

# Emergency Management May Reduce the Risk of CERCLA Liability for Natural Disasters

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**T**he federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and corresponding state laws were designed to impose liability on parties determined to be responsible for releases of hazardous substances into the environment, and the potential costs of liability can be devastating.

Natural disasters can lead to unexpected liabilities under these laws. Emergency managers should pause to reflect on ways to minimize these risks.

Consider the case of Alcan Aluminum. In litigation brought in 1989 by the United States, Alcan was found to have improperly handled oily wastes in an underground tunnel in northeastern Pennsylvania. After heavy rains from Hurricane Gloria flooded the tunnel and washed some of that waste into the Susquehanna River, the federal government successfully recovered more than \$1.3 million in cleanup costs. In imposing CERCLA liability, the court rejected Alcan's argument that it should not be held responsible for the effects of a hurricane, holding instead that the company could have prevented the damage by exercising due care and foresight.

The potential liability resulting from a disaster – especially from a storm the

magnitude of Sandy or Katrina – can be significant. Here is what emergency managers should know to minimize that risk:

## CERCLA

CERCLA, or Superfund, was signed into law in 1980. The statute assigns liability to potentially responsible parties (PRPs) for certain releases or threatened releases of hazardous substances. The four classes of PRPs under the law are

- current owners or operators of a site
- owners or operators at the time the substance was released
- persons who arranged for disposal or treatment of the hazardous substances
- persons who accept hazardous materials for transport for disposal or treatment

A state or local government can be held liable under CERCLA § 107(d)(2) if it acts grossly negligently or with intentional misconduct in response to an emergency created by the release or threatened release of a hazardous substance from a facility owned by another PRP.

## The Defenses

The statute provides for defenses to liability in instances where the PRP establishes by a preponderance of evidence that the release or threatened release was caused solely by an act of war, act of God, or act of a third party. However, these

exemptions have been qualified over the years by court decisions around the country.

To qualify as an Act of God, the disaster must be exceptional. For example, federal courts in California and Pennsylvania have held that heavy rains and flooding – even those resulting from a hurricane – are not exceptional. A federal judge in Louisiana held that “exceptionally strong currents” are not exceptional for purposes of CERCLA. Similarly, a federal court in New York held that freezing weather that caused pipes to burst was not exceptional. However, not every case leads to rejection of these defenses. In a 2014 opinion, for example, a federal appeals court found that “[i]t would be absurd to impose CERCLA liability on owners of property that is demolished and dispersed by a tornado.”

To invoke the third-party defense, the PRP must show that it exercised due care and took precautions against any foreseeable harm caused by the third party. Further, the release must not have been avoidable by exercising “due care or foresight.” Various courts have addressed instances of what does not rise to the level of due care – for example, where an oil company used vessels too weak to withstand strong currents. Federal appeals courts have found that “no care” can never be considered “due care.”

So what is due care? Congress stated in CERCLA's legislative history that to prove due care, the defendant must show that it took "all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances." Federal courts in New York and South Carolina have interpreted this to require "those steps necessary to protect the public from a health or environmental threat" and "the necessary steps to prevent foreseeable adverse consequences arising from the pollution on the site." In 2009, a federal judge in New Jersey held that homeowners exercised due care by conducting a facility inspection and obtaining a pre-purchase title report showing no basis for any further investigation. A county in California was similarly found to have exercised due care when it constructed and maintained its sewers in accordance with industry guidelines. Upon discovering that a hazardous substance was released into its water, the county promptly tested, removed, and destroyed wells.

Finally, an act of war, God, or a third party must be the sole cause of a release. A federal court in California imposed liability upon finding that winds carrying contaminated ash and smoke from an unintended fire at a smelting facility were not the sole cause of the release. Likewise, a federal court in New York imposed liability where extreme cold causing pipes to burst was not the sole cause of the release.

One of the more recent cases to address this issue is a 2014 decision relating to 9/11. Cedar & Washington Associates, LLC, a real estate developer, sued the owners of the World Trade Center under CERCLA to recover remediation costs. After the 9/11 attacks on the WTC, Cedar & Washington began transforming a nearby office building into a hotel. In 2004, the EPA and New York State Department of Environmental Conservation advised Cedar & Washington that the building may contain "WTC dust" – a pulverized mixture of concrete, silicon, asbestos, benzene, fiberglass, mercury, and lead that was dispersed and deposited after the collapse. Cedar & Washington was forced to remediate the WTC dust in order to continue development.

