Permit Me to Explain

Superfund Restricts State and Local Permitting Requirements

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The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, is a broad statutory scheme that, among other things, provides for cleanup of hazardous substances released into the environment. Congress, in enacting and reauthorizing CERCLA, determined that to effect the prompt and permanent cleanup of such sites to protect the environment and public health from harm, state and local permitting requirements needed to be preempted. Thus, section 121(e)(1) of CERCLA provides that no permits shall be required for remediations conducted pursuant to CERCLA. Defining the contours of this permit bar has, however, been left to the U.S. Environmental Protection Agency (EPA) and the courts. Moreover, this simple directive has resulted in states and municipalities attempting to impose permitting requirements under the guise of "permit equivalence" requirements, zoning changes, or municipality by-laws. This article will discuss the scope of the permit bar as currently interpreted and how remediating entities may respond to the concerns of local and state governments while carrying out CERCLA's mandate.

Cleanups under CERCLA may be conducted by private parties, commonly known as potentially responsible parties (PRPs), or by the EPA itself. In order to determine the appropriate response action to a release of hazardous substances, potentially contaminated sites are first identified and investigated. Then, short-term removal and/or long-term remediation methodologies are studied, after which a cleanup plan is preliminarily selected. Each step in this process takes years, and in some cases, decades, before actual remediation begins. This process also must comply with the requirements of the National Contingency Plan (NCP), which provides procedures for responding to hazardous spills and releases, including how a remedial plan is selected. Throughout the process, the NCP requires that the local community be informed and involved, where appropriate. The cleanup plans, known as Action Memos for removals and Records of Decision for remediations, are published in the *Federal Register* before adoption so that the public may comment on those plans. In cases where the work is being done by one or more PRPs, once the selection of a remedy becomes final, implementation is incorporated into an Order, either by consent or otherwise, with strict timeframes for compliance by the remediating parties. Even at this stage, if a state does not agree to the remedial action, it can intervene in the proceedings.

Courts have held that CERCLA, though comprehensive, does not expressly preempt state law. Indeed, the NCP and section 121(d) of CERCLA generally require that when selecting a remedy, cleanups must meet state-identified applicable or relevant and appropriate requirements (ARARs) where they are more stringent than federal ones. However, to ensure that remedies that have gone through the stringent requirements of the NCP are not derailed by state or local entities, CERCLA also contains an express provision that exempts cleanups from local permitting requirements. Section 121(e)(1) of CERCLA provides that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section." This provision (the Permit Bar) is echoed in the NCP itself, which provides that the Permit Bar is applicable to response actions "conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122." 40 C.F.R § 300.400(e)(1). Thus, the Permit Bar applies regardless of whether the cleanup is being conducted by EPA, by another federal agency, by a state or political subdivision, by a tribal nation, or by a PRP or PRP group.

While seemingly clear on its face, the contours of the Permit Bar remain subject to interpretation and refinement, primarily with regard to what laws or regulations constitute a prohibited

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permit requirement as well as the geographical scope of activities deemed to be "onsite." Moreover, not fully accepting of their loss of control, states and municipalities have attempted creative methods of imposing "permit equivalency" requirements, which, for the most part, have been rebuffed by the EPA and the courts.

In analyzing whether the Permit Bar applies, parties must first determine whether the activity is a removal or remedial action under CERCLA, whether it is considered "onsite," and whether the regulation at issue is a permitting requirement.

Removal or Remediation

The Permit Bar is limited to activities associated with a removal or remedial action under CERCLA. This limiting feature was addressed specifically in *In re U.S. Department of Energy Hanford Nuclear Reservation* (*Hanford*), where the EPA argued that the Department of Energy (DOE) was required to obtain permits for certain drums that were storing hazardous waste at the Hanford Nuclear Reservation. 2000 WL 356388 (EPA ALJ Feb. 9, 2000). The DOE responded that, because portions of the Reservation were on the National Priorities List (NPL), a list of sites identified by EPA as requiring remediation under CERCLA due to risks to health or the environment, no such permit could be required under section 121(e)(1). EPA responded that the stored drums at issue were not part of any approved response action, and therefore the permit exception was not applicable. The administrative law judge hearing the matter agreed with the EPA in this regard, noting that "Section 121(e)(1) contemplates the presence of a qualifying action. . . . [I]t is further limited by its restriction to that portion of any removal or remedial action. Here, EPA rightly points out that there is no showing that the storage of the 17 drums in the 200 East Pipe Yard was part of any such CERCLA removal or remedial action." *Id.* at *9.

