HOT TOPICS: CERCLA/RCRA AND MUNICIPALITIES

SEP. 23, 2020 |
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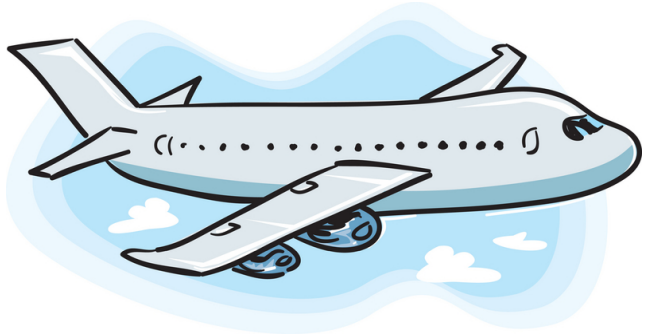
AGENDA

- What is CERCLA and why is it relevant for municipalities?
- Exemptions and defenses that can be used by municipalities
- Recent CERCLA case examples and takeaways for municipalities
- PFAS
- What is RCRA?
- RCRA citizen suits
- Recent RCRA case examples and takeaways for municipalities.

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What is CERCLA - and Why is It Relevant to Municipalities?

In CERCLA cost recovery cases, municipalities are often CERCLA plaintiffs and defendants.



Ports



Landfills

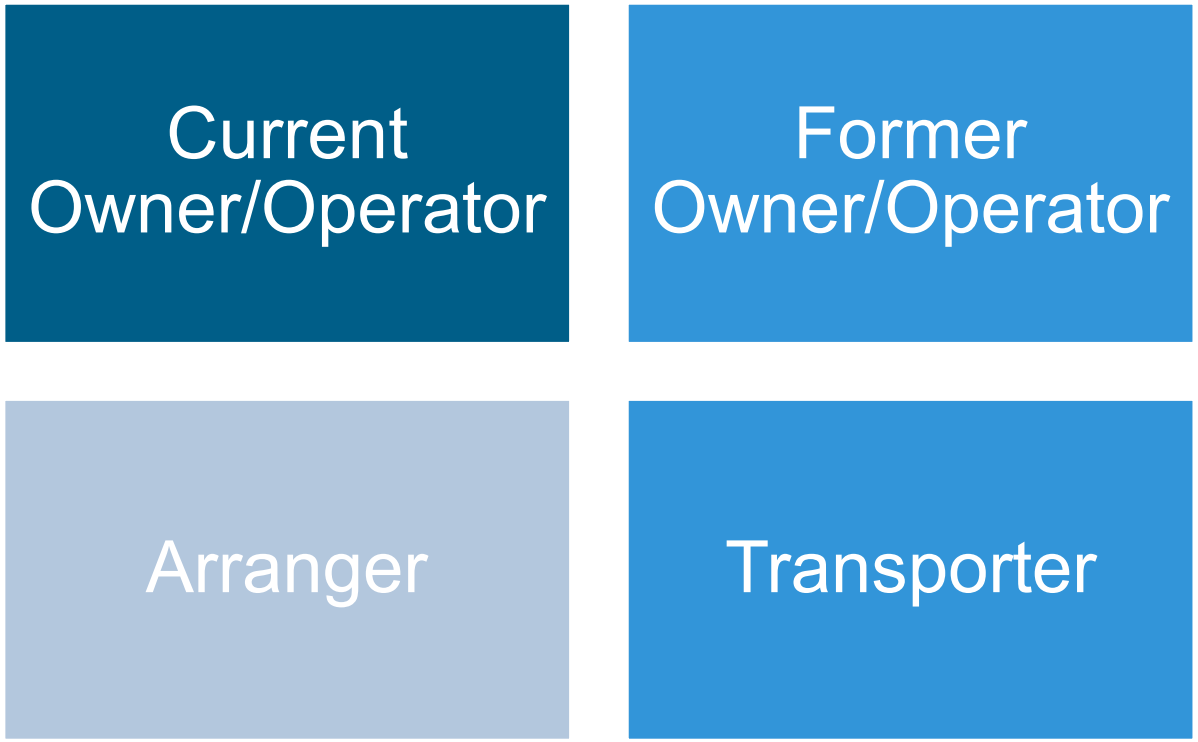


Drinking Water Wells

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What is CERCLA?

- Liability – "potentially responsible **persons**" (we'll discuss defenses later)



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What is CERCLA?

