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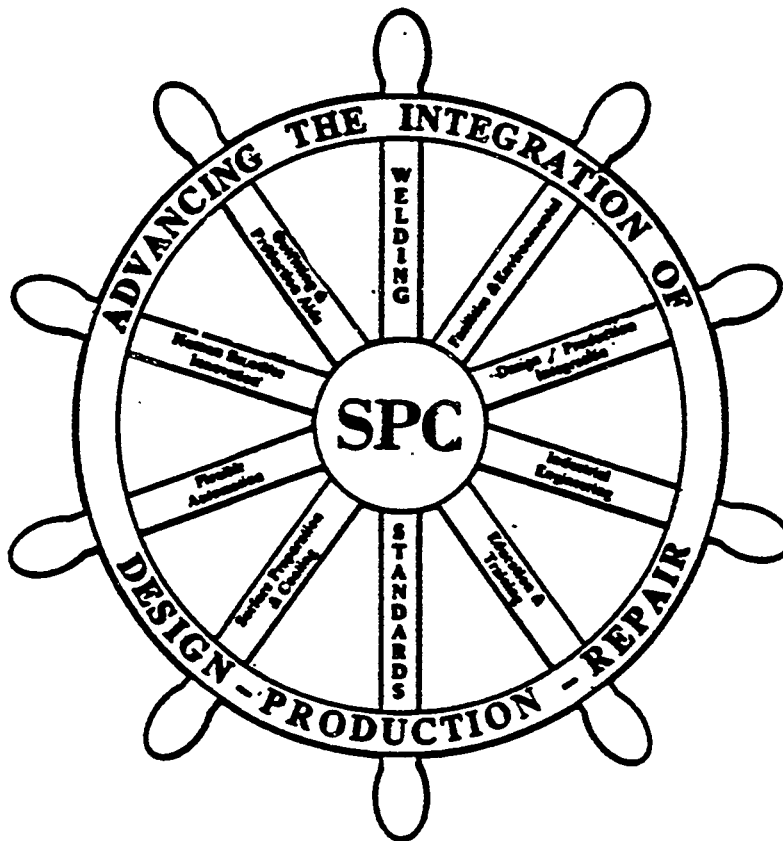
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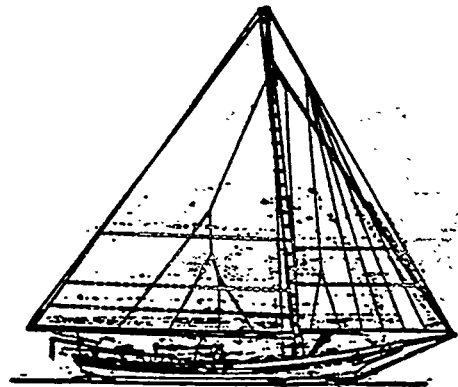
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No. 14

Liability for Hazardous Wastes Produced During the Course of Ship Repair

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ABSTRACT

Many common ship repair tasks result in the production of quantities of various hazardous wastes. These wastes, regardless of volume, present difficult burdens for shipyards and the U.S. Navy. Under federal environmental laws, the responsibility for handling hazardous wastes and the liability for their ultimate disposal rests with the person or persons who create the wastes and who arrange for their disposal. Often times, however, the responsibility and liability for handling and disposing of these wastes is unclear. This is especially true when naval ships are repaired in contractor facilities and wastes are produced by the activities of ships' force, contractor personnel or some combination of the two. Further complicating the web of liability is the divergent source of the wastes. Some wastes are produced as a direct result of required maintenance work on ship systems. Other wastes may be produced in the yard by activities which are largely discretionary with the contractor. Ultimately, these wastes from all sources must be identified, packaged, stored, treated, transported and disposed. Potential future liability may arise at each step in this process.

