard of care, of the liability of each of the following:

(A) Persons who generate hazardous substances: liability for costs and damages under this chapter.

(B) Persons who own or operate facilities: liability for costs and damages under this chapter.

(C) Persons liable for injury to persons or property caused by the release of hazardous substances into the environment.

(2) Consultation

In conducting the study under this subsection, the Comptroller General shall consult with the following:

(A) Representatives of the Administrator.

(B) Representatives of persons described in subparagraphs (A) through (C) of the preceding paragraph.

(C) Representatives (i) of groups or organizations comprised generally of persons adversely affected by releases or threatened releases of hazardous substances and (ii) of groups organized for protecting the interests of consumers.

(D) Representatives of property and casualty insurers.

(E) Representatives of reinsurers.

(F) Persons responsible for the regulation of insurance at the State level.

(3) Items evaluated

The study under this section shall include, among other matters, an evaluation of the following:

(A) Current economic conditions in, and the future outlook for, the commercial market for insurance and reinsurance.

(B) Current trends in statutory and common law remedies.

(C) The impact of possible changes in traditional standards of liability, proof, evidence, and damages on existing statutory and common law remedies.

(D) The effect of the standard of liability and extent of the persons upon whom it is imposed under this chapter on the protection of human health and the environment and on the availability, underwriting, and pricing of insurance coverage.

(E) Current trends, if any, in the judicial interpretation and construction of applicable insurance contracts, together with the degree to which amendments in the language of such contracts and the description of the risks assumed, could affect such trends.

(F) The frequency and severity of a representative sample of claims closed during the calendar year immediately preceding October 17, 1986.

(G) Impediments to the acquisition of insurance or other means of obtaining liability coverage other than those referred to in the preceding subparagraphs.

(H) The effects of the standards of liability and financial responsibility requirements imposed pursuant to this chapter on the cost of, and incentives for, developing and demonstrating alternative and innovative treatment technologies, as well as waste generation minimization.

(4) Submission

The Comptroller General shall submit a report on the results of the study to Congress with appropriate recommendations within 12 months after October 17, 1986.

(Pub. L. 96–510, title III, §301, Dec. 11, 1980, 94 Stat. 2805 ; Pub. L. 99–499, title I, §107(d)(3), title II, §§208, 212, Oct. 17, 1986, 100 Stat. 1630 , 1707, 1726; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095 .)

Editorial Notes

References in Text

This chapter, referred to in subsecs. (a)(1)(A), (E), (G), (c)(1), and (g), was in the original "this Act", meaning Pub. L. 96–510, Dec. 11, 1980, 94 Stat. 2767 , known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which enacted this chapter, section 6911a of this title, and sections 4611, 4612, 4661, 4662, 4681, and 4682 of Title 26, Internal Revenue Code, amended section 6911 of this title, section 1364 of Title 33, Navigation and Navigable Waters, and section 11901 of Title 49, Transportation, and enacted provisions set out as notes under section 6911 of this title and sections 1 and 4611 of Title 26. For complete classification of this Act to the Code, see Short Title note set out under section 9601 of this title and Tables.

Subchapter II of this chapter, referred to in subsec. (a)(1)(F), was in the original "title II of this Act", meaning title II of Pub. L. 96–510, Dec. 11, 1980, 94 Stat. 2796 , known as the Hazardous Substance Response Revenue Act of 1980, which enacted subchapter II of this chapter and sections 4611, 4612, 4661, 4662, 4681, and 4682 of Title 26. Sections 221 to 223 and 232 of Pub. L. 96–510, which were classified to sections 9631 to 9633 and 9641 of this title, comprising subchapter II of this chapter, were repealed by Pub. L. 99–499, title V, §§514(b), 517(c)(1), Oct. 17, 1986, 100 Stat. 1767 , 1774. For complete classification of title II to the Code, see Short Title of 1980 Amendment note set out under section 1 of Title 26 and Tables.

For effective date of this chapter, referred to in subsec. (a)(2), see section 9652 of this title.

Subsection 3001(b)(2)(B) and subsection 3001(b)(3)(A) of the Solid Waste Disposal Act of 1980, referred to in subsec. (a)(2), probably mean section 3001(b)(2)(B) and (3)(A) of the Solid Waste Disposal Act, as amended by the Solid Waste Disposal Act Amendments of 1980, which enacted section 6921(b)(2)(B) and (3)(A) of this title.

The Solid Waste Disposal Act, referred to in subsecs. (a)(2) and (d)(C), is title II of Pub. L. 89–272, Oct. 20, 1965, 79 Stat. 997 , as amended generally by Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2795 . Subtitle C of the Solid Waste Disposal Act is classified generally to subchapter III (§6921 et seq.) of chapter 82 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

Codification

Subsec. (h) of this section, which required the Administrator of the Environmental Protection Agency to submit an annual report to Congress of such Agency on the progress achieved in implementing this chapter during the preceding fiscal year, required the Inspector General of the Agency to review the report for reasonableness and accuracy and submit to Congress, as a part of that report, a report on the results of the review, and required the appropriate authorizing committees of Congress, after receiving those reports, to conduct oversight hearings to ensure that this chapter is being implemented according to the purposes of this chapter and congressional intent in enacting this chapter, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, the 5th item on page 164 of House Document No. 103–7.

Amendments

1986-Subsec. (a)(1)(H). Pub. L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", which for purposes of codification was translated as "title 26" thus requiring no change in text.

Subsec. (c)(1). Pub. L. 99–499, §107(d)(3), inserted at end "Notwithstanding the failure of the President to promulgate the regulations required under this subsection on the required date, the President shall promulgate such regulations not later than 6 months after October 17, 1986."

Subsec. (g). Pub. L. 99–499, §208, added subsec. (g).

Subsec. (h). Pub. L. 99–499, §212, added subsec. (h).

[1] *See References in Text note below.*

These methods are to be used to determine both the pathways through which resources have been exposed to oil or a hazardous substance and the nature of the injury.

(2) *Quantification phase.* The purpose of this phase is to establish the extent of the injury to the resource in terms of the loss of services that the injured resource would have provided had the discharge or release not occurred. The sections of subpart E comprising the Quantification phase include methods for establishing baseline conditions, estimating recovery periods, and measuring the degree of service reduction stemming from an injury to a natural resource.

(3) *Damage Determination phase.* The purpose of this phase is to establish the appropriate compensation expressed as a dollar amount for the injuries established in the Injury Determination phase and measured in the Quantification phase. The sections of subpart E of this part comprising the Damage Determination phase include guidance on acceptable cost estimating and valuation methodologies for determining compensation based on the costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, plus, at the discretion of the authorized official, compensable value, as defined in § 11.83(c) of this part.

(f) *Post-assessment phase.* Subpart F of this part includes requirements to be met after the assessment is complete. The Report of Assessment contains the results of the assessment, and documents that the assessment has been carried out according to this rule. Other post-assessment requirements delineate the manner in which the demand for a sum certain shall be presented to a responsible party and the steps to be taken when sums are awarded as damages.

[51 FR 27725, Aug. 1, 1986, as amended at 59 FR 14281, Mar. 25, 1994]

§ 11.14 Definitions.

Terms not defined in this section have the meaning given by CERCLA or the CWA. As used in this part, the phrase:

(a) *Acquisition of the equivalent* or *replacement* means the substitution for an injured resource with a resource that provides the same or substantially similar services, when such substitutions are in addition to any substitutions made or anticipated as part of response actions and when such substitutions exceed the level of response actions determined appropriate to the site pursuant to the NCP.

(b) *Air* or *air resources* means those naturally occurring constituents of the atmosphere, including those gases essential for human, plant, and animal life.

(c) *Assessment area* means the area or areas within which natural resources have been affected directly or indirectly by the discharge of oil or release of a hazardous substance and that serves as the geographic basis for the injury assessment.

(d) *Authorized official* means the Federal or State official to whom is delegated the authority to act on behalf of the Federal or State agency designated as trustee, or an official designated by an Indian tribe, pursuant to section 126(d) of CERCLA, to perform a natural resource damage assessment. As used in this part, authorized official is equivalent to the phrase ''authorized official or lead authorized official,'' as appropriate.

(e) *Baseline* means the condition or conditions that would have existed at the assessment area had the discharge of oil or release of the hazardous substance under investigation not occurred.

(f) *Biological resources* means those natural resources referred to in section 101(16) of CERCLA as fish and wildlife and other biota. Fish and wildlife include marine and freshwater aquatic and terrestrial species; game, nongame, and commercial species; and threatened, endangered, and State sensitive species. Other biota encompass shellfish, terrestrial and aquatic plants, and other living organisms not otherwise listed in this definition.

(g) *CERCLA* means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, as amended.

(h) *Committed use* means either: a current public use; or a planned public use of a natural resource for which there is a documented legal, administrative, budgetary, or financial commitment

established before the discharge of oil or release of a hazardous substance is detected.

(i) *Control area* or *control resource* means an area or resource unaffected by the discharge of oil or release of the hazardous substance under investigation. A control area or resource is selected for its comparability to the assessment area or resource and may be used for establishing the baseline condition and for comparison to injured resources.

(j) *Cost-effective* or *cost-effectiveness* means that when two or more activities provide the same or a similar level of benefits, the least costly activity providing that level of benefits will be selected.

(k) *CWA* means the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*, also referred to as the Federal Water Pollution Control Act.

(l) *Damages* means the amount of money sought by the natural resource trustee as compensation for injury, destruction, or loss of natural resources as set forth in section 107(a) or 111(b) of CERCLA.

