

# The Florida Handbook of Solid and Hazardous Waste Regulation: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>1</sup>

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## What is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)?

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980. CERCLA empowers the Environmental Protection Agency (EPA) to investigate and pursue cleanup of abandoned or uncontrolled sites contaminated by hazardous substances. It also established a tax on chemical and petroleum industries to support a trust fund (“Superfund”) that provides for cleanup where no responsible party can be identified. The statute was amended by the Superfund Amendments and Reauthorization Act (SARA) in 1986, which allowed for continued enforcement of CERCLA’s provisions and authorized the Emergency Planning and Community Right-to-Know Act (EPCRA) (see [FE766](#)).

CERCLA extends liability for site pollution to several classes of potential defendants at once. It is a powerful measure for forcing responsible parties to contribute to the costs of cleanup.

## What substances are regulated under CERCLA?

CERCLA cleanup provisions cover all substances designated as hazardous under these acts of Congress:

- Clean Water Act (CWA)
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
- Resource Conservation and Recovery Act (RCRA)
- Clean Air Act (CAA)
- Toxic Substances Control Act (TSCA)

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## What substances are excluded under CERCLA?

Substances excluded from CERCLA coverage include:

- petroleum, including crude oil or any fraction thereof that is not otherwise designated as a hazardous substance under another statute
- natural gas or natural gas liquids
- liquefied natural gas
- synthetic gas usable for fuel

Although petroleum and petroleum products are specifically excluded from regulation under CERCLA, Congress has enacted provisions under RCRA that impose liability on owners of petroleum storage tanks (FE762).

## Who is regulated by CERCLA?

CERCLA is aimed at four types of potentially responsible parties:

1. Current owners and operators of contaminated sites
2. Former owners or operators of contaminated sites
3. Generators of hazardous substances who arranged for treatment or disposal of hazardous substances
4. Transporters of the hazardous waste who chose the disposal site

Courts have broadly interpreted CERCLA to reach everyone who may have been in any way responsible for a site's contamination. A partial list of the parties who have faced liability under CERCLA includes:

- current and past owners who purchased land without knowledge of the hazardous pollutants there (the exception is the "innocent landowner defense")
- current landowners who merely act as landlords, lessees, and sub-lessees, if they had control of the site when it was contaminated
- past landowners who owned the site when it was contaminated
- government entities that may have been involved in regulating the site
- any commercial entity, including corporations, associations, partnerships, and sole proprietorships, who innocently purchased the facilities where hazardous waste is buried

- corporate officers and management employees of companies who had control of the site when it was contaminated
- anyone who arranged for the disposal of the hazardous waste
- foreclosing banks, lien holders, creditors, and mortgage companies
- moving companies

It is important to note that owners may be held liable even if they purchased land without knowledge of hazardous waste buried there. This has been a source of great concern to land buyers, foreclosing banks, and others about to acquire land.

## How is liability determined under CERCLA?

CERCLA imposes strict liability and therefore does not require a specific finding of negligence before penalties may be imposed (see the section on strict liability in FE783). CERCLA also provides for joint and several liability, which simply means that EPA may seek to recover some or all of the cleanup costs from any party or combination of parties it finds responsible for damage. This allows EPA to force a party who may be responsible for only part of the damage to pay the entire cost of cleanup (see the discussion on joint and several liability in FE783). In addition, CERCLA has retroactive effect and applies to properties that were contaminated prior to its enactment in 1980.

## What does CERCLA require?

CERCLA requires that the location of any site containing hazardous materials be reported to EPA. Additionally, prompt notification is also required after any spill or release of contaminated materials into the environment. Failure to notify EPA in either case may result in fines and/or imprisonment.

## Who is responsible for enforcing CERCLA?

While the President is the ultimate enforcer of CERCLA, EPA has been delegated the authority to enforce its provisions in all fifty states. EPA must consult with state and local officials before deciding on remedies for contamination at federal facilities, and site identification, monitoring, and response activities. These actions are often coordinated through state environmental protection or waste management agencies.

## How is CERCLA enforced?

EPA may begin investigations whenever there is reason to believe that a release has occurred or may occur. EPA, or a state or local authority acting under agreement with EPA, may require the person or business under investigation to provide them with:

- information about the nature and handling of all hazardous materials on the site
- information related to the potentially liable party's ability to pay for the cleanup

EPA may enter, at reasonable times, any site dealing with hazardous materials and take samples from the site. If EPA requests are denied during the investigation phase, the agency may issue compliance orders to compel cooperation. EPA can enforce these orders with civil fines of up to \$25,000 per day.