This article reviews briefly the structure and function of two principal federal hazardous waste statutes and explains how their myriad complex responsibilities and

liabilities are applied in the context of a typical ship repair. 1 /

SCOPE OF THE PROBLEM

Numerous hazardous wastes may and often are produced during the course of ship repair work. These can include (1) solvents used for engine repair, metal parts cleaning or painting; (2) acids or caustics used for boiler cleaning or line flushing; (3) spent abrasive blast containing quantities of toxic pigments; (4) sludges from fuel tanks or bilges; and (5) coolants or anticorrosive agents used in diesel engines or hydraulic systems. This list is far from exclusive. SUPSHIP Portsmouth has identified 43 kinds of hazardous waste typically produced during ship repair work. 2 / of course, not all of these wastes will "be produced in every ship repair. However, the production of any hazardous waste automatically triggers the application of several federal and state statutory and regulatory requirements, violations of which can lead to sizeable, civil and even criminal penalties. In addition, releases of such wastes, through spillage, in transportation

1 / Most states also have enacted statutes which will prescribe duties and liability for parties involved in hazardous waste handling and disposal. Readers are cautioned to consider the application of such laws in ascertaining their responsibility for hazardous wastes.

2 / Proposed Revised NAVSEA Standard Work Item No. 077-01, submitted to the General Committee of the NAVSEA Standard Specification for Ship Repair and Alteration Committee (SSRAC), June 12, 1989.

accidents, or at the disposal site even years after ultimate disposal, can lead to cleanup liability.

The principal federal statute which establishes the duties for hazardous waste handling and disposal is the Resource Conservation and Recovery Act (RCRA). 3/ The statute which creates liability for releases of such wastes into the environment is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 4/ These statutes apply to the U.S. Navy as well as to private shipyards. 5 /

RESOURCE CONSERVATION AND RECOVERY ACT

Enacted in 1976 as an amendment to the Solid Waste Disposal Act, RCRA was Congress' first attempt to regulate in a comprehensive fashion the handling and disposal of hazardous wastes. The Act is now well known for its "cradle to grave" regulatory program which requires detailed record keeping and careful tracking of hazardous wastes from the moment of production to the point of ultimate disposal. The key to making this system work lies with the person who produces the waste -- the generator.

Who is the Generator?

Although section 3002 of RCRA sets forth in general terms the duties of hazardous waste generator, but the term itself and the details of those responsibilities are set forth in the U.S. Environmental Protection Agency's (EPA's) implementing regulations. Those regulations define the term "generator" as "any person, by site, whose act or

3 / 42 U.S.C. §6901 et seq. (1982).

4./ 42 U.S.C. §9601 et seq. (1982).

5. / Under both RCRA and CERCLA, Congress has enacted comprehensive federal facility provisions which, in general terms, waive sovereign immunity defenses for all substantive and procedural requirements under the law. Thus, federal agencies and employees are liable to the same extent for violations of the hazardous waste laws as any other person, including liability for cleanup costs under CERCLA.

process produces hazardous waste identified or listed in Part 61 of this chapter or whose act first causes hazardous waste to become subject to regulation." 6/ By referring explicitly to the site of generation, the definition requires a company with multiple facilities evaluate and comply with the generator requirements individually for each such facility. However, the duties of a generator apply to the person or persons who produce the waste rather than simply the facility at which the waste is produced. When multiple persons are involved in the production of a hazardous waste, EPA interprets the definition broadly to apply the generator duties and liabilities jointly to all of the generator parties.

Duties of the Generator

The first duty of any generator is to determine whether any of its wastes are hazardous wastes under the criteria prescribed by RCRA. To be a hazardous waste, a material must first "solid waste." EPA's current regulations define this term to include say "discarded material" that is not otherwise subject to a regulatory exclusion or a specific variance granted by EPA. 7/ "Discarded material" is in turn defined as any material that is abandoned, recycled or "inherently waste-like". A material is abandoned if it is disposed of, burned or incinerated, or accumulated, stored or treated prior to or in lieu of abandonment. A material can be a solid waste if it is recycled in a manner constituting disposal, burned for energy recovery, reclaimed, or speculatively accumulated. Materials are not solid wastes when recycled in a manner involving direct use or reuse as ingredients feedstocks in a production process or as an effective substitute for a commercial product, or which are recycled in a closed loop production process.

Once a material is found to be a solid waste, it must be determined whether it is also a hazardous waste. Unless excluded or exempted under EPA's regulations, a solid

6 / 40 C.F.R. §260.10 (1988).