(m) *Destruction* means the total and irreversible loss of a natural resource.

(n) *Discharge* means a discharge of oil as defined in section 311(a)(2) of the CWA, as amended, and includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping of oil.

(o) *Drinking water supply* means any raw or finished water source that is or may be used by a public water system, as defined in the SDWA, or as drinking water by one or more individuals.

(p) *EPA* means the U.S. Environmental Protection Agency.

(q) *Exposed to* or *exposure of* means that all or part of a natural resource is, or has been, in physical contact with oil or a hazardous substance, or with media containing oil or a hazardous substance.

(r) *Fund* means the Hazardous Substance Superfund established by section 517 of the Superfund Amendments and Reauthorization Act of 1986.

(s) *Geologic resources* means those elements of the Earth's crust such as soils, sediments, rocks, and minerals, including petroleum and natural gas, that are not included in the definitions of ground and surface water resources.

(t) *Ground water resources* means water in a saturated zone or stratum beneath the surface of land or water and the rocks or sediments through which ground water moves. It includes ground water resources that meet the definition of drinking water supplies.

(u) *Hazardous substance* means a hazardous substance as defined in section 101(14) of CERCLA.

(v) *Injury* means a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge of oil or release of a hazardous substance, or exposure to a product of reactions resulting from the discharge of oil or release of a hazardous substance. As used in this part, injury encompasses the phrases ''injury,'' ''destruction,'' and ''loss.'' Injury definitions applicable to specific resources are provided in § 11.62 of this part.

(w) *Lead authorized official* means a Federal or State official authorized to act on behalf of all affected Federal or State agencies acting as trustees where there are multiple agencies, or an official designated by multiple tribes where there are multiple tribes, affected because of coexisting or contiguous natural resources or concurrent jurisdiction.

(x) *Loss* means a measurable adverse reduction of a chemical or physical quality or viability of a natural resource.

(y) *Natural Contingency Plan* or *NCP* means the National Oil and Hazardous Substances Contingency Plan and revisions promulgated by EPA, pursuant to section 105 of CERCLA and codified in 40 CFR part 300.

(z) *Natural resources* or *resources* means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management

Act of 1976), any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe. These natural resources have been categorized into the following five groups: Surface water resources, ground water resources, air resources, geologic resources, and biological resources.

(aa) *Natural resource damage assessment* or *assessment* means the process of collecting, compiling, and analyzing information, statistics, or data through prescribed methodologies to determine damages for injuries to natural resources as set forth in this part.

(bb) *Oil* means oil as defined in section 311(a)(1) of the CWA, as amended, of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

(cc) *On-Scene Coordinator* or *OSC* means the On-Scene Coordinator as defined in the NCP.

(dd) *Pathway* means the route or medium through which oil or a hazardous substance is or was transported from the source of the discharge or release to the injured resource.

(ee) *Reasonable cost* means the amount that may be recovered for the cost of performing a damage assessment. Costs are reasonable when: the Injury Determination, Quantification, and Damage Determination phases have a well-defined relationship to one another and are coordinated; the anticipated increment of extra benefits in terms of the precision or accuracy of estimates obtained by using a more costly injury, quantification, or damage determination methodology are greater than the anticipated increment of extra costs of that methodology; and the anticipated cost of the assessment is expected to be less than the anticipated damage amount determined in the Injury, Quantification, and Damage Determination phases.

(ff) *Rebuttable presumption* means the procedural device provided by section 107(f)(2)(C) of CERCLA describing the evidentiary weight that must be given to any determination or assessment of damages in any administrative or judicial proceeding under CERCLA or section 311 of the CWA made by a Federal or State natural resource trustee in accordance with the rule provided in this part.

(gg) *Recovery period* means either the longest length of time required to return the services of the injured resource to their baseline condition, or a lesser period of time selected by the authorized official and documented in the Assessment Plan.

(hh) *Release* means a release of a hazardous substance as defined in section 101(22) of CERCLA.

(ii) *Replacement* or *acquisition of the equivalent* means the substitution for an injured resource with a resource that provides the same or substantially similar services, when such substitutions are in addition to any substitutions made or anticipated as part of response actions and when such substitutions exceed the level of response actions determined appropriate to the site pursuant to the NCP.

(jj) *Response* means remove, removal, remedy, or remedial actions as those phrases are defined in sections 101(23) and 101(24) of CERCLA.

(kk) *Responsible party or parties* and *potentially responsible party or parties* means a person or persons described in or potentially described in one or more of the categories set forth in section 107(a) of CERCLA.

(ll) *Restoration* or *rehabilitation* means actions undertaken to return an injured resource to its baseline condition, as measured in terms of the injured resource's physical, chemical, or biological properties or the services it previously provided, when such actions are in addition to response actions completed or anticipated, and when such actions exceed the level of response actions determined appropriate to the site pursuant to the NCP.

(mm) *SDWA* means the Safe Drinking Water Act, 42 U.S.C. 300f–300j–10.

(nn) *Services* means the physical and biological functions performed by the resource including the human uses of those functions. These services are the result of the physical, chemical, or biological quality of the resource.

(oo) *Site* means an area or location, for purposes of response actions under

the NCP, at which oil or hazardous substances have been stored, treated, discharged, released, disposed, placed, or otherwise came to be located.

(pp) *Surface water resources* means the waters of the United States, including the sediments suspended in water or lying on the bank, bed, or shoreline and sediments in or transported through coastal and marine areas. This term does not include ground water or water or sediments in ponds, lakes, or reservoirs designed for waste treatment under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901–6987 or the CWA, and applicable regulations.

(qq) *Technical feasibility* or *technically feasible* means that the technology and management skills necessary to implement an Assessment Plan or Restoration and Compensation Determination Plan are well known and that each element of the plan has a reasonable chance of successful completion in an acceptable period of time.

(rr) *Trustee* or *natural resource trustee* means any Federal natural resources management agency designated in the NCP and any State agency designated by the Governor of each State, pursuant to section 107(f)(2)(B) of CERCLA, that may prosecute claims for damages under section 107(f) or 111(b) of CERCLA; or an Indian tribe, that may commence an action under section 126(d) of CERCLA.

(ss) *Type A assessment* means standard procedures for simplified assessments requiring minimal field observation to determine damages as specified in section 301(c)(2)(A) of CERCLA.

(tt) *Type B assessment* means alternative methodologies for conducting assessments in individual cases to determine the type and extent of short- and long-term injury and damages, as specified in section 301(c)(2)(B) of CERCLA.

(uu) *Indian tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5171, Feb. 22, 1988; 59 FR 14281, Mar. 25, 1994]

§ 11.15 What damages may a trustee recover?

(a) In an action filed pursuant to section 107(f) or 126(d) of CERCLA, or sections 311(f) (4) and (5) of the CWA, a natural resource trustee who has performed an assessment in accordance with this rule may recover:

(1) Damages as determined in accordance with this part and calculated based on injuries occurring from the onset of the release through the recovery period, less any mitigation of those injuries by response actions taken or anticipated, plus any increase in injuries that are reasonably unavoidable as a result of response actions taken or anticipated;

(2) The costs of emergency restoration efforts under § 11.21 of this part;

(3) The reasonable and necessary costs of the assessment, to include:

(i) The cost of performing the preassessment and Assessment Plan phases and the methodologies provided in subpart D or E of this part; and

(ii) Administrative costs and expenses necessary for, and incidental to, the assessment, assessment planning, and restoration, rehabilitation, replacement, and/or acquisition of equivalent resources planning, and any restoration, rehabilitation, replacement, and/or acquisition of equivalent resources undertaken; and

(4) Interest on the amounts recoverable as set forth in section 107(a) of CERCLA. The rate of interest on the outstanding amount of the claim shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954. Such interest shall accrue from the later of: The date payment of a specified amount is demanded in writing, or the date of the expenditure concerned;

(b) The determination of the damage amount shall consider any applicable limitations provided for in section 107(c) of CERCLA.

used as the ''No Action-Natural Recovery'' period for purposes of §11.82 and §11.84(g)(2)(ii) of this part.

(2) The estimated time for recovery shall be included in possible alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, as developed in §11.82 of this part, and the data and process by which these recovery times were estimated shall be documented.

(b) *Restoration not feasible.* If the authorized official determines that restoration will not be technically feasible, as that phrase is used in this part, the reasoning and data on which this decision is based shall be documented as part of the justification for any replacement alternatives that may be considered or proposed.

(c) *Estimating recovery time.* (1) The time estimates required in paragraph (a) of this section shall be based on the best available information and where appropriate may be based on cost-effective models. Information gathered may come from one or more of the following sources, as applicable:

(i) Published studies on the same or similar resources;

(ii) Other data sources identified in §11.72 of this part;

(iii) Experience of managers or resource specialists with the injured resource;

(iv) Experience of managers or resource specialists who have dealt with restoration for similar discharges or releases elsewhere; and

(v) Field and laboratory data from assessment and control areas as necessary.

(2) The following factors should be considered when estimating recovery times:

(i) Ecological succession patterns in the area;

(ii) Growth or reproductive patterns, life cycles, and ecological requirements of biological species involved, including their reaction or tolerance to the oil or hazardous substance involved;

(iii) Bioaccumulation and extent of oil or hazardous substances in the food chain;

(iv) Chemical, physical, and biological removal rates of the oil or hazardous substance from the media involved, especially as related to the local conditions, as well as the nature of any potential degradation or decomposition products from the process including:

(A) Dispersion, dilution, and volatilization rates in air, sediments, water, or geologic materials;

(B) Transport rates in air, soil, water, and sediments;

(C) Biological degradation, depuration, or decomposition rates and residence times in living materials;

(D) Soil or sediment properties and adsorption-desorption rates between soil or sediment components and water or air;

(E) Soil surface runoff, leaching, and weathering processes; and

(F) Local weather or climatological conditions that may affect recovery rates.

