

# What are the Liabilities in the HTRW Program?

This section outlines in a summary fashion, environmental liability concerns both to the Federal Government as an entity and to individual Federal employees. Necessarily, such outline is general in nature and not meant to be all-inclusive. Legal advice should always be sought concerning specific questions.

## **Potentially Responsible Party (PRP) Liability**

CERCLA section 107, U.S.C. 9607, defines one type of liability known as Potentially Responsible Party (PRP) liability. The Act allows EPA to force PRPs to perform remediation at hazardous substance sites or recover cleanup costs from the PRPs. Section 107 defines those persons responsible for the costs of a cleanup of hazardous substance as:



- ! the owner and operator of a vessel or a facility;
- ! any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
- ! any person who by contract, agreement, or otherwise arranged for disposal or treatment or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and
- ! any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, for which there is a release, or threatened release which causes the incurrence or response costs, of a hazardous substance.

Persons within the above-mentioned categories are liable for:

- ! all costs of removal or remedial action incurred by the United States Government or a state or an Indian tribe not inconsistent with the National Contingency Plan;
- ! any other necessary costs of response incurred by any other person consistent with the National Contingency Plan;
- ! damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
- ! the costs of any health assessment or health effects carried out under 9604(l) of this title.

However, there shall be no liability for a person who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:

- ! an act of God;
- ! an act of war;
- ! an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he or she exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he or she took precautions against foreseeable acts or omission of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- ! any combination of the foregoing paragraphs.

Typically, the Federal government as an entity is named as a PRP rather than any individual Federal employee acting within the scope of their employment. PRPs are strictly, jointly and severally liable. The concept of strict liability means liability without fault. Thus, even if the PRP is not negligent, it may be liable. The concept of joint and several liability means that even if the PRP is only the source of a portion of contamination at a site, the PRP may be held liable to EPA for all costs expended in the cleanup effort. This PRP may then sue other PRPs at that site, if any, to recover all or part of their payment to EPA in excess of their pro rata share. This is called a suit for contribution.

### **Tort Liability**

The Federal Employees Liability Reform and Tort Compensation Act, 28 U.S. C. 2679, protects employees acting within the scope of their official duties from personal liability for common law torts, namely acts of negligence resulting in personal injury or property damage. However, violations of Federal environmental laws which could result in civil penalties or criminal sanctions are not common law torts, and accordingly, no protection from personal liability from such environmental violations exist by reason of the Federal Employees Liability Reform and Tort Compensation Act.

## **Civil Liability**

Civil liability provisions for violation of Federal environmental laws appear in CERCLA, RCRA, TSCA, CAA, CWA, and SDWA. Civil penalties are assessed on a "strict liability" basis. Liability attaches automatically upon the omission or commission of the act giving rise to the violation; there is no requirement to show that the offender had "knowledge" of the legal implications of his or her act, or that he or she "intended" to violate the law. The decision to administratively pursue civil penalties by EPA is based on various factors, including the degree of willfulness or negligence of the violator, history of non-compliance, ability to pay, degree of cooperation or noncooperation, and other unique factors specific to the violators' case. Alternatively, EPA may refer its case to the Department of Justice for enforcement.

Although there are many civil liability provisions, as indicated above, four such provisions are especially noteworthy:

- ! CERCLA 109 provides that any person who violated CERCLA's notice requirements (including the notification to the National Response center of hazardous substance spills exceeding reportable quantities); administrative orders; consent decrees; settlement agreements; and requirements for maintaining records; may be assessed a civil penalty of \$25,000 per day for each day that the violation continues.
- ! RCRA 3008 provides that any person who violates any requirement of Subtitle C (the Subtitle of RCRA governing the handling and management of hazardous waste) may be assessed a civil penalty in an amount not to exceed \$25,000 for each such violation.
- ! CAA 113 (b) authorized EPA to initiate a civil action against any person who is an owner or operator or a major stationary source, or any other person, for injunctive relief or to recover a civil penalty for non-compliance with various CAA requirements in an amount not to exceed \$25,000 per day for each day that a violation continues.

Some environmental statutes contain a grant of immunity to Federal employees from personal liability for civil penalties. Section 118(a) of the Clean Air Act, 42 U.S.C. 7418(a) provides in pertinent part:

"No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable."