Onsite Activity

Neither of the other key terms that establish the Permit Bar—"permit" and "onsite"—are defined in CERCLA. Nonetheless, we look to the statutory context to understand congressional intent with respect to these terms. *See Carson Harbor Vill., Ltd. v. Unocal Corp*., 270 F.3d 863, 880 (9th Cir. 2001) (holding that statutory interpretation requires reading the statute as a whole). CERCLA does define the term "facility" as a starting point for determining the meaning of "onsite." A CERCLA "facility" means, in part, "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9)(B). Further, in the context of each individual listing of a site on the NPL, EPA defines what constitutes "onsite."

As a site or hazardous substance releases are investigated, by definition, what constitutes the "facility" may change as EPA determines where hazardous substances have "otherwise come to be located." Thus, EPA can redefine the boundaries of the CERCLA site. *See, e.g.*, *Eagle-Picher Indus. v. EPA*, 822 F.2d 132, 144 n.59 (D.C. Cir. 1987) (approving EPA expansion of the NPL site from 15 to 115 square miles based on discovery of full extent of contamination); *United States v. Asarco, Inc.*, 214 F.3d 1104, 1104–05 (9th Cir. 2000); *see also* site history in the district court case of the same name, 28 F. Supp. 2d 1170, 1180–81 (D. Idaho 1998) ("site" was originally defined to be a 21-square-mile area known as the "Box" and was ultimately expanded to include at least 1,500 square miles and essentially all of the watershed of the South Fork of the Coeur d'Alene River); *Coeur d'Alene Tribe v. Asarco, Inc.*, 2000 U.S. Dist. LEXIS 23434, at *20 (D. Idaho June 1, 2000) (eventually the "site" was narrowed by EPA to exclude the North Fork of the Coeur d'Alene River and the Spokane River). Conversely, as site remediation is completed, portions of the site can be deleted or "delisted" from the NPL, contracting the site boundaries. *See* 40 C.F.R. § 300.425(e).

EPA has, however, expressly rejected the notion that "onsite" is necessarily coextensive with the boundaries of legal ownership or even with the CERCLA definition of "facility." *Hanford*, 2000 WL 356388, at *1–2, 9. For purposes of the Permit Bar, EPA has defined "onsite" to mean "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." 40 C.F.R. § 300.5. EPA reasons that these measures—legal ownership or CERCLA "facility" boundaries—do not necessarily relate to the areal extent of contamination, or such contamination very nearby, which is the focus of EPA's "onsite" definition and permit exemption provision. *Hanford*, 2000 WL 356388, at *2.

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The definition in 40 C.F.R. § 300.5 provides EPA the flexibility to expand and contract what is "onsite" as contamination is discovered, as noted above. It also gives EPA the flexibility to include areas within a CERCLA site that do not themselves require remediation but are nevertheless necessary for remedy implementation purposes. For example, in *United States v. General Electric Co.*, the court determined that a location selected by EPA for a component of the remedial action—a contaminated sediment processing facility—that was 1.4 miles away from the Hudson River PCBs Superfund Site, met the definition

of "onsite" for purposes of state permitting requirements. 460 F. Supp. 2d 395, 404 (N.D.N.Y. 2006). EPA implemented a public notice and comment process for site selection, and the selected location on the Champlain Canal was agreed to be "suitable and convenient" and the general location near the river was "necessary." *Id.* at 403. The focus of the dispute was whether the processing facility was "in very close proximity" to meet the "onsite" definition. *Id.* Citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the court found EPA's interpretation reasonable and deferred to its decision that 1.4 miles was "in very close proximity" and therefore "onsite" and, necessarily, "entirely onsite" within the meaning of CERCLA section 121(e)(1). *Id.* at 403–04 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984)).

The cases that have examined the contours of the term "permit" in the context of CERCLA Section 121(e)(1) have concluded that neither a more restrictive local treatment requirement nor a zoning law is a "permit."