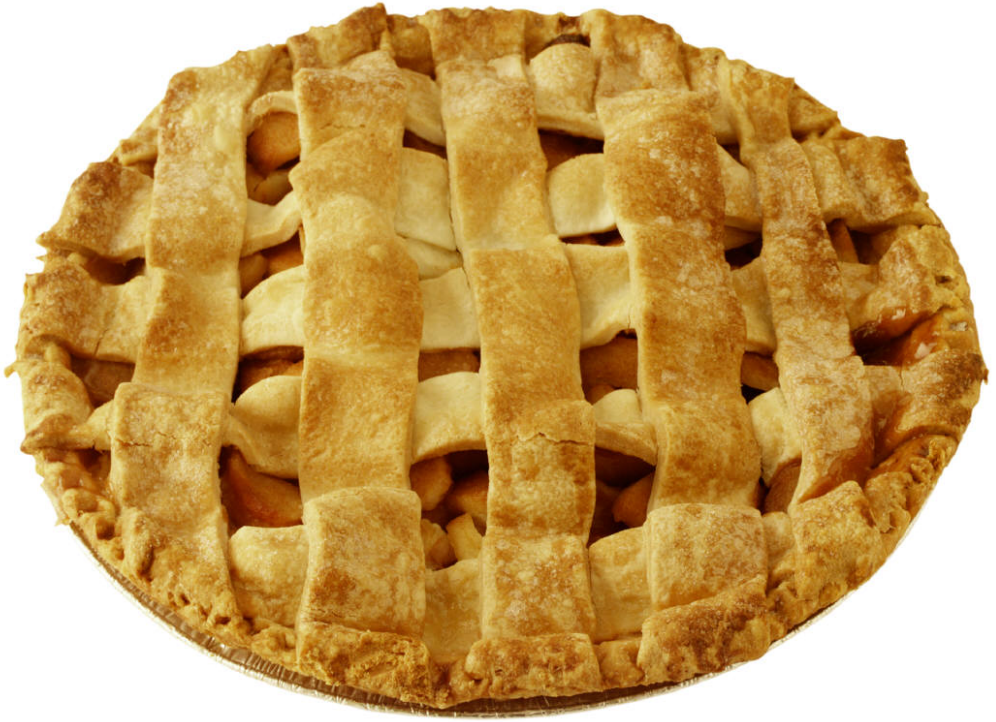
Other Important Concepts:

- Joint and several liability, unless there's proof of "divisibility"
- Retroactive
- Strict
- Only covers "Hazardous Substances" (not petroleum)
- National Contingency Plan/Necessity
- No attorneys' fee recovery, generally speaking

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What is CERCLA?

Allocation between liable parties



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CERCLA Exemption/Defenses to Owner/Operator Liability Available to Municipalities

1. "Owner/Operator" does not include local government which acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by virtue of its function as sovereign.
    - Doesn't apply if municipality caused or contributed to releases
2. Bonafide Prospective Purchaser
3. Innocent Landowner/Third Party Defense (limited availability)
    - For the #2 and #3, must conduct "all appropriate inquiry" (due diligence) and meet other post-acquisition criteria.
    - Idea of "overlapping protections" (e.g., if release occurs during excavation, #1 will be unavailable, but #2 and #3 could still apply if AAI was performed)

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New-ish "Local Government" Exemption from Owner/Operator Liability

- This exemption first appeared in 2018 (BUILD Act amended definition in CERCLA)
- June 15, 2020 EPA OECA Guidance "Superfund Liability Protections for Local Government Acquisitions after the BUILD Act of 2018"
- Definition is not an exhaustive list, but removes the previous requirement that the acquisition was "involuntary"
- EPA intends to apply law to local governments of all kinds – including land banks, community development agencies, multi-regional agencies, etc.
- Sovereign function isn't defined, but EPA examples include certain intergovernmental transfers (e.g., County to land bank), eminent domain for public use, foreclosure on government loan, escheat (no heirs), and other related functions – not donations, gifts.
- Related note: 2018 Ninth Circuit decision (*Westside Delivery)* holding tax sale purchaser liable (could not assert BFPP because did not conduct due diligence).