7 40 C.F.R. §261.2(a), 40 Fed. Reg. 664 (Jan. 4, 1985).

waste will also be a "hazardous waste" if it is either (1) specifically listed by EPA or (2) it exhibits any of the four characteristics of a hazardous waste set forth in EPA's regulations and discussed below. By regulation, EPA has specifically excluded certain wastes from the definition "hazardous wastes." ⁸ / In addition, EPA has provided other limited regulatory exemptions for particular circumstances. For example, hazardous sludges which are generated in a product or raw material storage tank, transport vessel, pipeline or manufacturing process unit are exempt from the definition of "hazardous waste." ⁹ /

Pursuant to statutory authority, EPA has established by regulation three lists of hazardous wastes: (1) hazardous waste from nonspecific sources (F-listed wastes); (2) hazardous wastes from specific sources (K-listed wastes); and (3) discarded commercial chemical products, off specification products, containers and spill residues thereof (U- or P-listed wastes). In addition to these specifically listed wastes, wastes which meet one of four hazardous characteristics: ignitability, corrosivity, reactivity, or toxicity, are also covered by RCRA. Specific definitions of each of these characteristics are contained in EPA's regulations at 40 C.F.R. 55261.21, .22, .23, and .24. Finally, a material will be subject to regulation under RCRA if it is a combination or mixture of a listed hazardous waste and any other solid waste.

Once the generator has determined that his waste is a hazardous waste, he must obtain an EPA identification number before the waste can be transported, treated, stored or disposed. Moreover, persons who receive wastes from the generator for shipping, treatment, storage or disposal must have obtained EPA identification

⁸ / The list of exclusions includes house household wastes, utility wastes from coal combustion, waste from the extraction and processing of ores, certain chromium-bearing wastes, etc. 40 C.F.R. §261.4.

²¹ 40 C.F.R. 5261.4(c).

numbers. ¹⁰ / The generator also has the responsibility of preparing the Uniform Hazardous Waste Manifest, a control and transport document that accompanies the hazardous waste at all times. Before shipment, the generator must insure that the waste is properly described as required by Department of Transportation (DOT) regulations, and properly packaged and labeled for shipment. Next, the generator must ensure that the name and EPA identification numbers of each authorized transporter and the treatment, storage and disposal facility are listed on the Manifest. Finally, the generator must ensure that a return copy of the Manifest is received indicating that the waste was accepted by the designated treatment, storage or disposed (TSD) facility and keep a copy of the final signed Manifest for a period of three years.

As amended in 1984, RCRA now requires the generator to certify on the Manifest that he has in place a program to reduce the volume and toxicity of such wastes to the degree determined by him to be economically practicable and that the proposed treatment or disposal method will effectively minimize the present and future threat to human health and the environment. For wastes which will be disposed of on the land, the generator must also certify that such wastes meet the applicable treatment standard which will allow land disposal to occur.

Before shipping wastes off-site, the regulations allow the generator to accumulate up to 55 gallons of hazardous wastes at the point of generation, as long as the containers are properly marked. In addition, the generator is allowed to store hazardous wastes on its site prior to shipment for a period of up to 90 days, without first obtaining a permit and meeting all of the requirements for permitted storage facilities.

Obviously, the proper identification of the generator is crucial in the overall RCRA hazardous waste regulatory scheme. Not only do the duties and responsibilities follow the identification of the generator, but, certain functions, such as on site storage for up to 90 days, are only allowed to the generator. The

¹⁰ / 40 C.F.R. 262.12(c).

penalties which accompany failure to properly perform these generator duties can be substantial. For violations of the regulations, including on-site storage beyond 90 days, RCRA provides for civil penalties of up to \$25,000 per day. For knowing or willful violations, criminal penalties, including fines and imprisonment, are available. When more than one party is considered to be a generator, these penalties can be applied to all "co-generators" of the wastes. Because many of the wastes produced during ship repair are co-generated, the allocation of the duties and liability under RCRA is of great importance.

CERCLA

While RCRA establishes a cradle-to-grave regulator program for present hazardous waste activities, the Comprehensive Environmental Response, Compensation and Liability Act (usually referred to as "CERCLA" or "Superfund") establishes a comprehensive response program for threats to environment caused by both present and Past hazardous waste activities.