EPA's determination of what constitutes "onsite" is made in the context of a specific CERCLA site or facility, and, according to EPA, is "not a generic determination but rather it is a 'response action-specific analysis.'" *Hanford*, 2000 WL 356388, at *6. This approach is reflected by standard provisions in EPA's model administrative settlement agreements and orders on consent. *See, e.g.*, RI/FS Administrative Settlement Agreement and Order on Consent (Sept. 2016), epa.gov/enforcement/guidance-2016-rifs-asaoc-and-uao. For example, in its CERCLA model RI/FS Administrative Settlement Agreement and Order on Consent (Model RI/FS AOC), EPA defines "Work" to mean all activities and obligations the settling party is required to perform under the settlement. *See* Model RI/FS AOC, sec. III, Definitions. Model agreements devote several paragraphs to a specific definition of the "site" and location of hazardous substance releases at the site. *See id.* sec. IV, Findings of Fact. These model agreements characteristically include a section titled "Compliance with Other Laws," which states, in part:

> Nothing in this Settlement limits Respondent's obligations to comply with the requirements of all applicable state and federal laws and regulations when performing the RI/FS. No local, state, or federal permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work), including studies, if the action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621.

Id. sec. XIV, Compliance with Other Laws. This site-specific, response-action-specific approach is generally sufficient to eliminate any ambiguities about the scope of the Permit Bar in the context of the actions being taken under that settlement agreement. Where we tend to see Permit Bar challenges arise nevertheless are those instances where the state, local government, or citizens in proximity to the CERCLA site do not like the remedy. The remainder of this article describes some creative "work around" efforts.

Permitting Requirement

The case law addressing the CERCLA meaning of "permit" is limited. Not surprisingly, those cases generally address efforts by local government to impose their laws. CERCLA includes multiple processes for state involvement in site identification, listing, investigation, remedy selection, and oversight. *See, e.g.*, 42 U.S.C. §§ 9605(a)(8)(B), 9620(a)(4), 9620(e)(1), 9620(f), 9621(d)–(f), 9652(d). Relevant here is the requirement that the remedy selected—or agreed to—by EPA must meet "any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal [counterpart] standard." *Id.* § 9621(d)(2)(A)(ii). The more restrictive standards must meet the ARARs of that section and the state must actively engage to identify its ARARs to EPA for them to be incorporated in the remedy selection process. However, it is EPA, by delegation from the president, that ultimately must select the remedy. *Id.* §§ 9604(c)(4), 9621(a); *Town of Acton v. W.R. Grace & Co.—Conn. Technologies, Inc.*, 2014 WL 7721850, at *8 (D. Mass. Sept. 22, 2014). Moreover, EPA is not obligated to incorporate more stringent *local* requirements, only more stringent state requirements. *Town of Acton*, 2014 WL 7721850, at *8–10.

The cases that have examined the contours of the term "permit" in the context of CERCLA section 121(e)(1) have concluded that neither a more restrictive local treatment requirement nor a zoning law is a "permit." That said, in those instances, the courts have typically found that the local requirement was preempted. In *Town of Acton*, the court first considered the *Black's Law Dictionary* definition of "permit" to mean "a certificate evidencing permission; a license." *Id.* at *13. Also citing to *Rhode Island Recovery Corp. v. Rhode Island Department of Environmental Management*, the court noted the definition could include "a written approval." *Id.* (citing *Rhode Island Recovery Corp. v. R.I. Dep't of Envtl. Mgmt.*, 2006 WL 2128904 (D.R.I. July 26, 2006) (finding that a "written approval" is a "permit" and therefore was subject to the CERCLA section 121(e)(1) Permit Bar)). In contrast, the court found that a municipal bylaw was not a permit.

In *Town of Acton*, in connection with a CERCLA site

remediation, W.R. Grace had constructed a groundwater treatment system as one component of a remedy selected by EPA in a Record of Decision (ROD) with the concurrence of the Massachusetts Department of Environmental Protection. Grace was permitted to seek approval for discontinuing operation of the treatment system if it could meet certain criteria. Years earlier, Acton had adopted a bylaw requiring that any cleanup continuously meet or exceed groundwater cleanup standards set in the bylaw and those standards were more restrictive than state or federal counterparts. Acton challenged Grace's request to discontinue treatment, based on the bylaw. The United States sought to bar application of the bylaw, contending that it was a "permit" and precluded by section 121(e)(1). Because the bylaw did not require any sort of permission, approval, or license, the court held that it was not a permit. Nonetheless, the court rejected application of the bylaw under the CERCLA section 122(e) enforcement bar.