Section 313(a) of the CWA, 33 U.S.C. 1323(a) provides, in pertinent part:

"No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable."

However, RCRA, 42 U.S.C. 6901 et. seq., which governs the manifesting requirements and CERCLA 42 U.S.C. 9601 et. seq., do not contain any such immunity provision for government employees.

However, the recently passed Federal Facilities Compliance Act exempts from civil penalties, Federal employees acting within the scope of their employment.

The U. S. Supreme Court has recently held that Congress has not waived the Federal government's sovereign immunity or civil fines imposed by a state for past violations of the Clean Water Act or RCRA (*U.S. Department of Energy V. Ohio*, 112 S. Ct. 1627, 118 L. Ed. 2d 255, 60 U.S. L. W. 4325 (1992)). However, it should also be noted that a Federal agency's sovereign immunity does not protect Federal employees from civil liability for their environmental - violations.

## **Criminal Liability**

### **General Criminal Statutes**

In addition to penalties for violation of environmental statutes, the applicable provisions of 18 U.S.C. may be invoked for misconduct. For example, sections of 18 U.S.C. dealing with criminal conspiracy and making materially false statements to the government may be appropriate for misconduct in the environmental arena.

### **Environmental Statutes**

Each of the major environmental statutes imposes criminal penalties for specific misconduct. Most statutes also provide for doubling the maximum permissible fine and the confinement if previously convicted for the same offense.

The CWA, 33 U.S.C. 1319, provides penalties as follows:

- ! Negligent violations such as violation of permit conditions, including those for effluent discharges; for violation of pre-treatment program requirements; or violations of 404 permits; and for introduction of pollutants or hazardous substances in a publicly owned treatment works which that person "knew or reasonably should have known could cause personal injury or property damage or. . . cause such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works..." carry penalty provisions ranging from \$2,500 to \$25,000 per day and/or 1 year confinement.
- ! Knowing violations carry penalty provisions ranging from \$5,000 to \$50,000 per day and/or 3 years confinement.
- ! Knowing endangerment violations carry penalty provisions of \$250,000 and/or up to 15 years confinement where a violator "knows at the time that he thereby places another person in imminent danger of death or serious bodily injury."

The CAA, 42 U.S.C. 7413, provides penalties as follows:

- ! Knowing violations of Federal implementation plan (FIP) or state implementation plan (SIP) requirements, or of orders to comply with SIPs under section 113(a); or of provisions relating to new source performance, inspections, solid waste combustion, preconstruction requirements for prevention of significant deterioration (PSD), emergency orders, permits, etc. carry penalties under Title 18 U.S.C. and/or 5 years confinement.
- ! Recordkeeping and reporting penalties include fines under 18 U.S.C. and/or 2 years confinement for:
  - "knowingly" making false "material" statements or omissions or other improper adjustments to documents required to be filed or maintained by the Act;

falsification or tampering with pollution control monitoring devices or methods; or

failure to report or notify as required under the Act. Negligent violations such as a release of a "hazardous air pollutant" listed under CAA section 112 or an "extremely hazardous substance" listed under section 302 of the Emergency Planning and Community Right to Know Act (EPCRA) and who at the time negligently places another person in imminent danger of death or serious bodily injury shall be fined under Title 18 and/or imprisoned up to 1 year.

- ! Knowing endangerment violations involving releases of hazardous air pollutants listed under CAA section 112 or any extremely hazardous substance listed under section 302 of EPCRA where the person knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall be fined under Title 18 and/or by imprisonment of up to 15 years.

RCRA 3008 (d) (1) (&2) and 42 U.S.C. 6928(d) (1) & (2) provide generic liability provisions of \$50,000 per day and/or 5 years confinement for the following:

- ! any person who knowingly transports or causes to be transported any identified or listed hazardous waste to a facility without a permit;
- ! who knowingly treats, stores or disposes of an identified or listed hazardous waste without a permit;
- ! who knowingly violates a material condition of that permit or any applicable regulation or standard;
- ! any person who knowingly omits material information or makes a false material statement in any specified document used for the purpose of compliance with regulations promulgated by the EPA;
- ! knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles hazardous waste and knowingly destroys, alters, conceals or fails to file any compliance document;
- ! knowingly transports or causes to be transported without a manifest any hazardous waste required to be accompanied by a manifest;
- ! knowingly exports an identified or listed hazardous waste without the consent of a receiving country or in a manner that doesn't conform to an existing international agreement; or
- ! knowingly stores, treats, transports, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under RCRA in knowing violation of a permit, applicable standards or condition.

