

US EPA ARCHIVE DOCUMENT



## VII. Hazardous Substances (Superfund Liability) Requirements for Construction Activities

**B**efore beginning any construction or demolition activities at your construction site, you should evaluate the site for existing hazardous substances as defined by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as “Superfund”). CERCLA was originally enacted to address hazardous substances at inactive or abandoned sites. The Superfund program is administered by EPA in cooperation with individual states and tribal governments. The program includes a revolving Trust Fund used by EPA and other agencies to clean up hazardous waste sites where no responsible party can be identified. CERCLA also requires you to immediately report to the National Response Center any releases of hazardous substances at your construction site if the amount released meets or exceeds the reportable quantity.

### Definitions and Acronyms

**Brownfield**—Property where any expansion, redevelopment, or reuse may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant, not including sites that are part of a planned or ongoing removal action or are on the National Priorities List.

**Extremely Hazardous Substances (EHSs)**—Chemicals that most likely induce serious acute reactions following short-term airborne exposure

(defined at 40 CFR Part 355). The list of extremely hazardous substances subject to EPCRA reporting requirements can be found in EPA’s Consolidated List of Chemicals Subject to the Emergency Planning and Community Right-To-Know Act (EPCRA) and Section 112(r) of the Clean Air Act (EPA 550-B-01-003). Note that an extremely hazardous substance may also be included on the CERCLA list of hazardous substances.

## Definitions and Acronyms

**Hazardous Substances**—Defined in CERCLA Section 101(14) and includes hazardous air pollutants (designated in Section 112(b) of the Clean Air Act), radionuclides, toxic pollutants (designated in Section 307(a) of the Clean Water Act), elements and compounds that present an imminent danger to public health when discharged into waters of the United States (designated in Section 311(b)(2)(A) of the Clean Water Act), TSCA substance that EPA has taken action against (currently none), RCRA-listed hazardous wastes, and RCRA characteristic wastes. The list of hazardous substances subject to CERCLA and EPCRA reporting requirements can be found in EPA's Consolidated List of Chemicals Subject to the Emergency Planning and Community Right-To-Know Act (EPCRA) and Section 112(r) of the Clean Air Act (EPA 550-B-01-003). Certain substances are excluded from CERCLA and/or EPCRA reporting requirements (see Section VII-F of this document for web sites and hotlines where you can obtain additional information).

**National Priorities List**—The list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation.

**Release**—Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance.

**Reportable Quantity**—Amount of hazardous substance (or extremely hazardous substance) released into the environment within a 24-hour period that must be met or exceeded before emergency release notification requirements are triggered. Reportable quantities are listed in EPA's Consolidated List of Chemicals Subject to the Emergency Planning and Community Right-To-Know Act (EPCRA) and Section 112(r) of the Clean Air Act (EPA 550-B-01-003).

**CERCLA**—Comprehensive Environmental Response, Compensation, and Liability Act

**CFR**—Code of Federal Regulations

**EPCRA**—Emergency Planning and Community Right-to-Know Act

**LEPC**—Local Emergency Planning Committee

**NPL**—National Priorities List

**SERC**—State Emergency Response Commission

SARA Title III, better known as the Emergency Planning and Community Right-to-Know Act (EPCRA), originated from CERCLA. EPCRA requires the use of emergency planning and provides citizens, local governments, and local response authorities with information regarding the potential hazards in their community. The regulatory text discussing these programs (40 CFR Part 302 and Parts 350-372) can be found at <http://ecfr.gpoaccess.gov> under "Title 40 - Protection of the Environment."

Prior to beginning the bidding process, the owner or developer should research the construction site to identify any history of hazardous substance use or disposal at the site. If you conduct this research prior to construction, it will help to avoid significant project delays and possible project cancellation if hazardous

substances are discovered during construction. Contractors should also make sure that this review has been completed prior to starting any construction activities to better understand potential risks and liabilities prior to bidding a job.

EPCRA establishes State Emergency Response Commissions (SERC) and Local Emergency Planning Committees (LEPC). If EPCRA applies to your construction project, you may need to provide information to your SERC/LEPC on the presence of hazardous chemicals and their releases (accidental or routine). In addition, your SERC/LEPC may have additional requirements. EPA has found that most construction sites are not subject to EPCRA planning requirements.

In addition to planning requirements, EPCRA also has reporting requirements for hazardous substances and extremely hazardous substances. You must report to your SERC/LEPC any releases of these substances at your construction site if the amount released meets or exceeds the reportable quantity.