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Some CERCLA State Equivalents

- California HSAA
- Washington MTCA
- Arkansas RATFA
- Delaware HSCA
- Georgia HSRA
- Hawaii HERL
- Maine UHSS

** Pay attention to small differences, which could mean big issues.

** Think about other state law claims that also might address contamination.

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MUNICIPALITIES AND CERCLA: SOME RECENT CASE EXAMPLES (1)

Mission Linen Supply v. ***City of Visalia***, Case No. 16-1164 (E.D. Cal.)

- Plaintiff, a laundry service company, was required by CA DTSC to remediate property contaminated by dry cleaning chemicals (PCE), and incurred costs for that work.
- Plaintiff sued the City where the property is located, asserting that the City should shoulder some of the cleanup costs because of defects in the sewer system that leaked the chemicals, which the City didn't properly maintain.
- The property and the sewers were both "facilities," and the company and the City were both owners/operators of those facilities.
- The court allocated the costs 50/50, but 100% of the sewer repair costs to the City. Ninth Circuit affirmed.
- Takeaway?

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MUNICIPALITIES AND CERCLA: SOME RECENT CASE EXAMPLES (2)

L.A. Terminals v. ***City of Los Angeles***, Case No. 18-6754 (C.D. Cal.)

- Original case filed by City of Los Angeles in California state court against L.A. Terminal, Occidental Chemical, and others, for cleanup costs relating to contamination in an area of land at the Port of Los Angeles that the City owns.
- The City asserted state law claims only.
- The cleanup could cost north of $50M.
- But L.A. Terminals removed the case to federal court, and asserted CERCLA claims against the City (and Occidental). Then Occidental brought claims against Phillips 66 and Union Oil.
- Most of the parties ended up asserting claims against each other, and now the parties are litigating summary judgment motions.
- Takeaway?

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MUNICIPALITIES AND CERCLA: SOME RECENT CASE EXAMPLES (3)

U.S. v. Godley v. ***Town of Pineville,*** *et al.,* Case No. 19-2020 (W.D.N.C.)

- Godley and his companies owned and operated on a former textile mill site and an old hospital site, both contaminated.
- Godley did some cleanup and demolition at the mill site, but didn't complete it (and exacerbated asbestos and PCB issues). The Town and the State issued NOVs.
- EPA got involved, and incurred costs. Godley insisted they didn't have money to clean up the properties. Godley and the Town entered an agreement to donate the properties to the Town (worth around $5M).
- The Town agreed to forgive back taxes and pay for cleanup costs at the mill site (around $80,000). The Town completed the work. The County foreclosed on the hospital site because of back taxes.
- EPA sued Godley regarding its costs for both sites. Godley then filed a third party claim against the City and the County (and some others), which is now being litigated.
- Takeaway?

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CERCLA HOT TOPIC - PFAS

- Group of man-made chemicals (PFOA/PFOS) – known as “forever chemicals”
- Resistant to heat, water, and oil.
- Manufacturing started in the 1940s but no longer manufactured in US
- Found in many consumer and other items:









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PFAS and MUNICIPALITIES

- EPA preliminary regulatory determination under the SDWA to potentially regulate PFAS in drinking water (first step towards MCL)
- Even without an MCL, there's been lots of litigation over PFAS in drinking water. *See Minnesota v. 3M* example.
- Will an MCL increase costs to fund PFAS treatment and remediation/mitigation?
- Will that lead to more pressure to search for and assert claims against parties that have potentially caused the PFAS contamination in the drinking water supply?

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MUNICIPALITIES AND CERCLA: PFAS LITIGATION

- Promulgation of an MCL may exacerbate the flood of litigation, but some is already here.
- Reminiscent of many lawsuits over solvents in groundwater and drinking water supply—some still ongoing.
- ***Town of East Hampton*** *(NY) vs. East Hampton Fire Department* (filed in April 2020)
  - Suit under CERCLA (and RCRA, which we'll talk about later in this presentation) to recover more than $7M in costs to extend County water line to Town.
  - Alleges that Fire Department didn't clean up the fire suppressant foam that it used in emergencies and training, resulting in contaminated drinking water.
- ***Lakewood Water District*** *v. United States*, Case No. 20-cv-02899 (W.D. Wash., filed in July 2020)
  - District sued DOD, Air Force, Army, 13 manufacturers of PFAS (including 3M) alleging that they've spent $377M to deal with contamination in groundwater supply, allegedly from firefighting foam used on Joint Base Lewis-McChord.
  - Transferred to MDL panel in South Carolina.

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WRAP-UP ON CERCLA

Questions?

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WHAT IS RCRA?