CERCLA broadly authorizes EPA to undertake short-term "removal" and/or long-term "remedial" action in response to a "release" (spilling, leaking, pumping, etc.) or a "substantial" of a release" of any (1) hazardous substance; or (2) pollutant or contaminant under circumstances where the pollutant or contaminant "may" present an imminent and substantial danger. A typical "removal action" would be a response to a tank truck spill in which EPA siphons all spilled materials and hauls away a few inches of contaminated soil. Removal action costs can run from a few thousand to two million dollars, and in certain cases, even more.^{11/} A typical "remedial action" would involve a more thorough cleanup of a waste disposal site such as a landfill which is contaminating the groundwater and which might require extensive construction activity,

including possibly a groundwater pumping and treating program. Remedial actions at Superfund sites can cost hundreds of millions of dollars with elaborate planning, design, construction and operation activities.

To ensure that EPA (or a State) is reimburses for Costs associated with a remedial or removal action, CERCLA authorizes EPA (or a State) to bring actions against "responsible parties", who are in varying degrees related to the site at which there is a release or a threatened release. The types of parties who may be liable for costs associated with a response action are specified in section 107(a) of CERCLA as follows:

- (1) Present and past "owners or operators" of the site at which there is a release or threatened release;
- (2) parties who transported wastes to the site at which there is a release or threatened release ("transporters"); and
- (3) parties (usually referred to "generators") who by contract, agreement or otherwise "arranged for" the wastes to be transported, disposed or treated.

Significantly, all of these "responsible parties" are strictly liable for costs associated with remedial or removal actions. This means that a party will still be liable even if he can demonstrate that he used all "due care and met all the legal requirements (such as selecting a properly licensed hauler to take the waste to a properly licensed landfill) unless he can establish one of three affirmative defenses set forth in section 107(b) of CERCLA. That section provides a defense to Superfund liability only for a party (defendant) who can demonstrate by a Preponderance of the evidence that the release or threat of a release was caused solely by: (i) an act of God; (ii) an act of war; or (iii) an act or omission of a third-party other than an employee or agent of the defendant and other than a third-party whose act or omission occurs in connection with a direct or

^{11/} By statute, removal actions are limited in scope to one year and \$2.0 million unless certain conditions are found and special authorization obtained by EPA CERCLA section 104(c)(1); 42 U.S.C. §9604(c) (1).

indirect contractual relationship with the defendant. To establish the "third-party" affirmative defense, the defendant must demonstrate by a Preponderance of the evidence that he: (i) exercised due care with respect to the hazardous substance concerned; and (ii) that he took precautions against foreseeable acts or omissions of any such third persons. Courts have very narrowly construed these three affirmative defenses to Superfund liability and generally only allow a third-party defense when there is no contractual relationship between the third-party and the defendant. U.S. v. Monsanto, 858 F.2d 160, 169 (8th Cir. 1988). ¹²

Under CERCLA, a responsible party may be held liable in the first instance for the entire cost of cleaning up a site instead of being liable only for the "share" of the release for which he is actually responsible. A responsible party in turn can bring a contribution claim under section 113(f) against any other person "who is liable or potentially liable under section 107." In resolving contribution claims, a court may allocate response costs among liable parties using such equitable factors as the court determines appropriate. Often EPA will pursue only a single responsible party or a small group of responsible parties for the total costs associated with a removal or remedial action. These responsible parties must then try to recoup the costs of EPA's cleanup by pursuing independent contribution claims against other responsible parties.

RCRA/CERCLA OVERLAP

Although CERCLA liability is distinct from RCRA duties, the two programs can and often do overlap. Frequently, to identify CERCLA responsible parties for a release

¹² / In 1986, Congress clarified the "contractual relationship" concept as it applies to landowners. Now, a party who acquires by deed or contract, a facility upon which hazardous substances have been placed or disposed may still be an "innocent landowner" if he took reasonable precautions prior to the purchase to determine whether the site was contaminated. See CERCLA section 101(35)(A); 42 U.S.C. §9611(35)(A).

requiring remedial action, EPA will use information on the RCRA Uniform Hazardous Waste Manifest forms to find the generators and transporters of the waste. Thus, the EPA generator number on the RCRA hazardous waste manifest becomes the fingerprint that EPA will use to identify future responsible parties under CERCLA.