**To make sure that your construction site is not a Superfund site or on the National Priorities List (NPL), go to: <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm>.**

## A. Does Your Construction Project Site Contain Hazardous Substances?

Your facility can be affected by Superfund or EPCRA if hazardous substances are discovered during construction activities (e.g., grading or digging) or removed during demolition (e.g., drums of spent chemicals). Prior to any construction activity, you should make sure that a thorough historical evaluation of your site has been completed. This should include, but not be limited to, a review of historical records to determine previous uses of the site, a review of historical aerial photographs to identify potential areas of contamination, and a review of state and local files to identify past environmental concerns at the site. If your site was previously used for industrial or commercial activities that may have generated hazardous substances, or there is some indication of waste disposal at the site, you should consider testing the soil, surface water, and groundwater prior to beginning any construction activities.

**To determine if test results indicate the presence of hazardous substances at your site contact the National Response Center Hotline, 1-800-424-8802.**

There may still be instances where, during construction, you discover hazardous substances at a site that was never used for industrial or commercial activities or waste disposal (i.e., illegal dumping grounds). If this happens, stop your construction activities and immediately notify the owner/developer and the National Response Center Hotline at 1-800-424-8802. See Section VII-B of Part I of this guide for more information.

If your construction site is considered a brownfield site, you should already be aware of any potential hazardous contamination. A brownfield site is a piece of property that is undesirable for development due either to contamination by a hazardous substance or the perception of contamination. Brownfields do not include sites that are part of the Superfund process. EPA implements a Brownfields Program to encourage states, communities, and other stakeholders to work together to prevent, assess, safely clean up, and reuse brownfields. The Brownfields Program provides grant money to communities to help fund the evaluation and cleanup of these sites. For more information on this program, go to EPA's Brownfields Cleanup and Redevelopment web site at <http://www.epa.gov/swerosps/bf/index.html>.

## EPCRA Planning Requirements

Your construction site is subject to EPCRA emergency planning requirements (Section 302) if it meets both of the following:

- It stores an extremely hazardous substance, as defined at <http://yosemite.epa.gov/oswer/cep-poweb.nsf/content/chemicalinfo.htm>; or stores any substance regulated by your state or local authority; and
- It stores the substance above the designated Threshold Planning Quantity, which varies by substance. A definition of Threshold Planning Quantities can be found at [http://yosemite.epa.gov/oswer/ceppoweb.nsf/vwResourcesByFilename/title3.pdf/\\$File/title3.pdf](http://yosemite.epa.gov/oswer/ceppoweb.nsf/vwResourcesByFilename/title3.pdf/$File/title3.pdf).

However, EPA has found that most construction sites do not work with the listed extremely hazardous substances and are not subject to the requirements of EPCRA. Therefore, this guide does not discuss EPCRA planning requirements further. If you discover hazardous substances at your site, you should consult the references listed above to determine if EPCRA applies.

**More information on brownfields cleanup enforcement is available on line at: <http://www.epa.gov/enforcement/cleanup/brownfields>.**

## B. Are You Responsible for Meeting CERCLA/EPCRA Requirements?

If hazardous substances are discovered during construction activities, the contractor or subcontractor who first discovers the material is responsible for notifying the general contractor, developer, and/or owner. Because the hazardous substance was present at the site prior to construction activities, the developer or owner typically is responsible for ensuring that the hazardous substances are handled and disposed of properly.

However, if you excavate or spread soils containing a hazardous substance (e.g., waste pesticides), you may be responsible under CERCLA as an operator, arranger, or transporter. For example:

- You may be an operator if you spread soil that contains a hazardous substance on the land.
- You may be an arranger if you dispose of a hazardous substance or arrange to have it removed from the construction site. For example, if you excavate soil that contains pollutants buried by a previous owner, you may be liable for disposal of a hazardous substance.
- You may be a transporter if you move hazardous substance from one location to another. For example, you may be liable if you transport dioxin-contaminated soil even if you did not know the soil contained dioxin.

If there is a hazardous substance release exceeding the reportable quantity for CERCLA, you must immediately notify the National Response Center at 1-800-424-8802 and your SERC/LEPC. If there is an extremely hazardous substance release exceeding the reportable quantity for EPCRA, you

**If you discover a hazardous substance on your construction site, you should notify your state and local authorities or the National Response Center Hotline, 1-800-424-8802.**

must immediately notify your SERC/LEPC. If no notification occurs, both the owner and operator (e.g., contractor, subcontractor) may be held responsible.