The City and County of Denver tried a different approach to change a remedy; it tried to enforce a local zoning ordinance to preclude maintenance of hazardous waste in an area zoned for industrial purposes. *United States v. City & Cnty. of Denver*, 100 F.3d 1509 (10th Cir. 1996). In that case, after public comment and with state concurrence, EPA selected onsite solidification of contaminated soils for the Shattuck Chemicals portion of the Denver Radium Superfund Site. Denver provided comments but did not reference the zoning ordinance until after EPA's remedy decision. Denver acknowledged the Permit Bar as an express preemption and then argued that "implied preemption cannot exist when Congress has included an express preemption clause in the statute." *Id.* at 1513. The court rejected that and Denver's further argument that a local zoning ordinance was a state environmental or facility siting law that should be incorporated as an ARAR. *Id.* Because the zoning law would preclude implementation of the EPA-selected remedy, the court held that application of the zoning ordinance would present an actual conflict with the remedy; thus, the zoning law was implicitly conflict preempted. *Id.*

The Tenth Circuit and the U.S. District Court for the District of Colorado have recognized one exception to the Permit Bar—for a permit that was in existence and operative at the time the site was added to the NPL. We have identified only two such cases, both in Colorado and both concerning a federal facility, the Rocky Mountain Arsenal. *Colo. Dep't of Pub. Health & Env't, Hazardous Materials & Waste Mgmt. Div. v. United States*, 381 F. Supp. 3d 1300 (D. Colo. 2019) (citing *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993)). In these cases, the U.S. Department of the Army historically used a surface impoundment known as "Basin F" for the disposal of a wide range of hazardous wastes. Before the Arsenal was listed on the NPL, Basin F was regulated under the Resource Conservation and Recovery Act (RCRA), as delegated by EPA to the State of Colorado, through the Colorado Hazardous Waste Act (CHWA). Colorado sought to require the Arsenal operator, Shell Oil Company, to obtain a RCRA post-closure permit for Basin F and to require the Army to obtain post-closure permits for several other onsite waste disposal locations. In rejecting Shell's and the Army's challenges to the post-closure permit requirement, both courts held that the Arsenal is subject to regulation under CHWA, and to its permitting requirements, because the Arsenal was regulated under CHWA/RCRA before it became an NPL site. *Colo. Dep't of Pub. Health & Env't*, 381 F. Supp. 3d at 1309 (citing *Colorado*, 990 F.2d at 1576).

Addressing Permit Equivalency Requirements

Despite the direct language of section 121(e)(1) and even when the local action falls clearly within the Permit Bar, states and municipalities have attempted to assert authority over response actions by insisting that remediating entities engage in a "permit equivalency" process. Generally, such processes seek to require the completion of an application in advance of activities, while waiving other standard permit features such as the payment of a fee. In 1992, the EPA issued a memorandum, OSWER Directive 9355.7-03 (1992 Memorandum), in which EPA sought to clarify its position, starting with a strong statement that "[i]t is not Agency policy to allow surrogate or permit equivalency procedures to impact the progress or cost of CERCLA site remediation in any respect." 1992 Mem. at 1.

The 1992 Memorandum's discussion begins with an acknowledgment that permit equivalency requirements often seek to ensure that the remedial plan complies with local ARARs and cites to the Notes to the NCP encouraging coordination and consultation with local agencies regarding the application of substantive requirements. However, it also recognizes that these processes are often as lengthy and time-consuming as actual permitting requirements, thus eviscerating the purpose and intent of section 121(e)(1). The 1992 Memorandum also expresses concern for the authority of the EPA, arguing that acquiescence to such processes "also suggests, incorrectly, that the approval of a permitting authority is required before a CERCLA action may proceed or before an ARARs determination may be made with respect to the permitting regulations." *Id.* at 3.

In discussing the potential responses to a local permit equivalency requirement, EPA acknowledged that lead agencies can simply refuse to participate, citing section 121(e)(1). But EPA then goes on to propose a more accommodating alternative, namely "actively consult[ing] on a regular and frequent basis with the permitting authority, in situations where the lead agency deems it helpful to hasten ARARs identification." *Id.* at 5. The 1992 Memorandum recommends timely providing key documents to the local agency and potentially entering into agreements that contain protocols to "establish specific time limits for the permitting authority to provide technical assistance in the evaluation of site-specific ARARs," so long as it is clear that the remediating entities can terminate the consultation at any time in order to avoid delays and excessive costs. *Id.*

In addition to the 1992 Memorandum, EPA's *RCRA, Superfund & EPCRA Hotline Training Module, Introduction to: Applicable or Relevant and Appropriate Requirements*, EPA 540-R-98-020 (June 1998) (1998 Training Module) also addressed the scope of the permit exception, as follows:

> EPA interprets CERCLA § 121(e) broadly to cover all administrative provisions from other laws, such as recordkeeping, consultation, and reporting requirements. In other words, administrative requirements do not apply to on-site response actions . . . . Only the substantive elements of other laws affect on-site responses.