[51 FR 27725, Aug. 1, 1986, as amended at 59 FR 14283, Mar. 25, 1994; 61 FR 20612, May 7, 1996]

§11.80 Damage determination phase—general.

(a) *Requirement.* (1) The authorized official shall make his damage determination by estimating the monetary damages resulting from the discharge of oil or release of a hazardous substance based upon the information provided in the Quantification phase and the guidance provided in this Damage Determination phase.

(2) The Damage Determination phase consists of §11.80—general; §11.81—Restoration and Compensation Determination Plan; §11.82—alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources; §11.83—cost estimating and valuation methodologies; and §11.84—implementation guidance, of this part.

(b) *Purpose.* The purpose of the Damage Determination phase is to establish the amount of money to be sought in compensation for injuries to natural resources resulting from a discharge of oil or release of a hazardous substance. The measure of damages is the cost of (i) restoration or rehabilitation of the injured natural resources to a condition where they can provide the level of services available at baseline, or (ii) the replacement and/or acquisition of equivalent natural resources capable of providing such services. Damages may

also include, at the discretion of the authorized official, the compensable value of all or a portion of the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement, and/or acquisition of equivalent of baseline.

(c) *Steps in the Damage Determination phase.* The authorized official shall develop a Restoration and Compensation Determination Plan, described in § 11.81 of this part. To prepare this Restoration and Compensation Determination Plan, the authorized official shall develop a reasonable number of possible alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources and select, pursuant to the guidance of § 11.82 of this part, the most appropriate of those alternatives; and identify the cost estimating and valuation methodologies, described in § 11.83 of this part, that will be used to calculate damages. The guidance provided in § 11.84 of this part shall be followed in implementing the cost estimating and valuation methodologies. After public review of the Restoration and Compensation Determination Plan, the authorized official shall implement the Restoration and Compensation Determination Plan.

(d) *Completion of the Damage Determination phase.* Upon completion of the Damage Determination phase, the type B assessment is completed. The results of the Damage Determination phase shall be documented in the Report of Assessment described in § 11.90 of this part.

[59 FR 14283, Mar. 25, 1994, as amended at 73 FR 75266, Oct. 2, 2008]

§ 11.81 Damage determination phase—restoration and compensation determination plan.

(a) *Requirement.* (1) The authorized official shall develop a Restoration and Compensation Determination Plan that will list a reasonable number of possible alternatives for (i) the restoration or rehabilitation of the injured natural resources to a condition where they can provide the level of services available at baseline, or (ii) the replacement and/or acquisition of equivalent natural resources capable of providing such services, and, where relevant, the compensable value; select one of the alternatives and the actions required to implement that alternative; give the rationale for selecting that alternative; and identify the methodologies that will be used to determine the costs of the selected alternative and, at the discretion of the authorized official, the compensable value of the services lost to the public associated with the selected alternative.

(2) The Restoration and Compensation Determination Plan shall be of sufficient detail to evaluate the possible alternatives for the purpose of selecting the appropriate alternative to use in determining the cost of baseline restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, and, where relevant, the compensable value.

(b) The authorized official shall use the guidance in §§ 11.82, 11.83, and 11.84 of this part to develop the Restoration and Compensation Determination Plan.

(c) The authorized official shall list the methodologies he expects to use to determine the costs of all actions considered within the selected alternative and, where relevant, the compensable value of the lost services through the recovery period associated with the selected alternative. The methodologies to use in determining costs and compensable value are described in § 11.83 of this part.

(d)(1) The Restoration and Compensation Determination Plan shall be part of the Assessment Plan developed in subpart B of this part. If existing data are not sufficient to develop the Restoration and Compensation Determination Plan at the time that the overall Assessment Plan is made available for public review and comment, the Restoration and Compensation Determination Plan may be developed later, after the completion of the Injury Determination or Quantification phases.

(2) If the Restoration and Compensation Determination Plan is prepared later than the Assessment Plan, it shall be made available separately for public review by any identified potentially responsible party, other natural resource trustees, other affected Federal or State agencies or Indian tribes, and any other interested members of

accordance with §11.72 of this part and compare those services with services now provided by the injured resources, that is, the with-a-discharge-or-release condition. All estimates of the with-a-discharge-or-release condition shall incorporate consideration of the ability of the resources to recover as determined in §11.73 of this part.

(c) *Range of possible alternatives.* (1) The possible alternatives considered by the authorized official that return the injured resources to their baseline level of services could range from intensive action on the part of the authorized official to return the various resources and services provided by those resources to baseline conditions as quickly as possible, to natural recovery with minimal management actions. Possible alternatives within this range could reflect varying rates of recovery, combinations of management actions, and needs for resource replacements or acquisitions.

(2) An alternative considering natural recovery with minimal management actions, based upon the ''No Action-Natural Recovery'' determination made in §11.73(a)(1) of this part, shall be one of the possible alternatives considered.

(d) *Factors to consider when selecting the alternative to pursue.* When selecting the alternative to pursue, the authorized official shall evaluate each of the possible alternatives based on all relevant considerations, including the following factors:

(1) Technical feasibility, as that term is used in this part.

(2) The relationship of the expected costs of the proposed actions to the expected benefits from the restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

(3) Cost-effectiveness, as that term is used in this part.

(4) The results of any actual or planned response actions.

(5) Potential for additional injury resulting from the proposed actions, including long-term and indirect impacts, to the injured resources or other resources.

(6) The natural recovery period determined in §11.73(a)(1) of this part.

(7) Ability of the resources to recover with or without alternative actions.

(8) Potential effects of the action on human health and safety.

(9) Consistency with relevant Federal, State, and tribal policies.

(10) Compliance with applicable Federal, State, and tribal laws.

(e) A Federal authorized official shall not select an alternative that requires acquisition of land for Federal management unless the Federal authorized official determines that restoration, rehabilitation, and/or other replacement of the injured resources is not possible.

[59 FR 14284, Mar. 25, 1994, as amended at 73 FR 57266, Oct. 2, 2008; 73 FR 65274, Nov. 3, 2008]

§11.83 Damage determination phase—use value methodologies.

(a) *General.* (1) This section contains guidance and methodologies for determining: The costs of the selected alternative for (i) the restoration or rehabilitation of the injured natural resources to a condition where they can provide the level of services available at baseline, or (ii) the replacement and/or acquisition of equivalent natural resources capable of providing such services; and the compensable value of the services lost to the public through the completion of the baseline restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources.

(2)(i) The authorized official shall select among the cost estimating and valuation methodologies set forth in this section, or methodologies that meet the acceptance criterion of either paragraph (b)(3) or (c)(3) of this section.

(ii) The authorized official shall define the objectives to be achieved by the application of the methodologies.

(iii) The authorized official shall follow the guidance provided in this section for choosing among the methodologies that will be used in the Damage Determination phase.

(iv) The authorized official shall describe his selection of methodologies and objectives in the Restoration and Compensation Determination Plan.

(3) The authorized official shall determine that the following criteria have been met when choosing among the cost estimating and valuation methodologies. The authorized official shall document this determination in

the Report of the Assessment. Only those methodologies shall be chosen:

(i) That are feasible and reliable for a particular incident and type of damage to be measured.

(ii) That can be performed at a reasonable cost, as that term is used in this part.

(iii) That avoid double counting or that allow any double counting to be estimated and eliminated in the final damage calculation.

(iv) That are cost-effective, as that term is used in this part.

(4) Factors that may be considered by trustees to evaluate the feasibility and reliability of methodologies can include:

(i) Is the methodology capable of providing information of use in determining the restoration cost or compensable value appropriate for a particular natural resource injury?

(ii) Does the methodology address the particular natural resource injury and associated service loss in light of the nature, degree, and spatial and temporal extent of the injury?

(iii) Has the methodology been subject to peer review, either through publication or otherwise?

(iv) Does the methodology enjoy general or widespread acceptance by experts in the field?

(v) Is the methodology subject to standards governing its application?

(vi) Are methodological inputs and assumptions supported by a clearly articulated rationale?

(vii) Are cutting edge methodologies tested or analyzed sufficiently so as to be reasonably reliable under the circumstances?

(5) All of the above factors may not be applicable to every case, and other factors may be considered to evaluate feasibility and reliability. The authorized official shall document any consideration of factors deemed applicable in the Report of Assessment.

(b) *Costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.* (1) Costs for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources are the amount of money determined by the authorized official as necessary to complete all actions identified in the selected alternative for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, as selected in the Restoration and Compensation Determination Plan of §11.81 of this part. Such costs shall include direct and indirect costs, consistent with the provisions of this section.

(i) Direct costs are those that are identified by the authorized official as attributed to the selected alternative. Direct costs are those charged directly to the conduct of the selected alternative including, but not limited to, the compensation of employees for the time and effort devoted to the completion of the selected alternative; cost of materials acquired, consumed, or expended specifically for the purpose of the action; equipment and other capital expenditures; and other items of expense identified by the authorized official that are expected to be incurred in the performance of the selected alternative.