- **Regulation of hazardous and non-hazardous solid waste**





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RCRA CITIZEN SUITS

Like CERCLA, municipalities can be plaintiffs or defendants in these suits.

Elements:

- A "*person*" who "*contributes*"
- To *past* or *present*
- *Handling, storage, treatment, transportation*, or *disposal*
- Of *solid* or *hazardous waste*
- Which "*may*" present
- An "*imminent* and *substantial endangerment*"
- To *health* or the *environment*.

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RCRA CITIZEN SUITS

Other items of note:

- Injunctive relief only; can't recover monetary damages.
- Forward-looking only; can't prevail if activities aren't ongoing.
- Notice of intent to sue, to allow corrective action.
- Attorneys fee recovery.

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MUNICIPALITIES AND RCRA: SOME RECENT CASE EXAMPLES (1)

City of West Sacramento *v. R&L Business Management,* Case No. 18-900 (E.D. Cal.)

- Citizen suit against former owners and operators of metal plating company.
- Court denies Plaintiffs' motion for summary judgment on RCRA, holding there was a material dispute of fact.
- Plaintiffs established that chromium and other toxics exceeded state regulatory levels in soil and groundwater, but Court held that did not automatically constitute an endangerment.
- Plaintiffs had to show evidence of likely harm to health or the environment and there was no proof that anyone was likely to be exposed to the contamination long-term.
- But court awarded summary judgment to Plaintiffs with regard to Defendants' liability under CERCLA.
- Takeaway?

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MUNICIPALITIES AND RCRA: SOME RECENT CASE EXAMPLES (2)

Miller v. ***City of Fort Meyers****,* Case No. 18-195 (M.D. Fla.)

- Citizen suit against City for prior disposal of arsenic-contaminated sludge in a landfill in the middle of what later became a residential neighborhood.
- After lawsuit was filed but before trial, City excavated the landfill and removed the sludge.
- City moved for summary judgment, which the court granted.
- Court held that whether an endangerment exists depends on conditions at the time of trial, not when suit is filed.
- There was no present endangerment due to any residual contamination.
- Takeaway?

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MUNICIPALITIES AND RCRA: SOME RECENT CASE EXAMPLES (3)

Fresh Air for the Eastside v. Waste Management and ***New York City*** – Case No. ***18-06588*** (W.D.N.Y.)

- Citizen suit against Waste Management and New York City regarding odors from landfill. The City was sued because the landfill received its garbage.
- Waste Management previously implemented mitigation measures in response to a NYSDEC notice of violation.
- Defendants moved to dismiss, asserting that the federal court should step aside and let DEC handle the matter.
- Court rejected all of Defendants' arguments that dismissal was warranted under various abstention theories or doctrine of primary jurisdiction. Court found that abstaining would be an "end run around RCRA."
- Court also rejected NYC's government discretionary function immunity defense. NYC had no discretion to take actions (i.e., generating and shipping the garbage) that created an imminent and substantial endangerment.
- Takeaway?

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MUNICIPALITIES AND RCRA: SOME RECENT CASE EXAMPLES (4)

California River Watch v. ***City of Vacaville***, Case No. 17-524 (E.D. Cal.)

- Citizen suit against Vacaville alleging that the presence of hexavalent chromium in public water supply is an imminent and substantial endangerment.
- Court grants Vacaville's motion for summary judgment, holding that there has been no disposal of solid or hazardous waste.
- Opinion was focused on:
  - Hex chrom was in the water supply because of other sources (not the pumping)
  - Water w being provided to consumers, which by definition was not "discarded" (i.e., separated from a manufactured product, with no intention of being reserved or returned for further use).
- Court did *not* opine that hex chrom in water is not an endangerment.
- Takeaway?

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MUNICIPALITIES AND RCRA: SOME RECENT CASE EXAMPLES (5)

White Plains Housing Authority *v. BP Products N. Am.*, Case No. 17-6250 (S.D.N.Y.)

- WPHA (a municipal public housing authority) was building affordable housing units on property adjacent to and downgradient from a gas station that had contaminated groundwater.
- WPHA spent money to address the contamination, which impacted the number of units it could build.
- WPHA brought RCRA citizen suit and state claims against gas station and others.
- Court granted summary judgment on all claims, and sent the case to a magistrate to determine damages (state claims) and injunctive relief (RCRA).
- Takeaway?

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WRAP-UP ON RCRA

Questions?

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