CERCLA Rights and Liabilities Handbook
August 2012

By

Gene A. Lucero
Kelly E. Richardson
Jennifer P. Casler-Goncalves
Latham & Watkins LLP
Los Angeles, California

Hillary H. Steenberge
Nishant Kumar
Taiga Takahashi
Howard Wu
Benjamin Gibson
Kasey Branham
Brittany Merrill
Zachary Thompson

© Latham & Watkins LLP. All rights reserved.
CERCLA RIGHTS AND LIABILITIES HANDBOOK

Gene A. Lucero
Kelly E. Richardson
Jennifer P. Casler-Goncalves

August 2012
Cover picture of drums removed from the Love Canal Superfund Site, located in the City of Niagara Falls, New York. (credit: U.S.E.P.A., http://www.epa.gov/superfund/30years/timeline/index.htm#). On September 1, 1983, the Love Canal site became first location in the nation to be placed on the newly created “Superfund” National Priorities List. After a variety of remediation methods were employed during a period of more than twenty years, the Love Canal site was removed from the National Priorities List on September 30, 2004.
FOREWORD

This August 2012 update of the CERCLA Rights and Liabilities Handbook is intended as a handy reference for important statutory and caselaw developments on many key CERCLA topics. Statutes and cases cited in the summary were chosen to illustrate important topics in the world of CERCLA litigation, however, the Handbook is not intended to provide a comprehensive description of every CERCLA issue or CERCLA case.

Nevertheless, the authors hope that readers will find the topics and cases selected to be a useful research aid.

Gene A. Lucero, Esq.
Kelly E. Richardson, Esq.
Jennifer P. Casler-Goncalves, Esq.
## TABLE OF CONTENTS

I. INTRODUCTION ......................................................................................................................... 1
   A. How to Use This Handbook ................................................................................................. 1
   B. Overview of 2011-2012 CERCLA Cases ............................................................................ 1
   C. New Cases Cited in the 2011-2012 Handbook .................................................................... 3

II. RELEVANT STATUTORY EXCERPTS ................................................................................... 12
   A. Section 101 (42 U.S.C. § 9601). Definitions ........................................................................ 12
      2. Section 101(20) (42 U.S.C. § 9601(20)): “Owner or Operator” .............................. 12
      5. Section 101(39) (42 U.S.C. § 9601(39)): Brownfield sites .................................. 22
      7. Section 101(41) (42 U.S.C. § 9601(41)): Eligible response site ............................... 26
   B. Section 105 (42 U.S.C. § 9605). National Contingency Plan ................................................ 27
      1. Section 105(h) (42 U.S.C. § 9605(h)): National Priorities List deferral ............................ 27
   C. Section 106 (42 U.S.C. § 9606). Abatement Actions ............................................................... 29
      1. Section 106(a) (42 U.S.C. § 9606(a)): Maintenance, jurisdiction, etc ............................. 29
      2. Section 106(b) (42 U.S.C. § 9606(b)): Fines; reimbursement ........................................ 29
   D. Section 107 (42 U.S.C. § 9607). Liabilities .............................................................................. 30
      1. Section 107(a) (42 U.S.C. § 9607(a)): Covered persons; scope; recoverable costs and damages; interest rate; “comparable maturity” date .......................................................... 30
2. Section 107(b) (42 U.S.C. § 9607(b)): Defenses ........................................31
3. Section 107(q) (42 U.S.C. § 9607(q)): Contiguous properties ..........32
4. Section 107(r) (42 U.S.C. § 9607(r)): Prospective purchaser and windfall lien ..................................................35

1. Section 113(f) (42 U.S.C. § 9613(f)): Contribution .............................36
2. Section 113(f) (42 U.S.C. § 9613(g)): Period in which action may be brought ..................................................37

F. Solid Waste Disposal Act, Section 1004(3) (42 U.S.C. § 6903(3)). “Disposal” Definition Incorporated Into CERCLA ........................................39
1. Section 1004(3) (42 U.S.C. § 6903(3)): “Disposal” ................................39
2. Caselaw ..................................................................................40

III. LIABLE PARTIES .................................................................................41
A. Overview—Categories of Potentially Responsible Parties (“PRPs”).........41
B. Owners ..................................................................................42
1. “Owner or Operator” Defined—CERCLA § 101(20) (42 U.S.C. § 9601(20)) ..................................................42
2. Current Owners/Operators ..................................................44
4. Miscellaneous “Arrangements for Disposal” ................................88
5. Subsequent Owners ..................................................................88
C. Special Classes of Owners or Operators .............................................91
1. Control of Operations or Decisions Involving Hazardous Substances ...........................................................................91
   a. The Supreme Court’s Decision in Bestfoods ...............................91
   b. Post-Bestfoods Cases ..................................................92
   c. Pre-Bestfoods Cases ..................................................117
2. Officers, Directors, and Shareholders as Operators
3. State/Federal Government as Operator
4. Lessors/Lessees as Operators
5. Cleanup Contractors as Operators
6. Easement Holders as Owners or Operators

D. Trustee/Receiver Liability

E. Generators—“Arranging for Disposal”

1. Overview of Arranger Liability

2. Burlington Northern & Santa Fe Ry Co. v. United States, 556 U.S. 599
   a. Background
   c. Summary of the Ninth Circuit’s Opinion, 520 F.3d 918 (9th Cir. 2008)
   d. The Supreme Court’s Holding on Arranger Liability
   e. The Supreme Court’s Holding on Apportionment
   f. Implications of the Supreme Court’s Decision in Burlington Northern

3. Recent Arranger Liability Cases Applying Burlington Northern

4. Caselaw Considering Arrangements for Disposal

5. “Product” vs. “Waste” – the Useful Product Exception
   a. Overview
   b. Factors Relevant to the Application of the Useful Products Exception
   d. Caselaw