(ii) Indirect costs are costs of activities or items that support the selected alternative, but that cannot practically be directly accounted for as costs of the selected alternative. The simplest example of indirect costs is traditional overhead, e.g., a portion of the lease costs of the buildings that contain the offices of trustee employees involved in work on the selected alternative may, under some circumstances, be considered as an indirect cost. In referring to costs that cannot practically be directly accounted for, this subpart means to include costs that are not readily assignable to the selected alternative without a level of effort disproportionate to the results achieved.

(iii) An indirect cost rate for overhead costs may, at the discretion of the authorized official, be applied instead of calculating indirect costs where the benefits derived from the estimation of indirect costs do not outweigh the costs of the indirect cost estimation. When an indirect cost rate is used, the authorized official shall document the assumptions from which that rate has been derived.

(2) *Cost estimating methodologies.* The authorized official may choose among the cost estimating methodologies listed in this section or may choose other

methodologies that meet the acceptance criterion in paragraph (b)(3) of this section. Nothing in this section precludes the use of a combination of cost estimating methodologies so long as the authorized official does not double count or uses techniques that allow any double counting to be estimated and eliminated in the final damage calculation.

(i) *Comparison methodology*. This methodology may be used for unique or difficult design and estimating conditions. This methodology requires the construction of a simple design for which an estimate can be found and applied to the unique or difficult design.

(ii) *Unit methodology*. This methodology derives an estimate based on the cost per unit of a particular item. Many other names exist for describing the same basic approach, such as order of magnitude, lump sum, module estimating, flat rates, and involve various refinements. Data used by this methodology may be collected from technical literature or previous cost expenditures.

(iii) *Probability methodologies*. Under these methodologies, the cost estimate represents an ''average'' value. These methodologies require information which is called certain, or deterministic, to derive the expected value of the cost estimate. Expected value estimates and range estimates represent two types of probability methodologies that may be used.

(iv) *Factor methodology*. This methodology derives a cost estimate by summing the product of several items or activities. Other terms such as ratio and percentage methodologies describe the same basic approach.

(v) *Standard time data methodology*. This methodology provides for a cost estimate for labor. Standard time data are a catalogue of standard tasks typically undertaken in performing a given type of work.

(vi) *Cost- and time-estimating relationships (CERs and TERs)*. CERs and TERs are statistical regression models that mathematically describe the cost of an item or activity as a function of one or more independent variables. The regression models provide statistical relationships between cost or time and physical or performance characteristics of past designs.

(3) *Other cost estimating methodologies*. Other cost estimating methodologies that are based upon standard and accepted cost estimating practices and are cost-effective are acceptable methodologies to determine the costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources under this part.

(c) *Compensable value*. (1) Compensable value is the amount of money required to compensate the public for the loss in services provided by the injured resources between the time of the discharge or release and the time the resources are fully returned to their baseline conditions, or until the resources are replaced and/or equivalent natural resources are acquired. The compensable value can include the economic value of lost services provided by the injured resources, including both public use and nonuse values such as existence and bequest values. Economic value can be measured by changes in consumer surplus, economic rent, and any fees or other payments collectible by a Federal or State agency or an Indian tribe for a private party's use of the natural resources; and any economic rent accruing to a private party because the Federal or State agency or Indian tribe does not charge a fee or price for the use of the resources. Alternatively, compensable value can be determined utilizing a restoration cost approach, which measures the cost of implementing a project or projects that restore, replace, or acquire the equivalent of natural resource services lost pending restoration to baseline.

(i) Use value is the economic value of the resources to the public attributable to the direct use of the services provided by the natural resources.

(ii) Nonuse value is the economic value the public derives from natural resources that is independent of any direct use of the services provided.

(iii) Restoration cost is the cost of a project or projects that restore, replace, or acquire the equivalent of natural resource services lost pending restoration to baseline.

(2) *Valuation methodologies*. The authorized official may choose among the

valuation methodologies listed in this section to estimate appropriate compensation for lost services or may choose other methodologies provided that the methodology can satisfy the acceptance criterion in paragraph (c)(3) of this section. Nothing in this section precludes the use of a combination of valuation methodologies so long as the authorized official does not double count or uses techniques that allow any double counting to be estimated and eliminated in the final damage calculation.

Type of Methodology	Description
(i) Market price	The authorized official may determine the compensable value of the injured resources using the diminution in the market price of the injured resources or the lost services. May be used only if: (A) The natural resources are traded in the market; and (B) The authorized official determines that the market for the resources, or the services provided by the resources, is reasonably competitive.
(ii) Appraisal	The measure of compensable value is the difference between the with- and without-injury appraisal value determined by the comparable sales approach as described in the Uniform Appraisal Standards. Must measure compensable value, to the extent possible, in accordance with the ''Uniform Appraisal Standards for Federal Land Acquisition,'' Interagency Land Acquisition Conference, Washington, DC, 1973 (incorporated by reference, see § 11.18).
(iii) Factor income (sometimes referred to as the ''reverse value added'' methodology).	May be used only if the injured resources are inputs to a production process, which has as an output a product with a well-defined market price. May be used to determine: (A) The economic rent associated with the use of resources in the production process; and (B) The in-place value of the resources.
(iv) Travel cost	May be used to determine a value for the use of a specific area. Uses an individual's incremental travel costs to an area to model the economic value of the services of that area. Compensable value of the area to the traveler is the difference between the value of the area with and without a discharge or release. Regional travel cost models may be used, if appropriate.
(v) Hedonic pricing	May be used to determine the value of nonmarketed resources by an analysis of private market choices. The demand for nonmarketed natural resources is thereby estimated indirectly by an analysis of commodities that are traded in a market.
(vi) Unit value/benefits transfer	Unit values are preassigned dollar values for various types of nonmarketed recreational or other experiences by the public. Where feasible, unit values in the region of the affected resources and unit values that closely resemble the recreational or other experience lost with the affected resources may be used.
(vii) Contingent valuation	Includes all techniques that set up hypothetical markets to directly elicit an individual's economic valuation of a natural resource. Can determine: (A) Use values and explicitly determine option and existence values; and (B) Lost use values of injured natural resources.
(viii) Conjoint Analysis	Like contingent valuation, conjoint analysis is a stated preference method. However, instead of seeking to value natural resource service losses in strictly economic terms, conjoint analysis compares natural resource service losses that arise from injury to natural resource service gains produced by restoration projects.
(ix) Habitat Equivalency Analysis.	May be used to compare the natural resource services produced by habitat or resource-based restoration actions to natural resource service losses.
(x) Resource Equivalency Analysis.	Similar to habitat equivalency analysis. This methodology may be used to compare the effects of restoration actions on specifically identified resources that are injured or destroyed.
(xi) Random Utility Model	Can be used to: (A) Compare restoration actions on the basis of equivalent resource services provided; and (B) Calculate the monetary value of lost recreational services to the public.

(3) *Other valuation methodologies.* Other methodologies that measure compensable value in accordance with the public's willingness to pay for the lost service, or with the cost of a project that restores, replaces, or acquires services equivalent of natural resource services lost pending restoration to baseline in a cost-effective manner, are acceptable methodologies to determine compensable value under this part.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5175, Feb. 22, 1988; 59 FR 14285, Mar. 25, 1994; 73 FR 57266, Oct. 2, 2008]

§ 11.84 Damage determination phase—implementation guidance.

(a) *Requirement.* The authorized official should use the cost estimating and valuation methodologies in § 11.83 of this part following the appropriate guidance in this section.

(b) *Determining uses.* (1) Before estimating damages for compensable value under § 11.83 of this part, the authorized official should determine the uses made of the resource services identified in the Quantification phase.

No. 24-5565

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, and THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, and the STATE OF WASHINGTON,

Plaintiff-Appellant,

v.

TECK COMINCO METALS LTD., a Canadian corporation,

Defendant-Appellee,

On Appeal from the United States District Court
for the Eastern District of Washington
No. 2:04-cv-00256-SAB
Hon. Stanley Bastian

APPELLANT'S OPENING BRIEF

Paul J. Dayton, WSBA #12619
Daniel J. Vecchio, WSBA #44632
Daniel F. Shickich, WSBA #46479
Alexandrea M. Smith, WSBA #57460
OGDEN MURPHY WALLACE, P.L.L.C.
701 Fifth Avenue, Suite 5600
Seattle, Washington 98104
206-447-7000

Attorneys for Appellant The Confederated Tribes of the Colville Reservation

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INTRODUCTION

In this phase of this decades-long litigation, Appellant, The Confederated Tribes of the Colville Reservation (the "Colvilles" or "the Tribes"),[1] has alleged natural resource damage claims under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et. seq*. ("CERCLA"), against Teck Metals, Ltd. ("Teck") based on Teck's contamination of the Upper Columbia River ("UCR") with hazardous substances from its lead-zinc smelter in Trail, British Columbia, resulting in injuries to natural resources in the river. As this Court previously has recognized:

> "From time immemorial, the Upper Columbia River has held great significance to the Confederated Tribes of the Colville Reservation. These tribes historically depended on the River's plentiful fish for their survival and gave the River a central role in their cultural traditions. And the Colville Tribes continue to use the Upper Columbia River to this day for fishing and recreation. Under the applicable treaties, the Tribes retain fishing rights in the River up to the Canadian border. … For nearly a century, however, the Upper Columbia River has been fouled by Teck Metals' toxic waste. … Between 1930 and 1995, Teck discharged about 400 tons of slag daily—an estimated 9.97 million tons in total—directly into the free-flowing Columbia River. Teck washed this debris into the river using untold gallons of contaminated effluent. These solid and liquid wastes contained roughly 400,000 tons (800 million pounds) of the heavy metals arsenic, cadmium, copper, lead, mercury, and zinc, in addition to lesser amounts of other hazardous substances."