### C. What Are the Penalties?

Federal environmental laws give a range of enforcement options to EPA, state agencies, and individual citizens. Most laws authorize EPA to: (1) issue an administrative order or impose an administrative penalty, (2) file a civil action in a federal court for injunctive relief or a civil penalty, or (3) file a criminal action in a federal court to impose criminal sanctions.

EPA may impose administrative, civil, and criminal sanctions on a property owner and/or a contractor for failure to comply with Superfund requirements. Administrative penalties and civil penalties – imposed in a judicial proceeding – can reach \$32,500 per violation per day. In addition to fines, you may need to pay legal fees and face project delays. If legal action is taken against your construction site, you may also be subject to increased scrutiny at all of your other construction sites by regulatory agencies and the public.

CERCLA authorizes EPA to negotiate with parties that helped create hazardous waste sites (responsible parties, also known as PRPs) to get them to clean up the sites. If those parties refuse to cooperate, EPA can order them to conduct the cleanup, or EPA can conduct the cleanup using money from the Superfund Trust Fund. Regardless of how the cleanup is conducted, CERCLA gives EPA the authority to recover any costs it incurs as part of the response. Therefore, any responsible party may be required to pay for the entire cleanup cost. For more information on the types of costs EPA can recover, go to <http://www.epa.gov/compliance/cleanup/superfund/recovercosts/index.html>.

### D. In General, What are the Steps for Cleanup?

If you discover hazardous materials, contaminated soil, or contaminated groundwater, your construction site may be entered into the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS), EPA's computerized inventory of potential hazardous substance release sites. When this happens, the responsible parties are required to work with EPA to evaluate the severity of the problem and develop remedies. EPA and the responsible party will evaluate the potential for a release of hazardous substances from the site through these steps in the Superfund cleanup process:

- Preliminary Assessment/Site Inspection (PA/SI) - Investigate the site conditions;
- Hazard Ranking System (HRS) Scoring - Based on the results of the PA/SI, rate the site and determine if it should be placed on the National Priorities List; and
- National Priorities List (NPL) Site Listing Process - Based on the HRS score, EPA lists the most serious of the sites for further investigation and possible long-term cleanup.

If a site is placed on the NPL, the responsible parties are required to work with EPA to conduct several steps to clean up the site, including:

- Remedial Investigation/Feasibility Study (RI/FS) - Investigate the NPL sites to determine the nature and extent of contamination as well as the potential treatment options;
- Records of Decision (ROD) - Use the results of the RI/FS to explain which cleanup alternatives will be used at the NPL site;

- Remedial Design/Remedial Action (RD/RA) - Design the cleanup technology and begin the site cleanup process;
- Cleanup Completion - Complete any required cleanup activities or, remove the site from the NPL; and
- Post Cleanup Completion - Once cleanup is complete, implement maintenance programs that will provide for the long-term protection of human health and the environment.

Releases that require immediate or short-term response actions are addressed under the Emergency Response program of Superfund.

## E. What Questions Do You Need to Answer Before Starting Your Construction Project?

You can use the questions in Section II of Part I of this guide to start a discussion among all parties involved in the construction project and to assign tasks to ensure all environmental requirements are met. Each question has a space next to it to designate who will take the lead on each task. Note that designating a responsible party does not absolve you of responsibility for meeting environmental requirements or liability for failing to meet these requirements.

## F. Where Can You Get Additional Information?

Many tools are available to assist you with your CERCLA and EPCRA requirements, including the following:

- The Hazardous Substances (Superfund Liability) Self-Audit Checklist in Part II of this guide;
- EPA's Superfund web site: <http://www.epa.gov/superfund/index.htm>;
- EPA's Brownfields homepage: <http://www.epa.gov/swerosps/bf/>;
- EPCRA web site: <http://yosemite.epa.gov/oswer/ceppoweb.nsf/content/epcraoverview.htm>;
- EPCRA Hotline: 1-800-424-9346;
- EPA's "Where you live" page contains links to state environmental agencies: <http://www.epa.gov/epahome/whereyoulive.htm>;
- EPA's Office of Site Remediation and Enforcement (OSRE) staff assist with issues such as lender liability, prospective purchasers, comfort letters, and municipal solid waste. OSRE web sites include: <http://www.epa.gov/compliance/cleanup/> and specifically for brownfields, <http://www.epa.gov/enforcement/cleanup/brownfields>;
- The Construction Industry Compliance Assistance Center provides information on hazardous and toxic substances regulations that apply to the construction industry: <http://www.cicacenter.org/hazwaste.html>; and
- The National Environmental Compliance Assistance Clearinghouse contains a search engine to help you find compliance assistance tools, contacts, and EPA- sponsored programs: <http://www.epa.gov/clearinghouse/>.