1998 Training Module at 7. The module then goes on to discuss the Permit Bar in relation to other federal statutes. For example, the module notes that "CERCLA response actions frequently trigger administrative NPDES standards, because only surface water that is within or in very close proximity to [a Superfund site] is considered on site." *Id.* at 15. On the other hand, it makes clear that a remediating entity would not have to obtain a permit for onsite storage of hazardous waste otherwise subject to RCRA.

Notwithstanding the expansive language and interpretation of section 121(e)(1), states still seek to have remediators, including the EPA, engage in a permit equivalency process. For example, the New Jersey Department of Environmental Protection (NJDEP) Division of Water Supply and Geoscience generally requires a party to obtain a Water Allocation Permit for any diversion of ground or surface water in excess of 100,000 gallons per day. Recognizing that it cannot require remediators acting pursuant to CERCLA to obtain such a permit, New Jersey has a "C.E.R.C.L.A. Application Permit Equivalency" form that in many ways mimics its Water Allocation Permit Application. While simpler, both forms request information regarding the location and property information, the quantity of water proposed to be diverted and its source, and a map depicting the location of affected and nearby wells, landfills, known contamination, and wetlands. Similarly, NJDEP's Division of Land Use Regulation purports to require completion of a permit application for CERCLA activities in flood hazard, coastal, and freshwater wetlands areas.

New Jersey has also attempted to unilaterally impose permits on exempt activities. In a recent matter, NJDEP sent a remediating PRP group a "New Jersey Pollutant Discharge Elimination System (NJDPES) permit equivalent." The document purports to "authorize" certain discharges and warns that "compliance with conditions of the permit equivalent will be monitored by the Department's Site Remediation Program." While at times couching the document's requirements as "recommended," it clearly contains mandatory language requiring monitoring, reporting, testing methodologies, and maximum limitations on certain effluents, and threatens suspension of the "permit equivalent" for violations.

As an even more striking example, in 2003, the Missouri Department of Natural Resources' Water Pollution Control Program accepted and acted on "permit equivalent applications" completed by EPA Region VII, contending that the effluent limitations for stormwater discharges, sampling, reporting, and best management practices requirements in the document, were "not a permit per se," for the Annapolis Lead Mine Site and the Doe Run Leadwood-Eaton Tailings Dam Area but rather the establishment of relevant ARARs under Missouri's Clean Water Law. Nevertheless, the documents themselves refer to the "permittee" throughout. *See, e.g.*, Applicable or Relevant and Appropriate Requirements (ARARs) Discharges to Waters and Groundwater of the State at Leadwood, St. Francois County, Sec. 4, T36N, R4E, MO, dnr.mo.gov/env/wpp/permits/issued/docs/ARAR011.pdf.

Such overreaching by states may rightly concern PRPs, but early engagement can head off conflict. When dealing with state and local entities insistent on compliance with permitting requirements, whether or not identified as such, once a determination is made as to whether a local requirement implicates the Permit Bar, it is important to determine whether the actual requirement is one that has already been met, or can be met without disruption of the remedial work. Whether representing a state or a PRP, encourage your client to be actively engaged in the remedy selection process. As an alternative to imposing permit requirements, states have the opportunity to apply their more restrictive standards and siting criteria through the ARARs identification process of CERCLA section 121(d) and, in that way, influence the remedy decision. PRPs generally have an interest in reducing process red tape to reduce costs. It is incumbent upon the PRP doing the work to communicate closely with EPA about the location of all work to ensure that it is truly within site boundaries or is defined by EPA to be "onsite" within the definition of 40 C.F.R. § 300.5. Lastly, if your client is a local government that has specific concerns about remedy options, it should be an active participant in the public comment process and work with the relevant state agencies to ensure they are fully informed about important local standards, requirements, and siting criteria that could influence the remedy. Ideally, such local requirements should be included by the state as state ARARs where feasible.

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