[1] The Tribes is comprised of 12 individual tribes, but functions as a single entity.

Pakootas v. Teck Cominco Metals, Ltd., 905 F.3d 565, 572 (9th Cir. 2018) ("*Pakootas IV*"). The Colvilles thus have a unique relationship with the UCR and its natural resources, and the injuries to those natural resources caused by Teck's contamination have harmed the Colvilles and are the basis for this suit.

CERCLA authorizes the federal government, states, and Indian tribes, acting as natural resource trustees, to recover damages for injury to natural resources. 42 U.S.C. § 9607(a). Determination of such damages includes, but is not limited to, consideration of "replacement value, **use value**, and the ability of the ecosystem or resource to recover." 42 U.S.C. § 9651(c)(2) (emphasis added). The text of CERCLA neither defines "use" nor purports to limit the term in any way, and the federal courts of appeal that have considered the issue consistently have held that "use" is to be construed broadly to allow for recovery of damages for all lost "**utility derived by humans from a [natural] resource**." *State of Ohio v. U.S, Dept. of the Interior,* 880 F. 2d 432, 464 (D.C. Cir. 1989) (emphasis added). Recognizing the broad scope of recoverable damages for the lost use of natural resources under CERCLA, this Court has held that natural resource trustees "are entitled to recover **for all lost-use damages** on behalf of the public, from the time of release until restoration." *Alaska Sport Fishing Ass'n v. Exxon Corp*., 34 F.3d 769, 772 (9th Cir. 1994).

Invoking CERCLA's natural resource damages provisions, the Colvilles, together with its co-Plaintiff the State of Washington, asserted joint claims for

natural resource damages caused by Teck's contamination of the UCR, including claims for damages for the public's lost use of those natural resources. Of relevance here, the Colvilles also asserted its own unique natural resource damages claims seeking recovery of damages for the Tribes' lost use of the natural resources injured by Teck's contamination, as distinct from uses by the general public, recognizing that the Colvilles' relationship with the UCR, rooted deeply within the Tribes' history and culture, means that the contamination of the UCR has harmed them in distinct ways above and beyond the harm suffered by the general public. The Colvilles referred to these claims as "tribal service loss" claims, and they are the subject of this appeal.[2]

Despite this clear statutory mandate, Teck sought summary judgment on the Tribes' claims for interim lost use damages and mischaracterized the Tribes' claims as seeking "cultural resource" damages, not natural resource damages. The district court erroneously accepted Teck's characterization and, without analysis and

[2] The text of CERCLA expressly refers to recovery of damages for the "use value" of injured natural resources. 42 U.S.C. § 9651(c)(2). As explained in detail below, CERCLA's implementing regulations and the governing case law have used myriad other terms to describe the same concept, including "lost use," "interim lost use," and/or "service loss." The Colvilles chose the term "tribal service loss" in their complaint to denote the fact that the claims seek damages for the loss of the Tribes' use of the injured natural resources, as separate and distinct from the lost uses of the natural resources by the general public (which are addressed by the joint claims). To avoid confusion, we will refer to these claims herein as claims for "interim lost use" of the injured natural resources by the Tribes.

without consideration of either the governing case law or CERCLA's implementing regulations authorizing interim lost use claims, granted summary judgment in favor of Teck. In so doing, the district court misconstrued the Colvilles' claims, apparently reasoning that because the Tribes' unique uses of the natural resources included a cultural component, they sought compensation for injured "cultural resources" rather than the Tribes' lost use of the injured natural resources alleged in its complaint and authorized in CERCLA. This was error. Though neither Teck nor the district court defined "cultural resources," the D.C. Circuit has suggested that damage to archeological "artifacts" on land contaminated by pollution might be an example of a "non-natural" **cultural resource**, though it declined to decide whether such damage might be recoverable under CERCLA. *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1222 (D.C. Cir. 1996). The Colvilles' claims do not seek damages for such injury; to the contrary, they seek only damages for the Tribes' interim lost use of the **natural resources** injured by Teck, which damages necessarily take into consideration the Tribes' culture, history, and related uses of those resources. This Court should reverse and remand to the district court for trial.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1292(b), this Court granted interlocutory review of the district court's order dismissing certain of Appellant's natural resource damages

claims. *Confederated Tribes of the Colville Reservation v. Teck Cominco Metals LTD*, No. 24-4442, Dkt. No. 5 (9th Cir. filed July 18, 2024).

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and/or constitutional and/or regulatory authorities appear in the Addendum to this brief.

STATEMENT OF ISSUES

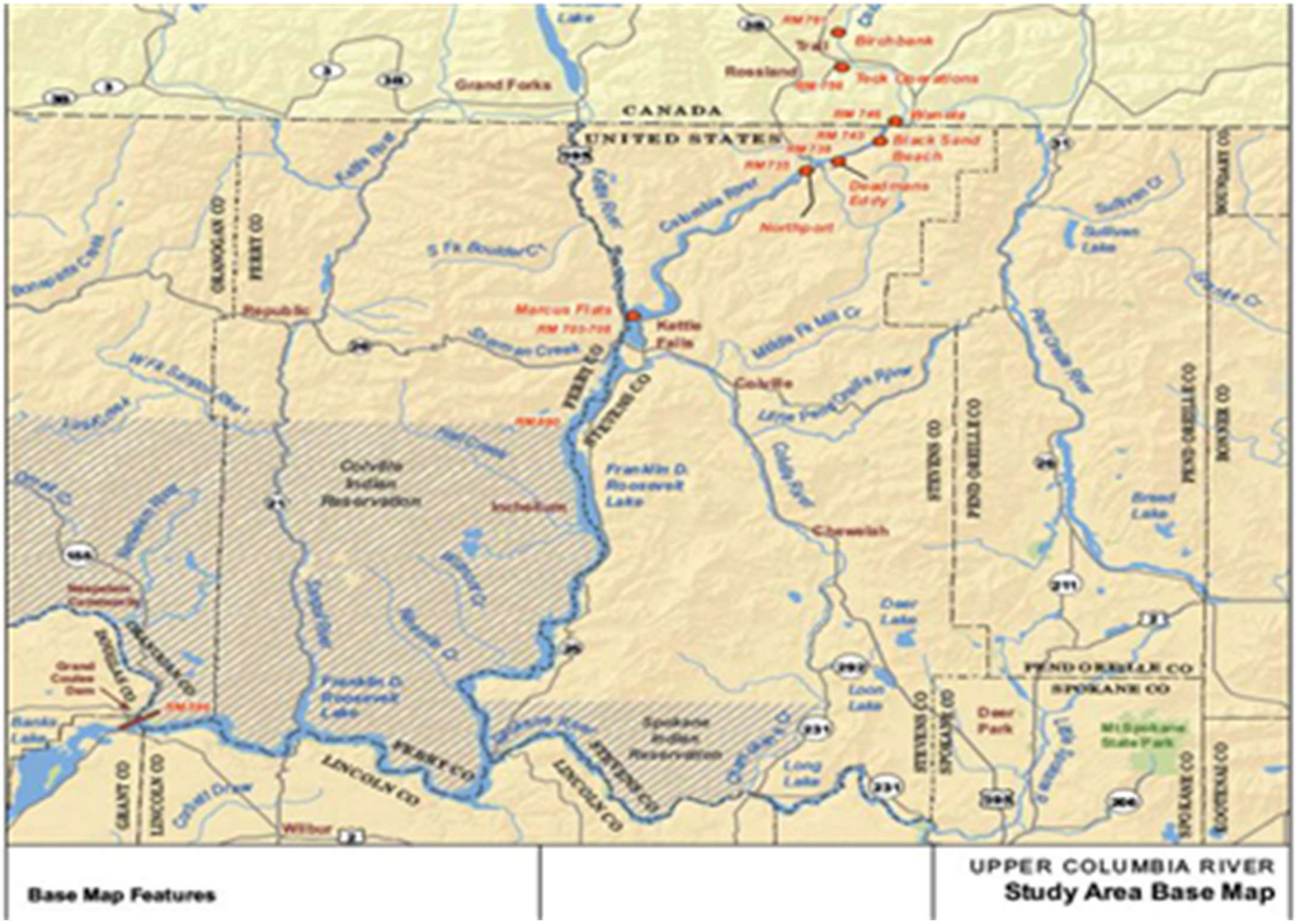
CERCLA grants the United States, States, and Tribes a cause of action against responsible parties for "damages for injury to, destruction of, or loss of natural resources . . . resulting from such a release [of a hazardous substance]," and further provides that such damages must compensate for, *inter alia*, "both direct and indirect injury" taking into account "use value, and [the] ability of the ecosystem to recover." Did the district court err in granting summary judgment to Teck on the Colvilles' claims for damages based on interim lost use of natural resources by characterizing the claims as seeking damages for injured "cultural resources" and rejecting recovery for cultural uses?

STATEMENT OF THE CASE

A. Background.

The Colvilles is a federally recognized Indian tribe and its members have lived on the banks of the Upper Columbia River since time immemorial. Beginning in the early 1920's and continuing to the present, ten miles north of the Canadian border, Teck and its predecessors have operated one of the largest lead-zinc

smelters in the world. Teck's smelter dumped its wastes, including slag containing lead, zinc, copper and other metals and effluent containing mercury in the Columbia River where they flowed downstream and released hazardous substances in the Upper Columbia in the United States. 4-ER-695–696. The resulting injuries to natural resources have had great consequence for the Colvilles because its reservation abuts the UCR downstream of Teck's discharges. It also holds preferred hunting and fishing rights for the territory north of its reservation to the Canadian border.



