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# Work Session I:
# A Growing Trend in Environmental Litigation: Municipalities as Plaintiffs in Lawsuits that Shift Clean-up Costs from the Public to the Polluters

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## Introduction

A growing number of municipalities and states around the country have succeeded in affirmative litigation against manufacturers whose products have contaminated groundwater and other public resources. In 2009, for example, a jury awarded the City of New York $105 million against Exxon Mobil for contamination of groundwater. In 2011, a small town in Michigan obtained $26.5 million to clean-up contaminated drinking water. In 2012, a plaintiff class consisting of municipalities obtained a $105 million settlement for groundwater contamination. Earlier this year, a jury awarded the State of New Hampshire $236 million for contamination of the State's water resources. These and other recoveries have shifted the burden of cleaning up contamination from the public to polluters.

This growing trend presents a marked contrast to traditional legal remedies for environmental contamination, which focus not on the manufacturers of the products but rather on the local spillers, such as operators of gas stations who sold gasoline, local farmers who handled pesticides, and dry cleaners who used solvents. The traditional legal response is often impractical or insufficient because local spillers may not have the financial capability to pay for clean-up costs.

This alternative approach to responding to environmental contamination has important implications for municipalities and those who represent them. This presentation, by lead lawyers in a number of these landmark cases, will discuss the legal theories underlying these cases, case studies of specific litigation, and the importance of municipal attorneys as environmental enforcers.

## Case Study: TCP Contamination in Groundwater

### What is TCP and why is it bad?

1,2,3-trichloropropane, referred to as "TCP" for short, is a volatile organic compound ("VOC"), meaning it contains carbon and can evaporate from liquid or solid form into air at ordinary room temperature. TCP is not found in nature. TCP is produced from a very high-temperature reaction that is only possible in a large chemical manufacturing plant. TCP has been manufactured for use as an industrial solvent and degreasing agent. Additionally, TCP was produced as a chemical byproduct in the manufacturing of agricultural pesticides made by Dow Chemical and Shell Oil. With respect to pesticides made by Dow and Shell, TCP was an unnecessary impurity that did not contribute to the efficacy of those products. These pesticides were used in California, the Pacific Northwest, the Southeast, and other agricultural regions.

The United States Environmental Protection Agency ("U.S. EPA") has classified TCP as "likely to be carcinogenic to humans." Animal studies have demonstrated that long-term exposure to TCP may cause kidney failure, reduced body weight, and an increase in tumors within numerous organs.

**How does TCP contaminate groundwater?**

Once TCP is introduced into the environment, it moves easily into groundwater because it does not stick to soil particles. TCP has been detected in hundreds of groundwater sources. TCP is extremely persistent and will remain in soil and water for many decades.

TCP in groundwater may be caused by releases from landfills and other industrial sites. However, it is believed that most TCP groundwater contamination, particularly in the absence of a point source, has been caused by the use of TCP-containing agricultural pesticides. The reason that agricultural products are the predominant source of TCP contamination is that they were injected in liquid form into land.

**What are the relevant environmental regulations?**

Across the country, Maximum Contaminant Levels or "MCLs" are enforceable standards dictating the maximum level that a particular contaminant may be present in drinking water that is served to the public. Currently, Hawaii is the only state that has promulgated an MCL for TCP. In 2002, Hawaii established an MCL of 0.6 micrograms per liter (*i.e.*, 600 parts per trillion). However, California is close to enacting an MCL as well, and the U.S. EPA has also taken steps toward a national MCL.

In 1999, the State of California established a notification level for TCP of 0.005 micrograms per liter (*i.e.*, 5 parts per trillion). In 2009, California established a health-based advisory standard called a Public Health Goal of 0.0007 micrograms per liter (*i.e.*, 0.7 parts per trillion). It is expected that California will announce an MCL for TCP in 2014.

At the federal level, the U.S. EPA included TCP in its Third Contaminant Candidate List ("CCL 3") issued in 2009. Identification of a contaminant in the Contaminant Candidate List is the first step towards enacting a federal MCL. In 2010, the U.S. EPA released a new drinking water strategy that addresses contaminants in groups rather than individually. TCP is part of the carcinogenic

volatile organic compounds ("cVOCs") group. The U.S. EPA anticipates proposing a cVOC group regulation in late 2013 or early 2014.