The United States Court of Appeals for



the Second Circuit held that the owners of the WTC were not liable to Cedar & Washington because the attacks constituted an act of war, directly and immediately caused the release, and were the sole cause of the release. The Court emphasized that the attacks were “unique in our history” and stressed that the defenses should be narrowly applied – only in situations where an act of war, God, or a third party overwhelmed and swamped any other causes.

### What Does This Mean For Emergency Managers?

In a 2013 report to Congress, FEMA director Craig Fugate said, “Environmental issues such as climate change, societal shifts, and newly evolving paradigms challenge the nation’s emergency management community and other partners to think in new ways and bring every capability of every sector of society to bear to develop a more resilient nation.” This raises questions about the sufficiency of traditional emergency response concepts.

Traditionally, many jurisdictions relied on local fire departments’ institutional knowledge of hazardous substances within the community. Under the Emergency Planning and Community Right-to-Know Act (EPCRA), the creation of Local Emergency Planning Committees and State Emergency Response Commissions in the 1980s afforded great progress in emergency management agencies’ ability to plan and respond. As emergency management migrates to the whole-community approach and focuses on long-term recovery planning, the role of private sector participants in risk reduction will inevitably increase. But there are still steps that emergency management agencies should consider taking.

- **Conduct multi-disciplinary vulnerability assessments**, especially for facilities which store reportable quantities of hazardous substances. Include facility owners and key staff, emergency managers, law enforcement, fire service, environmental control agencies, and other emergency support functions. Be sure to identify and communicate threats to responder safety.
- **Update the agency’s public information campaign**. Consider tailoring a preparedness message to the regulated community by including relevant

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information about hazardous substances and potential liability. Individuals, businesses, and governments have become reliant on post-disaster individual and public assistance, making it important to educate your constituency. Consider using your state fusion centers and LEPCs to disseminate information to the private sector.

- **Involve the private sector in your training and exercise programs**. Distribute information regarding applicable FEMA independent study courses. Involve facility on-site response personnel in agency exercises and help them conduct their own.
- **Provide technical assistance**. Help private-sector entities develop plans and ensure that state, local, and private-sector plans align to the extent possible. Assist agencies in incorporating the results of vulnerability assessments and after-action reports into their existing plans and operations. This strategy also allows emergency management planning staff to anticipate resource requirements.
- **Reduce your own risk**. Consider any hazardous substances the agency handles or plans to use in response. Train responders and exercise plans as appropriate.

### What Does This Mean For The Regulated Community?

Private sector businesses can reduce their exposure to liability by taking a few important steps.

- **Ensure compliance**. Local, state, and federal laws and regulations can be complex and can frequently change. Depending on the location and nature of a business, it could be subject to numerous storage, planning, and reporting requirements. Facility owners should understand the relevant regulatory scheme.
- **Invest in private hazard mitigation**. Hazard mitigation grant funding is diminishing and generally available post-disaster. In order to avoid liability and prove that the entity exercised due care, facility owners and operators should invest in private hazard mitigation projects. This may include physical mitigation such as storage and containment reinforcement and elevation projects. It can also include intangible mitigation strategies such as reviewing contracts for storage and transport of hazardous materials, refusing to accept responsibility for hazardous substances that are not within its control, and exercising due diligence before purchasing land.
- **Review and obtain insurance**. While insurance may not provide complete coverage, pollution legal liability and clean-up cost cap policies are available and are worth considering.
- **Develop a comprehensive emergency management program**. Onsite response plans may no longer be adequate. With little expense, private sector entities and municipalities can and should develop a comprehensive emergency management program that addresses preparedness, response, recovery, and mitigation. By assisting with the creation of the program, emergency management agencies can develop valuable pre-disaster relationships.

The key is to reduce risk of a release. This will in turn reduce the risk of exposure to liability. An informed and forward-thinking approach to emergency planning and response can go a long way toward avoiding the dangers and expenses of a hazardous substance cleanup.



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