Upper Columbia River Study Area Base Map

Teck concedes, and the district court has found, that it used the Upper Columbia River—the Colvilles' homeland—as a "free" "convenient disposal facility" for its hazardous wastes. 4-ER-702. These wastes included more than 10 million tons of slag deposited in the UCR along with 200 tons of mercury in effluent form also deposited in the UCR and have released hazardous wastes—zinc, lead, cadmium, mercury, and copper in the UCR. 4-ER-695–696. Based on these releases, the district court has found that Teck is a liable party under CERCLA as an "arranger," 42 U.S.C. § 9607(a). 4-ER-731–732.

Most of the metals released from Teck's slag and effluent have settled in the bottom of the UCR above the Grand Coulee Dam. Many years of scientific investigation by the United States Geological Service, the U.S. Environmental Protection Agency and the natural resource Trustees has demonstrated that Teck's releases of hazardous substances in the UCR have contributed to extensive injuries to benthic creatures residing in the sediment – death, reduced reproduction and reduced biomass. *See* 3-ER-307; 313–314; 2-ER-76; 263–264; 279–285. Expert investigation and opinion also demonstrates that Teck's effluent has released large amounts of mercury in the UCR. *See* 2-ER-281–282; 3-ER-310. Mercury concentrations have resulted in UCR fish advisories limiting fishing by the Colvilles and other members of the public.

These injuries to natural resources have resulted in the interim lost use of such resources that form the basis for the natural resource damages claims in this case.

B. Natural Resource Damages claims in this case.

In 2007, the Colvilles and the State along with the Department of the Interior ("DOI") and the Spokane Tribe of Indians, formed a Trustee Council to investigate and assess natural resource injuries and resulting damages in the UCR. These natural resource trustees have since developed joint claims identifying natural resource injuries and resulting damages for interim lost use of those natural resources, and the Colvilles and the State have asserted them in this action. 4-ER-662–672; 680–687.

These claims are based on extensive investigation of site conditions and expert testimony showing that Teck's hazardous substances are toxic to benthic organisms (or "benthos") in the UCR sediment and have resulted in elevated mercury in UCR fish leading to fish advisories. These opinions are described in detail in the reports and declarations of Joel Blum, Dimitri Vlassopoulos, William Clements, Jesse Sinclair and Adam Domanski. 2-ER-71–81; 260–285; 3-ER-306–317. Teck's Motion for Summary Judgment at issue here did not contest proof of these injuries. *See* 2-ER-208–242. Indeed, Teck does not deny that its metals are toxic to benthos and it concedes that mercury in the UCR have led to fish

advisories. 2-ER-88–89; 168–169. On review of this evidence, Teck's expert conceded that natural resource damages have been proved. 2-ER-88–89.

Based on this proof of injury, for the joint claims, Plaintiffs employed a habitat equivalency analysis to calculate the cost of restoration of damaged sediment habitat as well as calculation of the value of lost fishing trips due to fish advisories. Teck moved for summary judgment as to the first of these claims, but not the second. Its motion was denied. 2-ER-37–43.

Along with the joint damages claims asserted with the State, the Colvilles have also investigated and assessed interim lost use of natural resources unique to the Tribes as authorized by 42 U.S.C. § 9607(f) ("liability…to an Indian Tribe…"). Such tribal claims for interim lost use have featured in many natural resource damage assessments. 2-ER-74; 76–77. The Colvilles based these separate resource service loss claims on the same proof as the joint claims – natural resource injuries in the form of toxicity to benthos and elevated mercury in fish. 2-ER-147; *see also* 3-ER-369–374; 2-ER-248; 251; 3-ER-324–327; 337–338. Based on this evidence of injury, the Colvilles' experts developed proof of damages—specifically, the Colvilles' interim lost use of natural resources in the form of (1) reduced river trips by Tribal members due to mercury-based fish advisories, (2) interim lost use of an

uncontaminated river, and (3) interim lost use of injured natural resources for cultural purposes.[3]

1. Lost River Use Damages.

Mercury based fish advisories attributed to Teck's release of metals in the UCR have resulted in reduced river trips by the Colvilles. For the Colvilles, this has led to reduced fishing and also lost use of the river for other recreational purposes. Because of the Colvilles' unique relationship to the UCR, these reduced trips have impacted the Tribes in ways that are distinct from the general public, and thus the Colvilles' claim is separate from the joint claim asserted with the State for lost fishing trips by the general public.

The Colvilles' expert, Robert Unsworth, used an extensive survey conducted by the Environmental Protection Agency in coordination with Colvilles (Westat) to measure reduced river use due to mercury-based fish advisories. 3-ER-559. Mr. Unsworth applied an enhanced value based on the role of fishing in the Colvilles' culture. 3-ER-563. Applying this methodology yielded a valuation of reduced river trips from 1988-2030 ranging from $9.8 million to $14.7 million. 3-ER-564. Teck did not offer expert opinion on this claim in its summary judgment motion, nor did it address its merits. See 2-ER-208–242.

[3] The second and third categories of damages are alternative approaches to damages and the Colvilles anticipate that at trial, the district court will determine which measures best address the evidence.

2. Lost Value of an Uncontaminated River.

The Colvilles value the natural resources surrounding them in ways that perhaps mining companies do not fully understand. They are central to the Tribes' experience and identity and not assets to be traded away. Before these events, in 2006 a mining company offered the Colvilles more than $1 billion for the right to mine Molybdenum in a mountain on their property and the Colvilles, by referendum, rejected it. 4-ER-611. In this case, Teck did not offer any such exchange. Without a word or warning to the Tribes or any measures to deal with the consequences, it unilaterally dumped its wastes in the river and left the Colvilles to deal with it or live with it. The Colvilles now seek damages for the interim lost use of that uncontaminated resource. Since there is no market for uncontaminated rivers, in this circumstance economists employ contingent valuation methods to measure the economic valuation of the natural resource. *See State of Ohio*, 880 F.2d at 475-477; 43 C.F.R. § 11.83; and 4-ER-600–601.

3. Lost Use of Injured Resources for Cultural Purposes.

With funding from DOI and in consultation with DOI, the Colvilles investigated the impact of Teck's contamination of the UCR on the Colvilles' use of the UCR for cultural purposes. 2-ER-179–180; 3-ER-549. This approach assessed interim lost use of the UCR for cultural purposes due to the injury to natural resources caused by Teck's contamination. *See* 73 FR 57259; 2-ER-76 –77 ("services include both ecological and human services resulting from the physical,

chemical or biological quality of resources"). The investigation encompassed oral history research, literature review and review of an extensive survey of UCR resources jointly conducted by CCT and EPA (Westat Survey). 3-ER-392–396; 3-ER-368–369. The oral history component included interviews of 45 tribal members selected for their knowledge of the impact of Teck's contamination. 2-ER-69.

Based on this investigation the Tribes developed a proposed restoration plan developed by the Tribes to redress the interim lost use damages it had identified. 3-ER-463–468; 3-ER-547–548. The plan had four components, each directed at addressing the Tribes' interim lost use of natural resources from contamination of the river: (1) monitoring of the UCR to confirm water and sediment conditions; (2) selected slag removal to remove visual indicators of contamination; (3) cultural programs and buildings to enable restoration of cultural attributes, including language programs to restore the primacy of the river in the Tribes' experience; and (4) acquisition of land. 3-ER-463–468; 547–548. The cost of the restoration plan is $114.6 million as of April 2023. 2-ER-80.

C. Relevant Orders in the district court.

Teck moved for summary judgment as to the Colvilles' separate claim for interim lost use of the injured natural resources, arguing primarily that the claim was based on injury to "cultural resources" rather than "natural resources," citing (but never quoting) the text of 43 C.F.R. § 11.14(z). 2-ER-226. The district court agreed, reasoning that the Colvilles had alleged injury to "cultural resources" and

that such resources were not within the section 11.14(z)'s definition of "natural resources," and granted summary judgment to Teck on the Colvilles' separate interim lost use claims. 2-ER-2–6.

In a motion for reconsideration, the Colvilles explained that the district court was mistaken because its claims were based on injury to "natural resources" not "cultural resources," and that "natural resource" injury in the form of toxicity to benthos and elevated mercury in fish is well within the regulatory definition. 43 C.F.R. 11.14(z) ("Natural resources or resources means land, fish, wildlife, biota…"). The Colvilles also explained that the forms of interim lost use it had alleged were authorized in CERCLA and its regulations and recognized by the United States Court Appeals for the D.C. Circuit in *State of Ohio*. 2-ER-12–31. The district court was not persuaded, concluding that damages with a cultural component were not recoverable, and denied the motion, declining to apply the regulations or *State of Ohio*. 2-ER-11. It also certified the Court's decision for immediate review under 28 U.S.C. §1292(b). *Id*.

The Colvilles' first petition to this Court asking it to accept review under §1292(b) was denied without prejudice because the district court had not made the findings required for such review. 2-ER-8. The Colvilles then moved in the district court requesting findings as provided in §1292 and the district court granted the motion and made specific findings supporting immediate review under §1292. *Confederated Tribes of the Colville Reservation v. Teck Cominco Metals LTD*, No.