APPLICATION To SHIP REPAIR
OPERATIONS

RCRA Compliance

In the context of a typical ship repair operation, both the Navy and the contractor are likely to be considered generators of hazardous wastes. The contractor would clearly be the generator for those wastes which his personnel create through the use of materials, such as hazardous solvents, which are discretionary with the contractor. In addition, the contractor would be liable as a generator for wastes which first become subject to regulation because of the acts of his employees. Similarly, the U.S. Navy would be the generator for wastes produced exclusively by the ships' force either on the ship or in the contractor's facility. In such cases, it is the Navy's own operations which first cause these wastes to become subject to RCRA regulation. Thus, the Navy is clearly the "person" whose act first produces the hazardous waste. ¹³ Moreover, the Navy, and not the contractor, produces, owns and possesses the material on its ships; therefore, only the Navy could have the intent to "discard" its own hazardous materials and thereby first cause them to become subject to RCRA regulations. A shipyard contractor which simply removes, handles or disposes of hazardous waste produced by the Navy is not a RCRA generator of those wastes because the contractor neither produces the hazardous wastes nor first causes them to become subject to regulation.

¹³ / 40 C.F.R. §260.10 defines "person" to mean an individual, trust, firm, joint stock company, federal agency, corporation (including government corporation), partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body. (Emphasis added).

There is a category of waste however, for which both the Navy and the contractor would be considered co-generators. Co-generated wastes include comingled wastes such as bilge water which was contaminated by actions of both the Navy and the contractor, or materials such as diesel engine coolant fluid which becomes a hazardous waste when removed from the ship's systems pursuant to necessary repair work. For these wastes, both the Navy and the contractor would share generator liability because their independent actions each contributed to the contamination, or because their actions in combination first caused the material to become subject to regulation -- the Navy by ordering the repair and the contractor by performing the repair and removing the fluid.

Under EPA's policy, the Navy and the contractor are co-generators of these wastes and are equally liable for their proper disposition. The question of who must perform the duties of the generator is one to be resolved by contract between the Navy and the shipyard and not by EPA's regulations. Regardless of who performs the generator duties, EPA will look to either party or both parties if the requirements of the regulations are not performed or not performed properly. Thus, both the Navy and the shipyard must ensure that RCRA compliance is scrupulously maintained.

Once the RCRA issues are resolved and wastes have been properly identified, packaged and shipped for disposal, potential liability does not end. In some cases, despite the best intentions of both parties and despite adherence to the RCRA requirements, hazardous waste problems will still arise if wastes are accidentally spilled or even if wastes are released into the environment years after proper disposal. In either of these cases, the private shipyard and the Navy may be faced with cleanup liability under CERCLA.

CERCLA Liability

As described above, CERCLA liability may arise whenever EPA, a State or another private party undertakes a removal or remedial action in response to a release or threatened release of hazardous substances. In the context of ship repair, this release or threatened

release may apply to wastes generated during the course of ship repair which are released from: (a) a Navy ship docked at a private shipyard facility; (b) a private shipyard facility; and (c) a treatment, storage or disposal facility or during transportation.

Section 107(a) of CERCLA imposes liability on "the owner and operator of a vessel or a facility" from which there is a release or threatened release of hazardous substances. Thus, if there is a release from a Navy vessel which is docked at a private shipyard facility, the Navy, as the owner or operator of the "vessel" from which there was a release, would certainly be a responsible party. 14/

The shipyard contractor would also be considered a responsible party if the contractor "operated" or "controlled" repair procedures on the Navy vessel that caused or contributed to the release of the hazardous substances. Even if the shipyard contractor did not directly contribute to the release on the Navy vessel, the contractor might still be considered a responsible party because CERCLA defines "facility" broadly to include any place where hazardous substances have "come to be located." Therefore, as the owner and operator of the shipyard facility at which the release occurred, the contractor could be a responsible party for releases from the ship even if he did not contribute to or cause that release. 15\

The contractor could also claim that he was not liable for the

14 / Section 120 of CERCLA expressly provides that "each department, agency and instrumentality of the United States shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act." Thus, the Navy would not have a "sovereign immunity" defense to CERCLA liability.

15 / In such a case, the contractor could also argue that a release from the Navy "vessel" is not a release from his "facility" since these two terms are given equal and separate status under section 107(a).

release because the release was due to an unforeseeable act or omission of a third party (the Navy). However, in order to make a successful "third-party" defense, the shipyard contractor would have to demonstrate that the release from the Navy vessel did not occur "in connection with" the contract between the shipyard and the Navy and that the shipyard exercised due care and took precautions against the Navy's foreseeable acts or omissions causing the release.