## What are the procedures for a cleanup under CERCLA?

If the investigation confirms that a hazardous substance (or a pollutant or contaminant with the potential to pose an imminent threat to public health) has been released or may be released, EPA may exercise any combination of response options, including:

- short-term removal actions
- long-term remedial actions
- enforcement actions against the responsible parties

EPA prefers permanent, cost-effective measures whenever possible. Also, the cleanup must be in accordance with other appropriate federal or state environmental statutes.

EPA, or the state, may undertake the cleanup. The responsible parties may be permitted to begin a private cleanup if they can demonstrate to EPA that it will be as effective as the proposed EPA measures. This alternative may be much less costly for parties who would otherwise be forced to pay for a cleanup conducted by EPA or the state.

The responsible parties will be liable for all costs related to:

- removal or remedial action by the federal or state government
- any other necessary costs of response incurred by a third party
- damages for injury or destruction to natural resources

- health assessment or health effects studies resulting from the contamination

## What are the defenses to liability under CERCLA?

Legal defenses to CERCLA liability are limited to the following:

- acts of God
- acts of war
- actions or omissions of a third party
- the secured creditor exemption (aka "security interest exemption")
- the innocent landowner defense

There is an additional defense that is not specifically listed but that may be used if a site is contaminated by pesticide application. You would not be liable under CERCLA if you followed all label instructions under FIFRA.

Acts of God are defined as unanticipated and grave natural disasters that cause effects that could not have been prevented by the exercise of due care. Events that could be anticipated, such as heavy rains in flood-prone areas or earthquakes near fault lines, are not eligible for this defense.

The third-party defense may only be used when the third party is entirely responsible for the contamination and when there is no contract between the defendant and the third party. For example, this defense may not be used if there is a sales contract between the current owner (the defendant) and the prior owner (the third party whose actions caused the contamination). In that situation, the innocent landowner defense would apply.

The secured creditor exemption protects lenders (such as banks) from liability when the lender acquires ownership through a default or foreclosure on a mortgage and does not participate in the management of the facility.

The innocent landowner defense applies when a new landowner did not know, and had no reason to know after making all appropriate inquiries into previous owners, uses, and environmental conditions of the property, that a previous landowner had contaminated the property. It can be very difficult for a new landowner to prove this defense. Even if an innocent landowner defense is successful, the innocent landowner must still provide proper notice for the contaminated site, take reasonable precautions to prevent the spread of the contamination, submit the contaminated

site to any cleanup efforts prescribed, and accept stringent land-use regulations that often prevent intended uses.

The Small Business Liability Relief and Brownfields Revitalization Act, adopted in 2002, similarly protects bona fide prospective purchasers (“BFPPs”) and contiguous property owners (“CPOs”) from liability under CERCLA so long as they can show that they made all appropriate inquiries into previous owners and uses of the property (see the discussion on environmental audits below) and are not affiliated with another party who is potentially liable under CERCLA. The Brownsfields provisions of CERCLA were amended in March 2018 by the Brownsfields Utilization, Investment, and Local Development Act (“BUILD Act”). The BUILD Act revised the BFPP definition to include persons with leasehold interests in a property (subject to other criteria), among other changes.

Note: No indemnification clause will be effective in removing oneself from CERCLA liability.

## What is an environmental audit?

An environmental audit is an evaluation of the condition of the land and assesses whether the lender or buyer is likely to become subject to some type of enforcement action. An environmental audit entails a written report by an environmental professional that details the results of interviews with past and present owners, reviews of historical sources and government records, and visual inspection of the property and adjoining lands.

Under CERCLA, all buyers, even buyers without knowledge of buried contaminants, may be held liable for cleanup costs. Thus, buyers and lenders alike should conduct an audit before purchasing property that may be contaminated. This audit can help you avoid responsibility for the prior owners’ cleanup costs.

## Why do an environmental audit?

An environmental audit is a required component of the innocent landowner defense, and must be completed in the year preceding acquisition of the property. An audit demonstrates that the new landowner used due diligence and took all appropriate actions to find out whether there was any likelihood of contamination. For this reason, environmental audits have become very popular with purchasers of land as a form of protection from liability.

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