24-4442 (9th Cir. filed July 18, 2024), Dkt. No. 1 at 33–38. The Colvilles then renewed their petition for immediate review and this Court granted the Petition. *Id.* at Dkt. No. 5.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing the Colvilles' lost use claims by characterizing those claims as seeking "cultural resource" damages and finding that such "cultural resource are not include in CERCLA's definition of natural resources which may form the basis for a section 9607(a) natural resource damages claim." In so doing, the district court erroneously adopted Teck's mischaracterization of the Colvilles' claims, without analysis, and failed to recognize that the Colvilles' claims are in fact claims for lost interim use of "natural resources" authorized in 42 U.S.C. § 9607(f). See 43 C.F.R. § 11.14(z) (defining natural resources). The district court did not analyze the CERCLA text authorizing recovery of use value, governing court of appeals decisions, or the implementing regulations, and instead analyzed the claim as targeting "cultural resources" outside the framework of CERCLA. The Colvilles' claims are not based on an injury to a cultural resource such as a hunting lodge, however, and the district court's holding was error. The Colvilles' claims target injury to the biological resources in the UCR and properly seek damages for the interim lost use of natural resources injured by Teck's contamination between the time of release and potential restoration. 42 U.S.C. § 9607, 9651(c)(2); *see State of Ohio*, 880 F. 2d at 464.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Lolli v. Cnty. Of Orange*, 351 F.3d 410, 414 (9th Cir. 2003). Viewing the evidence in the light most favorable to the non-movant, the Court determines whether there are genuine issues of material fact and whether the district court correctly applied the law. *Id*. The Court does not weigh the evidence, ascertain credibility, or determine the truth, but rather determines whether there is a genuine issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 255 (1986). The Court may not make factual determinations where the record contains contrary evidence. *Chevron USA v. Cayetano*, 224 F.3d 1030, 1038 n.6 (9th Cir. 2000).

ARGUMENT AND AUTHORITY

The district court based its order in a misunderstanding of the Colvilles' resource loss claim and did not discuss how—once correctly analyzed as damages from natural resource injury—CERCLA applies to the lost use claims at issue here, so we start there.

A. Damages For Interim Lost Use Of Injured Natural Resources Are Recoverable Under CERCLA.

CERCLA specifically authorizes Tribes such as the Colvilles – in addition to and as distinct from States or other parties – to seek recovery of damages for injury to natural resources. 42 U.S.C. § 9607(f) (discussing "liability…to an Indian Tribe…"). Such natural resource damages are not limited to compensating for the damage to the natural resources themselves, but expressly include damages for lost use of the

natural resources by members of the public (in this case, members of the Tribe) by the injured resources. *See* 42 U.S.C. § 9651(c)(2) (CERCLA regulations shall identify best available procedures to determine damages, "including both direct and indirect injury . . . and shall take into account factors including, but not limited to, replacement value, **use value**, and the ability of the ecosystem or resources to recover.") (emphasis added); 43 C.F.R. § 11.80(b) (natural resource damages recoverable under CERCLA include the "compensable value of all or a portion of the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement, and/or acquisition of equivalent of baseline.").

It is well-settled that natural resource damages under CERCLA "normally include restoration costs at a minimum, **plus interim lost-use value in appropriate cases**." *State of Ohio*, 880 F.2d at 454 n.34 (emphasis added); *see also Alaska Sport Fishing Ass'n v. Exxon Corp*., 34 F.3d 769, 772 (9th Cir. 1994) (natural resource trustees "are entitled to recover **for all lost-use damages** on behalf of the public, from the time of release until restoration.") (emphasis added). "[L]ost-use damages incurred by the public prior to cleanup are damages that, in a layman's terms, remain on the debit side of the ledger after cleanup, and are, in fact, unredressed damages for which the trustees may recover." *Alaska Sport Fishing Ass'n*, 34 F.3d at 772. Indeed, the D.C. Circuit Court of Appeals rejected DOI's first attempt to draft regulations implementing CERCLA's damages provisions

precisely because the regulations initially failed to provide for recovery of interim lost use and existence value, and thus failed to fully implement the statute as Congress intended.[4] *State of Ohio*, 880 F.2d at 463-64 (noting Congressional intent that CERCLA damages assessments allow trustees to "select the most accurate and credible damage assessment methodologies available" and that DOI's regulations as initially drafted "defeat this intent by arbitrarily limiting use values to market prices.").

Adhering to the *State of Ohio* court's reading of the scope of CERCLA's remedies, the current implementing regulations provide that recoverable damages for interim lost use of natural resources are measured by "both public use and nonuse values such as existence and bequest values." 43 C.F.R. § 11.83(c)(1); *State of Ohio*, 880 F.2d at 464*; see also Kennecott Utah Copper Corp. v. U.S. Dept. of Int.,* 88 F. 3d 1191,1220-1221(D.C. Cir. 1996) (confirming CERCLA regulations permit recovery of damages for "human uses" of natural resources as lost "services" provided by the resources). "Use value," just as its name implies, is defined as "the economic value of the resources to the public attributable to the direct use of the

[4] CERCLA designates the D.C. Circuit as the authoritative court for interpretation of its regulations. *See* 42 U.S.C. § 9613(a) ("Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia.").

services provided by the natural resources." 43 C.F.R. § 11.83(c)(1)(i).[5] "Nonuse value," on the other hand, represents "the economic value the public derives from natural resources that is independent of any direct use of the services provided." 43 C.F.R. § 11.83(c)(1)(ii); *see also State of Ohio*, 880 F.2d at 464. Such nonuse value includes so-called passive use or "existence value" – *i.e.*, the value to the public of the mere existence of the resource, which despite its "passive" nature, "reflect[s] utility derived by humans from a resource, and thus, prima facie, ought to be included in a damage assessment." *State of Ohio*, 880 F.2d at 464; *see also* 4-ER-600. Damages for the loss of such use and nonuse services provided by the injured resource are recoverable under CERCLA *in addition to* damages to restore the lost resources themselves.[6] *State of Ohio*, 880 F.2d at 464. Nothing in CERCLA, its

[5] Neither the statute, the regulations, nor the case law define the word "use," much less purport to limit recoverable "uses" to those which are not "cultural" in nature. In absence of an express statutory definition, "use" should be given its plain meaning – anything to which natural resources may be put. *See, e.g.*, WEBSTER'S UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 2097 (2d ed. 2001) ("an instance or way of employing or using something.").

[6] Teck repeatedly has argued that CERCLA's requirement that recovered natural resource damages must be used to "restore, replace, or acquire the equivalent of" the injured natural resources somehow precludes the Colvilles' claims for interim lost use or service losses. *See, e.g.*, 2-ER-229–232. That is a red herring, for the issue of how any damages recovered ultimately are used is not an element of an NRD claim that a plaintiff must prove, nor is it even possible to make a determination about the propriety of such uses until after damages are, in fact, recovered. *See* 42 U.S.C. § 9607(f)(1) (natural resource damages "shall not be limited by the sums which can be used to restore or replace" natural resources).

regulations, or applicable case law restricts recoverable damages based on *type* of use as Teck proposed and as the district court accepted.

The district court's search for authority for a "cultural resource injury" claim diverted it from application of the foregoing regulations and case law discussing interim lost use. Instead of applying the Court of Appeals' analysis of use and existence values in *State of Ohio*, the district court relied on two district court cases with no discussion of these points, *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1122 n.22 (D. Idaho 2003) and *In re Gold King Mine Release in San Juan Cnty., Colorado, on Aug. 5, 2015*, No. 16-CV-931, 669 F. Supp. 3d 1146, 2023 WL 2914718 (D.N.M. Apr. 12, 2023). Neither case is on point, for neither case addresses the regulatory framework discussed herein nor the availability of damages for interim lost use under CERCLA, and thus neither opinion can substitute for the review and application of *State of Ohio*, *Alaska Sport Fishing Ass'n*, or other binding authority directly on point.

Neither district court case even considered – let alone decided – whether claims such as the Colvilles' interim lost use claims are cognizable under CERCLA. *Couer d'Alene* in fact provided no discussion of the issue in that opinion at all – merely a single-sentence *finding of fact* entered after a months-long trial stating that the "cultural uses of water and soil by the tribe" – which are nowhere defined or discussed – were not recoverable as natural resource damages. 280 F. Supp. 2d at

1101.[7] At most, this case reminds that the question of whether the Colvilles have proven lost uses, whether cultural or otherwise, may be determined only after trial and full consideration of the evidence. Since the *Couer d'Alene* court did not engage in any legal analysis of the scope of recoverable service losses, the decision gives no guidance in evaluating the claims at issue here.

Gold King Mine is not on point either as it did not involve or evaluate allegations of interim lost use and did not consider or take up the relevant regulations or the guidance from the Court of Appeals in *State of Ohio*. The Court approached the issue on a claim of CERCLA preemption of common law claims and reasoned in broad principles that Plaintiff had not made resource damage claims. This was understandable as there were no allegations that the damages suffered had anything to do with interim lost use of natural resources, as the court itself expressly noted. *Gold King Mine*, 669 F.Supp.3d at 1159 ("[The defendant] **has not shown that the restorative programs damages claims are natural resource damages claims** the recovery of which would be subject to the restriction that they be used only to restore, replace or acquire the equivalent of the damaged resource.") (emphasis added). Without CERCLA allegations invoking the framework of identifying injury to natural resources, lost services due to that injury, and the requirement that recovery be used to

[7] The Court should have in mind that elsewhere in the *Couer d'Alene* opinion the district court concluded that the tribe in question lacked trusteeship over the resources at issue and that may have influenced its finding of fact. 280 F. Supp at 1117.

restore those services, the *Gold King Mine* court had no reason to discuss the actionability of claims for lost use of natural resources and thus did not even consider *State of Ohio* or the governing regulations.