Beginning in 2013, large water systems serving more than 10,000 people are required to monitor for the presence of TCP in drinking water as part of the federal Unregulated Contaminant Monitoring Rule 3 ("UCMR 3").[1] Detections of TCP must be reported in those water systems' Consumer Confidence Report.[2]

**What are the treatment technologies for TCP in groundwater?**

There are a few different treatment technologies for removing TCP from groundwater, but Granular Activated Carbon ("GAC") treatment is typically the best available treatment option. GAC treatment generally consists of one or more tanks containing activated carbon granules. As water passes through the tanks, contaminants adhere to the porous surface of the activated carbon granules. Activated carbon granules are available in a range of sizes and other properties. The specific type selected will depend on the contaminant of concern. After a period of months or years, the surfaces of the carbon granules will be taken up by contaminants and the carbon will need to be replaced. Contaminant levels and water use will influence the frequency of carbon replacement.

GAC is a reliable process that has been used successfully for removing TCP. However, the capital costs of building carbon plants are high, and the treatment plants may have to be operated and maintained for decades due to the persistence of TCP. The costs of GAC treatment are proportional to the amount of water treated and the level of contamination.

## Case Study: PCB Contamination in Schools

**What are PCBS and why are they bad?**

Polychlorinated biphenyls, referred to as "PCBs" for short, are a family of man-made chemicals. There is no known natural source of PCBs. PCBs are either oily liquids or solids that are colorless to light yellow in appearance. They are odorless and tasteless. Because they are non-flammable, chemically stable, have a high boiling point, and electrical insulating properties, PCBs have been used in a wide range of industrial applications. For example, PCBs have been used as hydraulic fluids, plasticizers, adhesives, fire retardants, way extenders, de-

[1] *See* 40 C.F.R. § 141.40.
[2] *See* 40 C.F.R. § 141.153(d)(1)(ii).

dusting agents, pesticide extenders, inks, and lubricants. Between the 1930s and 1978 when the use of PCBs was banned, Monsanto Company was the exclusive manufacturer of PCBs in the United States.

According to the U.S. EPA, PCBs have been demonstrated to cause cancer, as well as a variety of other adverse health effects on the immune, reproductive, nervous, and endocrine systems of animals and humans. In 1996, the U.S. EPA completed an assessment of PCB carcinogenicity, which was peer-reviewed by 15 experts on PCBs, including scientists from government, academia, and industry. The peer reviewers agreed with the U.S. EPA's conclusions that PCBs are "probable human carcinogens." Children are more vulnerable to PCBs because of their smaller size and developing systems.

**How do PCBs contaminate schools?**

PCBs have been released through ordinary uses of building products in which PCBs were an ingredient. From around 1950 through 1978, PCBs were an ingredient in many building products. This period of PCB use corresponded with a rise in school construction caused by the post-World War II "Baby Boom" generation attending school. Over time, these building products have emitted PCBs into the surrounding air. PCBs have also migrated from their original sources to secondary sources. For example, PCBs from caulk are known to have migrated into, and contaminated, adjacent masonry and soil.

**What are the relevant environmental regulations?**

In 1976, Congress passed the Toxic Substances Control Act ("TSCA"), which created a framework for the U.S. EPA to regulate the use and disposal of chemical substances deemed hazardous to human health or the environment.[3] Effective 1978, the TSCA banned the manufacture of PCBs for use in most applications.[4]

Building materials containing PCBs at a concentration of 50 parts per million or greater are treated as toxic substances and must be disposed.[5] However, the disposal requirements differ depending on whether the materials are classified as "PCB bulk product waste" or "PCB remediation waste."[6] The U.S. EPA recently reevaluated its position on disposal of PCB waste materials. As of

[3] *See* 15 U.S.C. §§ 2603-2605.
[4] 15 U.S.C. § 2605(e)(3)(A).
[5] 40 C.F.R. § 761.20(c).
[6] *Compare* 40 C.F.R. § 761.61 and 40 C.F.R. § 761.62.

