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Methods To Minimize CERCLA Liability: Part 2

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It is never pleasant for a company to receive a potentially responsible party letter from the U.S. Environmental Protection Agency or a state environmental agency seeking relief under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq.

This is particularly true when the environmental site in question has been the subject of investigations and cleanup activities for years, but no prior contact has been made with your company. Given the breadth of actions and powers provided to government agencies under CERCLA, most companies that receive these CERCLA 104(e) requests for information, or CERCLA 106 notices of potential liability, believe they have no defense. Often overlooked is a key defense: the statute of limitations. PRPs added late to the process need to consider this defense as soon as such a letter arrives. Raising this issue early might allow your company to cut back on the increasingly expensive process of responding to government demands that ultimately have no merit.

CERCLA actions, like actions under any other statute, are time-limited. See 42 U.S.C. § 9613(g)(2)(B). Statutes of limitations ensure "that the defendant is given the protections of predictability and promptness." United States v. Hagege, 437 F.3d 943, 955 (9th Cir. 2006); see Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp., 613 F.3d 910, 914 (9th Cir. 2010) (statutes of limitation are intended in part to protect defendants).

A CERCLA cost recovery claim associated with "remedial" actions must be commenced within six years after initiation of physical on-site construction of the remedial action. 42 U.S.C. § 9613(g)(2)(B). The language of CERCLA's statute of limitations "indicates that there will be but one 'removal action' per site or facility, as well as a single 'remedial action' per site or facility." Colorado v. Sunoco Inc., 337 F.3d 1233, 1241 (10th Cir. 2003); see New York State Elec. & Gas Corp. v. FirstEnergy Corp., 766 F.3d 212, 235

(2d Cir. 2014) ("Virtually every court" agrees that "there can only be one remedial action at any given site."); see also California ex rel. Cal. Dep't of Toxic Substances Control v. Hyampom Lumber Co., 903 F. Supp. 1389, 1394 (E.D. Cal. 1995) ("Hyampom") ("There is no authority for the view that each 'remedial' activity undertaken at a site triggers a new cause of action for the cost recovery of that activity.").

The first step in the CERCLA statute of limitations analysis is to determine whether the response action or actions taken at the site constitute one or more remedial actions. Where the facts regarding the response actions at the site are undisputed, the determination of whether an action can be characterized as a removal action or a remedial action "is one of law and is therefore appropriate for resolution on summary judgment." Hyampom, 903 F. Supp. at 1391; see United States v.W.R. Grace & Co., 429 F.3d 1224, 1234 (9th Cir. 2005) ("Whether the ... cleanup activity was a removal action — or, on the other hand, a remedial action in removal action's clothing—is a question of statutory interpretation.").

The term "remedial action" is defined by CERCLA as:

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. 42 U.S.C. § 9601(24).

Courts addressing the distinction between removal and remedial actions have developed the universally accepted principle that "removal actions generally are immediate or interim responses, and remedial actions generally are permanent responses." Geraghty & Miller Inc. v. Conoco Inc., 234 F.3d 917, 926 (5th Cir. 2002). Consistent with this approach, the Hyampom court has held that "'removal' actions are short-term, temporary responses to an immediate threat as well as actions taken to assess, monitor and evaluate a given site, while 'remedial actions' are those measures taken to achieve a permanent solution." Hyampom, 903 F. Supp. at 1391.

As opposed to remedial actions, removal actions are usually short in duration and occur early in the cleanup "life" of a site. See OBG Tech. Servs. Inc. v. Northrop Grumman Space & Mission Sys. Corp., 503 F. Supp. 2d 490, 523 (D. Conn. 2007) (regarding Congress' motives for different statutes of limitation for removal and remedial actions). Further, removal actions usually precede remedial actions. Id. at 525 (plaintiff could not point to permanent remedial action that followed its so-called removal actions "because the actions it considers to be removal actions were, in fact, the permanent remedial solution envisioned under CERCLA"). Courts also emphasize the circumstances in which the response action is taken, rather than the type of response activity, to determine whether a response action should be characterized as a removal action or a remedial action. Valbruna Slater Steel Corp. v. Joslyn Mfg. Co., No. 1:10-CV-044 JD at *9 (N.D. Ind. March 21, 2013).

In Hyampom, the court set forth several factors to be considered in determining whether a response action at a hazardous waste site is properly characterized as a "removal" action or a "remedial action." These factors, applied on a case-by-case basis with no one factor carrying more weight than any other, are: (1) proximity in time of the response action to disclosure of the final remedial design; (2) whether remedial investigation and feasibility study monitoring and testing are ongoing at the time of the response action; (3) whether the response action falls within the statutory definition of "removal" (or "remedial"); and (4) the response action's role in the implementation of the permanent remedy. Hyampom, 903 F. Supp. at 1392-94. Regarding the fourth factor, the Ninth Circuit has held that whether a given response action is consistent with a permanent remedy "is when the permanent remedy is

actually selected," i.e., when a final remedial action plan is approved. California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co., 358 F.3d 661, 667 (9th Cir. 2004).

Given this case law, companies served with PRP notices by the EPA or state agencies threatening action under CERCLA should carefully scrutinize the available public record concerning the site in question to determine whether the statute of limitations has already run on the remedial action involved.

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