If a release of hazardous wastes generated during the course of ship repair on a Navy vessel occurs on shore at the shipyard facility, the shipyard contractor would clearly be a responsible party as the owner and operator of the facility. The Navy would also be considered a responsible party if it could be determined that the Navy had "arranged for" the treatment, transportation, or disposal of the hazardous wastes released.

Courts have broadly interpreted the "arranged for" language in section 107(a) as imparting liability to any party with the authority to control the handling and disposal of hazardous substances, even if that party did not actually exercise its authority or did not own or possess those substances. United States v. Northeastern Pharmaceutical and Chemical Company, 810 F.2d 726 (8th Cir. 1987). Under common law theories, if a shipyard contractor was handling hazardous substances generated during the course of ship repair work pursuant to a contract or agreement with the Navy, a court could construe the Navy as having the authority to control the handling and disposal of those substances. In such a case, the Navy would be held to be a CERCLA responsible party over the wastes even though it was not the RCRA generator of those wastes.

The full reach of CERCLA liability is illustrated by a recent case in which pesticide manufacturers were held liable under section 107(a)'s "arranged for" language for releases which occurred at the facility of a pesticide formulator that processed the manufacturers' pesticides to produce a commercial product. The court found that the manufacturers contracted with the formulator to mix its materials for eventual sale knowing that in the process certain

hazardous wastes were likely to be produced. Because the formulator produced the waste for the manufacturers' "benefit and at their direction," the court found a sufficient degree of control to hold the manufacturers liable under CERCLA for the cleanup of those releases.

U.S. v. Aceto Agricultural Chemicals Corp., Nos. 88-1580 to 1583 (8th Cir. April 25, 1989). Because of the contractual relationship between the Navy and the shipyard, liability for releases of wastes which are derived directly from ship systems or which are otherwise under the control of the Navy will likely be attributable to the Navy as well as the contractor even if the release is actually caused by the contractor.

When a release of hazardous substances generated during the course of ship repair operations occurs off-site either (i) on the highway during the transportation of the wastes or (ii) at a treatment, storage or disposal facility, the owner or operator of the transportation vehicle, or of the treatment, storage or disposal facility, would clearly be a responsible party. In addition, the shipyard contractor and/or the Navy would also be a responsible party for those wastes which it had arranged by contract, agreement, or otherwise to be transported, treated or disposed. Once again, the liability of the shipyard contractor and/or the Navy would depend on the authority or control those parties exercised or could have exercised in the selection of the transporter, or the treatment, storage or disposal facility.

Neither the shipyard contractor nor the Navy could escape CERCLA liability by arguing that they did not select or even know about the site at which their wastes were disposed. Courts have consistently interpreted CERCLA as imposing strict liability on the party who arranges for the disposal or treatment of hazardous wastes regardless of whether that party selects the site at which the wastes are subsequently dumped. United States v. Ward, 618 F. Supp. 884, 895 (D.C.N.C. 1985). The courts recognize that a less stringent interpretation "would allow generators to escape liability under CERCLA by closing their eyes to the method in which their hazardous wastes were disposed of." *Id.*

Under these broad constructions, even though the shipyard contractor, as agent of the Navy, makes the actual transportation and disposal arrangements, the Navy cannot escape the potential liability which may accrue if those wastes are subsequently released into the environment. The allocation of this liability between the contractor and the Navy may be resolved by contract between the two parties or will be decided by the court using "equitable factors" in a subsequent action for contribution.

CONCLUSION

The web of liability and responsibility under RCRA and CERCLA is both broad and complex. The reach of these statutes is deliberately far, with the intent of maximizing the number of parties to whom EPA can look for enforcement and liability. However, the statutes are not clear with regard to the allocation of responsibility and liability among the various parties within EPA's web. In the context of hazardous wastes produced during ship repair activity in private shipyards, these legal responsibilities must be clearly resolved by contract to insure that all requirements of the law are met in a full and fair manner. Although such contractual provisions will not affect either party's liability to EPA or a State under RCRA or CERCLA, they will enable the parties to fairly allocate between themselves both the duties and costs associated with the handling, treatment, and proper disposal of these wastes.

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