Liability Under CERCLA

- The following parties may be held liable for most CERCLA costs and damages:
  - Current owners and operators
  - Former owners and operators of a facility who were involved with a facility during the time any hazardous substance was disposed of at the facility
  - Persons who arranged for the disposal or treatment of hazardous substances that they owned or possessed at the facility
  - Person who transported hazardous substances to disposal or treatment facilities that were selected by the transporter [42 U.S.C. sec. 9607(a)(1)-(a)(4)]
- In short: Any person who was involved with the creation, handling, or disposal of hazardous materials at a CERCLA site will be held liable pursuant to Section 107(a) of CERCLA

Assessment of Liability

- 2 General Liability Provisions
  - 42 U.S.C. sec. 9606
    - The EPA may seek a judicial order requiring a liable party to abate any danger to public health or the environment
  - 42 U.S.C. sec. 9607
    - The EPA and private parties may recover their cleanup costs

CERCLA Proceedings

- Actions to Recover Damages to Natural Resources
- Section 107 Cost Recovery Actions
  - Criteria that must be met:
    - Liable parties must be identified
    - There must be a release or a threatened release
    - A hazardous substance has been released
    - The release must be from a vessel or facility
    - The release has resulted in response costs
  - Abatement Actions

CERCLA Proceedings (cont.)

- Administrative Orders (the EPA's enforcement mechanism of choice under CERCLA)
  - Before the EPA can issue an order, there must be
    - The existence of
      - An actual or threatened release
      - A hazardous substance
      - A release of a hazardous substance from a facility
    - An administrative finding that there is or may be an imminent or substantial endangerment
    - Relief that "may be necessary" to abate the danger

CERCLA Proceedings (cont.)

- Consent Decree/Order
  - Settlements are beneficial to both liable parties and the EPA
  - What do settlements with the EPA typically cover?
    - Orphan share
      - The waste contributed by parties that are either defunct or bankrupt at the time of a CERCLA enforcement action
  - 2 categories of EPA settlements
    - Consent decree
      - An order filed with and signed by a federal court
    - Consent order
      - An order that does not result from any type of judicial action, or in other words, an agreement outside of a court proceeding

Failure to Comply with EPA Enforcement Orders

- Penalties
- Section 106 order
  - Substantive defenses
- Section 107 order
  - Affirmative defenses
  - Equitable defenses

Other Provisions Related to Liability

- Statute of Limitations
  - Section 113(g)
  - Cost recovery actions
    - For removals
    - For remediations
  - Claims for damage to natural resources
  - Contribution actions
    - For response costs
    - For damages

Division of Responsibility for Costs or Damages

- *De minimus* contributors
- Contribution action
  - An action brought by a party to a CERCLA action who determines that some division of the liability may be made
- Equitable factors used in assessing liability:
  - The amount of waste contributed by each party
  - The relative toxicity of the waste contributed by each party
  - Each party's involvement in the generation, transport, treatment, storage, or disposal of the waste
  - The care in handling demonstrated by the parties
  - The degree of cooperation of each party with the government's attempts to protect the public and the environment

Citizen Suits

- Any “person” may file a suit under CERCLA
  - against any other person, including the U.S., for violations of CERCLA laws, rules, regulations, or properly issued orders
  - against any officer of the U.S. for failure to perform a nondiscretionary act under CERCLA (*mandamus* action) [42 U.S.C. sec. 9659]
- The EPA and/or alleged violator must be given 60 days’ notice prior to filing the suit

Federal Facilities

- Sovereign immunity
  - A legal doctrine that permits governments to avoid liability for their actions in certain circumstances
- CERCLA contains broad waivers of sovereign immunity
  - This allows citizens and states to bring civil suits for recovery of cleanup costs and to require such facilities to comply with CERCLA requirements