B. The Colvilles' Claims Meet the Required Elements Under CERCLA And Disputed Issues Of Fact Precluded Summary Judgment.

Proof of a natural resource damage claim under CERCLA starts with evidence of "injury to, destruction of, or loss of natural resources." 42 U.S.C. § 9607(f)(1). The Colvilles met this burden by proving that Teck's metals have caused injury to benthic invertebrates residing in the sediment of the UCR and with evidence of fish advisories based on elevated mercury from Teck's releases. The next step is for the trustees to show that the injury to the natural resources caused damages. As discussed above, proof of such damage may be based on lost services, both active "use" and passive "nonuse" or existence values, derived from injured resources. *See State of Ohio*, 880 F.2d at 464. The Colville's claims present various measures of damages to compensate for interim lost use and existence values. While it is true that the Colvilles' claims necessarily implicate "cultural" perspectives to the extent such perspectives inform the value of the interim lost use by the Tribes and because injured natural resources may have cultural uses, that is not the same as asserting a claim for injury to "cultural resources" as the district court erroneously concluded. We review below each of the Colvilles' approaches to proof of resource service losses and put them in context of CERCLA and the regulation promulgated thereunder.

C. The Colvilles' Claim For Lost Fishing Trips Is An Interim Lost Use Claim Based on Unique Colville Impacts.

The Colvilles' claim for interim lost use damages based on the reduction of fishing trips by tribal members based on Teck's contamination of the UCR is a typical CERCLA claim for lost use services provided by the injured natural resource. 43 C.F.R. § 11.83(c)(1)(i). This claim is based on the expert report of Robert Unsworth, an expert who has worked on more than 100 natural resource damage assessments. *See* 2-ER-63. His approach to assess the damages from lost tribal fishing trips was "drawn directly from the Department's Regulations (see §11.83(c)(1) and §11.83(c)(2)(vi))." 2-ER-65. Mr. Unsworth calculated "reduced participation in on-water and in-water activities given contamination," and he explained that "[t]hese damages reflect the presence of a health-based fish advisory on the Upper Columbia River fishery." 2-ER-64–65. It is not based on any claim of lost "cultural resources" and the district court's characterization of it as such was clear error.

Mr. Unsworth gave each lost river trip enhanced value based on the increased significance for tribal members in comparison to the general public. Teck must take its victim where it finds it and is responsible for the consequent losses of use. River use trips are valued higher for Colville members than for the general public because of cultural and historical considerations, that does not make them any less recoverable. Mr. Unsworth calculated the value of the lost fishing trips by tribal members and submitted a declaration explaining his methodology in response to Teck's summary

judgment motion, to which Teck had no response. *See* 2-ER-62–67. There was no basis for summary judgment dismissing this claim.

D. The Colvilles' Claim for Damages Based on a Contingent Valuation Study is a Claim for Nonuse "Existence Value" of an Uncontaminated UCR.

The Colvilles' claim for damages based on the contingent valuation (stated preference) study performed by Dr. Layton and Mr. Paterson is a well-recognized claim under CERCLA for the lost passive use or existence value of an uncontaminated UCR. *See State of Ohio*, 880 F.2d at 464; 2-ER-75–78 (explaining economic foundation for recovery of interim lost use based on cultural uses of natural resources); 4-ER-608–610 (explaining basis for use of stated preference study in framework of identifying lost value of uncontaminated river).[8] It is well-settled that damages based on the existence value of resources are cognizable under CERCLA. 43 C.F.R. § 11.83(c)(1); *State of Ohio*, 880 F.2d at 464. Perhaps for this reason, Teck's original summary judgment motion did not even attempt to explain why this claim of damages was not actionable under CERCLA, and instead focused on methodological criticisms of the work of Dr. Layton and Mr. Paterson to measure such damages. *See* 2-ER-232–233. Only after the Colvilles answered those methodological challenges did Teck suddenly insist, in a single sentence in its reply brief, that the claim somehow was

[8] As Dr. Domanski explains, CCT members incur losses through the loss in services due to Teck's contamination of the UCR. 2-ER-75–76. The ecological injury is measured by studies of how a biological receptor responds to contamination – specifically, reduced benthic productivity due to contaminated habitat. 2-ER-76. To measure lost human services, NRD assessments analyze how individuals respond to the contamination. 2-ER-76–78. Teck offered no evidence in rebuttal to Dr. Domanski's testimony on these issues.

measuring "cultural loss" and thus was not actionable. 2-ER-46. The district court dismissed the claim solely on this basis, again without analysis. See 1-ER-6.

Merely labeling a lost use "cultural" does not take it outside the scope of recoverable damages, however. The "existence value" of an uncontaminated UCR – which is plainly a cognizable claim under CERCLA – necessarily involves consideration of some "cultural" factors, for the value of the river's existence to the Tribes is tied in some measure to the Tribes' history and culture, but that does not transform the claim from an ordinary existence value claim to a "cultural resource" claim. *See State of Ohio*, 880 F.2d at 462-63 ("From the bald eagle to the blue whale and snail darter, natural resources have values that are not fully captured by the market system . . . [the] decision to limit the role of non-consumptive values, such as option and existence values, in the calculation of use values rests on an erroneous construction of the statute."). The district court's decision on this point was error.

E. The Restoration Plan Reflects the Colvilles' Alternate Measure of Damages for Use and Nonuse Service Losses as a Result of the Injured Natural Resources.

The third and final lost use claim seeks to recover resource service losses based on the Tribes' lost cultural use of the injured natural resources. The Colvilles' investigation, funded and guided by DOI, identified disrupted cultural uses of the biological resources of the UCR as well as damage to the Tribes' experience of an uncontaminated river which formed the basis for a restoration approach to damages. 2-ER-69–70. The Court appears to have regarded this claim as based on injury to cultural resources, not natural resources as alleged in the Colvilles' complaint and

opposition to Teck's motion. 1-ER-6; *see also* 4-ER-681–682; 2-ER-116–119. The court's mistaken focus on how "cultural resources" fits in the definition of "natural resources" distracted it from the case law explaining that lost resource use is defined broadly to encompass human uses, and nothing in the regulations or case law restricts such use recovery when it is based on a cultural use. The Court of Appeals foreclosed the district court's conclusion in *State of Ohio* when, in rejecting narrowly drafted regulations promulgated by DOI restricting use, it explained that CERCLA requires that use values must be taken into account where they "reflect utility derived by humans from a resource and thus, *prima facie*, ought to be included in a damage assessment." 880 F. 2d at 464. Cultural uses fit easily in the scope of "human uses" of the resources.

The Tribes' investigation led to development of a restoration plan to alleviate and restore interim lost use of natural resources. The Restoration Plan is a method of valuing the lost uses of the river by the Tribes as a result of the injured natural resources. Such uses include, but are not limited to, cultural and ceremonial components; both the regulations and the legislative history expressly contemplate such considerations. *See* 2-ER-18–20; 2-ER-109–110; *see also* § Section II.B.3, *supra*. While Teck may disagree that the Restoration Plan is the appropriate measure of damages for the lost uses, or may argue that the losses reflected in the Restoration Plan were not caused by injury to natural resources, those are issues of fact for trial – not issues of law susceptible to summary judgment.

CONCLUSION

For the reasons stated herein, the Court should reverse the district court's grant of summary judgment on the Colvilles' separate claims for natural resource damages and remand for trial.

STATEMENT OF RELATED CASES

The Colvilles are aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Court of Appeals Docket Number 24-554, *Confederated Tribes of the Colville Reservation v. Teck Cominco Metals LTD*, is the docket number that was assigned to the Colville's Petition for Permission to Appeal filed in on April 22, 2024. Dkt. No. 1. This Court denied the petition for permission to appeal without prejudice on June 20, 2024. Dkt. No. 7.

Court of Appeals Docket Number 24-4442, *Confederated Tribes of the Colville Reservation v. Teck Cominco Metals LTD*, is the docket number that was assigned to the case upon filing of the Colville's Petition for Permission to Appeal on July 18, 2024. Dkt. No. 1. The Order granting permission to appeal was granted on September 11, 2024. Dkt. No. 5.

RESPECTFULLY SUBMITTED this 21st day of November, 2024.

OGDEN MURPHY WALLACE, PLLC

By */s/ Paul J. Dayton*
Paul J. Dayton, WSBA #12619
Daniel J. Vecchio, WSBA #44632
Daniel F. Shickich, WSBA #46479
Alexandrea M. Smith, WSBA #57460

Attorneys for Petitioner Confederated Tribes of the Colville Reservation

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing System. I also hereby certify that I served the foregoing document on counsel below via the method indicated.

Counsel for Plaintiff-Intervenor State of Washington

andyf@atg.wa.gov
kelly.wood@atg.wa.gov
joshua.osborneklein@atg.wa.gov
kara.tebeau@atg.wa.gov
Dylan.Stonecipher@atg.wa.gov
christa.thompson@atg.wa.gov
tanya.rosejohnston@atg.wa.gov
danielle.french@atg.wa.gov
john.level@atg.wa.gov

☑ Via E-mail

Counsel for Defendant Teck Metals

deborah.baum@pillsburylaw.com
amanda.halter@pillsburylaw.com
anne.voigts@pillsburylaw.com
ashleigh.myers@pillsburylaw.com
anne.voigts@pillsburylaw.com
BWilcox@workwith.com
DWillman@workwith.com

☑ Via E-mail

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 21st day of November 2024 at Seattle, Washington.

/s/ Chris Hoover
Chris Hoover, Legal Assistant