October of 2012, the U.S. EPA allows building materials "coated or serviced" with PCB material to be disposed of as PCB bulk product waste.[7] This reinterpretation will allow adjoining materials to be disposed of in the same way as PCB bulk waste products, expediting and reducing the cost of PCB remediation in public buildings.

In 2009, the U.S. EPA established Public Health Levels for PCBs in indoor school air.[8] The U.S. EPA recommends that the concentration of PCBs in indoor school air be maintained below levels ranging from 70 nanograms per cubic meter to 600 nanograms per cubic meter, depending on the age of students and based on prudent risk levels.[9] Although the U.S. EPA does not currently require schools to test for PCBs, it strongly recommends such testing.[10] As public awareness of PCBs' potential harm to indoor air quality grows, the pressure on Congress and the U.S. EPA to set up mandated testing and remediation also grows.[11]

**What are the treatment technologies for PCBs?**

There are several methods for remediating PCB contamination in buildings. One of the primary methods is source removal, where the source of the PCBs is physically removed and replaced with PCB-free equivalents. Another common method of remediation is encapsulation, where the surface of the PCB containing material is painted with an epoxy or other coating material to form a barrier. Encapsulation is generally effective only for materials with a relatively low content of PCBs. Application of coating materials may have to be repeated in order for the encapsulation to be effective.

PCB remediation is labor intensive and expensive. Workers must follow strict safety regulations. Disposal of any PCB-containing materials is also subject to special standards. The U.S. EPA has authority to approve of keeping PCBs in building materials subject to conditions such as regular monitoring and reporting. Obtaining such authorization, however, can also be expensive.

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[7] October 24, 2012 letter from Suzanne Rudzinski to Regional TSCA and RCRA Division Directors, EPA Regions 1-10.
[8] *See* <http://www.epa.gov/pcbsincaulk/pdf/maxconcentrations.pdf>.
[9] *See id*.
[10] *See id*.
[11] *See*, February 29, 2012 and October 24, 2012 letter from Suzanne Rudzinski to Regional TSCA and RCRA Division Directors, EPA Regions 1-10 and "21st Century Green High-Performing Public Schools Facilities Act", H.R. 2187 111th Cong. (May 14, 2009)

## Other Case Studies

- ***City of St. Louis, Michigan v. Velsicol Chemical Corporation, et al.***
  **United States District Court for the Eastern District of Michigan**
  In 2007, the City of St. Louis, Michigan sued defendants for the contamination of its drinking water wells with para-Chlorobenzene Sulfonic Acid ("p-CBSA"). p-CBSA is a by-product of the manufacture of dichlorodipenyltrichloroethane ("DDT"), a dangerous pesticide used extensively before it was banned by the United States Federal Government. The City obtained a $26.5 million settlement before trial.

- ***City of New York v. Exxon Mobil Corporation, et al.***
  **United States District Court for the Southern District of New York**
  In 2009, the City of New York went to trial against ExxonMobil. The case involved six wells contaminated with methyl tertiary butyl ether ("MTBE"), a chemical that defendant added to gasoline. The jury found defendant liable under New York law for negligence, trespass, public nuisance, and failure-to-warn and awarded $105 million to the City. The Second Circuit Court of Appeals affirmed the verdict and award in its entirety.

- ***State of New Hampshire v. Hess Corporation, et al.***
  **State of New Hampshire Superior Court, Merrimack County**
  In 2013, the State of New Hampshire was the plaintiff in a three-month jury trial arising from MTBE contamination in the State's groundwater aquifers. After obtaining $136 million in settlements before trial, the jury found the sole non-settling defendant liable under theories of negligence, defective design, and failure to warn. The non-settling defendant's portion of the State's damages is $236 million, exclusive of pre-judgment and post-judgment interest.

## Conclusion

Affirmative litigation presents an opportunity for municipalities to mitigate the burden of environmental clean-up on taxpayers and rate payers. Municipalities dealing with contamination of public resources should have experienced counsel evaluate the potential for such a case. As with any contemplated litigation, potential plaintiffs are urged to act promptly to minimize

any defense based on the passage of time and the possibility that important evidence will be lost.