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LEGAL HURDLES AND POTENTIAL PATHWAYS  
TO IMPLEMENTING INNOVATIVE REMEDIAL  
TECHNOLOGIES AT HISTORIC MINE SITES

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A LexMundi Member

- Most of the legal risks associated with historic mines sites are created by federal environmental statutes.
- For implementing innovative technologies at historic mine sites, the most important are:
  - Clean Water Act
  - CERCLA a/k/a “Superfund”

# LEGAL RISKS

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- Risks to Property Owners
  - CERCLA, CWA, third-party tort claims
- Risks to Consultants
  - CERCLA, breach of contract, third-party tort claims

# CLEAN WATER ACT

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# CLEAN WATER ACT § 402

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- Regulates “discharges” of “pollutants” from “point sources” into “navigable waters”
- Unpermitted discharges can lead to civil or criminal enforcement actions and substantial fines and penalties.
  - Most states have been delegated authority to enforce CWA § 402.

# CWA SECTION 402 PERMITS

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- A “point source” is a discrete conveyance, such as a pipe or man-made ditch that discharges pollutants into waters of the United States.
  - Adit drainage is a point source
- Site-specific NPDES permits have numerical effluent limitations for specific pollutants and monitoring requirements.

# CERCLA (“SUPERFUND”)

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# CERCLA

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- Retroactive, strict, joint and several liability
- Liability based on status, not conduct
- Allows the government and private parties to recover environmental response costs



# POTENTIALLY RESPONSIBLE PARTIES (PRPs)

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- **Current owner or operator** of a facility at which hazardous substances have been disposed
- **Past owner or operator** of a facility at the time hazardous substances were disposed
- **Arrangers** for the disposal of hazardous substances
- **Transporters** of hazardous substances

## CERCLA LIABILITY – PROPERTY OWNERS

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- Current owners are jointly and severally liable even for historic releases.
- Liability is imposed regardless of whether historic operations were legal at the time of disposal.

# DEFENSES TO CERCLA LIABILITY

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- Defenses available if All Appropriate Inquiries (AAI) are conducted:
  - Innocent Landowner Defense
  - Contiguous Property Owner Defense
  - Bona Fide Prospective Purchaser Defense

# BFPP DEFENSE

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- Only CERCLA defense available where a release is known prior to taking title to property.
- One requirement is taking “reasonable steps” concerning hazardous substance releases, including stopping continuing releases.
- This could include meeting surface water quality standards for metals if a mine discharges water.

## POTENTIAL CERCLA LIABILITY – CONTRACTORS AND CONSULTANTS

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- A CERCLA operator “must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” *United States v. Bestfoods*, 524 U.S. 51 (1998).

- Response Action Contractors (CERCLA § 9619)
  - Contractors responding to a release are not liable for damages caused by the release, *unless*
    - The contractor is negligent, grossly negligent, or engages in intentional misconduct.
  - However, some courts have found contractors can be CERCLA operators, arrangers, and transporters without discussing CERCLA § 9619.
    - Moving contaminated soil, failing to properly characterize waste improperly disposed, cross-contaminating aquifers by drilling through an aquitard

# NCP COMPLIANCE

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# CERCLA NCP COMPLIANCE

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- To recover response costs, they must be incurred in compliance with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).
  - The NCP is the primary guide for CERCLA cleanups.



- “Remedial actions” generally are considered long-term or permanent remedies.
  - Remedial Investigation/Feasibility Study (“RI/FS”)
- “Removal actions” are taken in response to an immediate threat, and primarily are intended for the short-term abatement of hazards.
  - Engineering Evaluation/Cost Analysis (“EE/CA”)

# CERCLA NCP COMPLIANCE

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- Two key requirements when implementing innovative technologies
  - Meaningful evaluation of remedial alternatives
  - Opportunity for public input
- Even states have been denied cost recovery where they failed to comply with the NCP.

# EPA'S GOOD SAMARITAN INITIATIVE

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# EPA'S GOOD SAMARITAN INITIATIVE

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- Encourages volunteers to clean up Orphaned Mine Sites without incurring liability under CERCLA or CWA
- No extraction of mineral reserves is allowed
- Doesn't apply to National Priority List ("NPL") sites

# EPA'S GOOD SAMARITAN INITIATIVE

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- Can't be a PRP under federal, state, or local law for existing contamination
- Less-stringent cleanup standards allowed in some cases

# OPTIONS GOING FORWARD

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# OPTIONS GOING FORWARD

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- Proceeding under CERCLA has some benefits.

# CERCLA 121(e) PERMIT WAIVER

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- No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite.
  - RCRA Permits
  - Clean Water Act Permits
    - NPDES Point Source Permits
    - 404 Dredge & Fill Permits



# OPTIONS GOING FORWARD

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- Settle with EPA or a State
  - Administrative Settlement Agreement and Order on Consent (ASAOC)
  - Judicial Consent Decree
- Settling party gets contribution protection and covenant not to sue from government
- Work is deemed NCP compliant

# OPTIONS GOING FORWARD

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- Negotiate a Unilateral Administrative Order
  - No financial assurance required
  - Agency cannot order payment of response costs
  - Can be same work plan as ASAOC
  - CERCLA 121(e) permit waiver
  - But no contribution protection or covenant not to sue by government

# OPTIONS GOING FORWARD

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- Conduct an interim removal action/pilot test
  - Much less rigorous NCP requirements
  - No EE/CA required
  - If cleanup goals are met, liability risk is greatly reduced, especially if water quality standards are met.

# OPTIONS

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- What if water quality standards still are exceeded after a CERCLA removal action?
  - Options are limited.
  - One alternative is to have ongoing O&M obligations (e.g., periodic monitoring), to keep the CERCLA permit waiver in place.