RCRA also contains fines of up to \$250,000 and/or 15 years confinement for knowing endangerment in which liability accrues to a person handling hazardous waste "who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury." Actual knowledge is required.

The Endangered Species Act, 16 U.S.C. 1540 provides penalties as follows:

- ! knowing violations include harming a listed endangered species or plant or their critical habitat, violating the provisions of a permit issued under the act, or violating listed implementing regulations carry penalties of up to \$50,000 and/or 1 year confinement.
- ! violation of implementing regulations other than those enumerated in the act shall result in a fine of not more than \$25,000 and/or 6 months confinement.

### **Federal Sentencing Guidelines**

The Federal sentencing guidelines created pursuant to the 1984 Comprehensive Crime Control Act have been applied to criminal violations of environmental statutes. When imposing a sentence, courts are to consider the following as aggravating factors:

- ! whether the offense was an ongoing, continuous, or repetitive discharge of a hazardous substance to the environment;
- ! whether it resulted in a substantial likelihood of death or serious bodily injuries;
- ! whether it resulted in disruption of public utilities or evacuation of a community;
- ! whether it involved transport, treatment, storage, or disposal without a permit, or in violation of a permit; and
- ! whether it reflected an effort to conceal a substantive environmental offense.

Probation is strictly limited under the guidelines.

### **Federal Employee Prosecutions**

1. In *U.S. V. Dee*, 19 ER 2353, (D.Md., 1989), three Department of Defense civilian employees at Aberdeen Proving Ground were prosecuted by the Maryland U.S. Attorney's Office for violations of RCRA. The three defendants held position titles as Director of the Munitions Directorate of the Chemical Research and Development Center, Chief of the Producibility, Engineering, and Technology Division of the Munitions, and Plant Manager of the research building. All three had degrees in chemical engineering. The defendants were found guilty of RCRA violations relating to the improper storage of dimethyl polysulfide and other hazardous chemicals at and around two buildings at Aberdeen Proving Ground. They were each sentenced to 3 years probation.





On appeal, the 4th Circuit, *U.S. v. Dee*, 912 F.2d 741, (4th Cir., 1990); *cert. denied*, 111 5. Ct. 1307 113 L. Ed. 2d 242(1991), held that the government did not have to show that the defendants knew that violation of RCRA was a crime or that they knew regulations existed listed specific chemical wastes as hazardous. The court commented that "ignorance of the law is no defense." The government would only have to show that the defendants knew the wastes were hazardous.

2. In *U.S. v. Carr*; 880 F.2d 1550 (2d cir. 1989), the defendant was a DOD civilian employee and *maintenance foreman* on the Fort Drum, N.Y., firing range. In 1986 he directed several subordinates to dispose of old cans of waste paint in a small man-made pit filled with water on the range. After 50 or so cans had been thrown in the pit, workers noticed that some of the cans were leaking and decided to stack the rest of the cans against a shed. The workers *told him* of the leaking cans and that they thought the dumping was illegal. Two weeks later he ordered a subordinate to *cover up* the cans with piles of dirt.

The defendant was convicted for violations of CERCLA. On appeal, the court found that Carr was "in charge" of a facility within the meaning of CERCLA 103. The court explained that to be "in charge", *sole control of the facility was not necessary*. The defendant was sentenced to a suspended sentence of 1 year's confinement and to 1 year of probation. The defendant had to pay his own legal fees.

3. *U.S. V. Pond*, 21 ER 2035, (D.Md., S-900420, January 17, 1991), The superintendent of the waste water treatment facilities at Fort Meade, Maryland was convicted for falsifying discharge monitoring reports and violating the Clean Water Act NPDES permit conditions. The defendant did not conduct required sampling and testing of wastewater effluent from September 1988 to March 1989 and submitted false reports on eight occasions from November 1988 to April 1989.