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Environmental Law Governing Hazardous Waste Contamination and Cleanup

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Research Guides

Environmental Law Governing Hazardous Waste Contamination and Cleanup

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The Importance of Environmental Awareness

Hazardous waste sites pose a very serious threat to public health and safety. Unfortunately, the American public had to learn this lesson the hard way. In the late 1970s, the nation's attention was diverted to the disturbingly high rate of miscarriage, genetic abnormalities, and mental retardation in a small community of Niagara Falls New York called Love Canal. As it turned out, the area was built atop an abandoned toxic waste dump, and the various substances that often seeped into the back yards and basements of those residents was the key to their myriad of devastating health epidemics.

It is difficult to understand in our own era of environmental awareness, but the site of this community was not the result of community planning undertaken by some innocent and hoodwinked urban planner. Quite the opposite, the original purchasers of the site were tenacious in their efforts to attain the former dump site from the Hooker Chemical Company, which repeatedly refused to sell while also vocalizing a concern over the site's safety. The Chemical company finally sold the site for $1 when it was faced with the prospect of foreclosure.

The Love Canal Disaster was the product of a society with little to no knowledge of the persistent ability of hazardous waste to devastate human health. Today, we wince in bafflement at the actions of a School District that would insist on buying such a dangerously contaminated piece of property with the full knowledge of its hazardous nature. Still, we owe our own high awareness of public health threats to disasters such as these, and more importantly to the government's ensuing legislative response.

Introduction

While much environmental law is aimed at the prevention of environmental spoilage, this guide addresses legislation dealing with the fallout from massive environmental contamination which was able to proceed unchecked. Over the last three decade, Congress has been forced to find a remedy for such contamination, which often results in direct physical harm to individuals in surrounding communities. The resulting legislation has dealt with contamination by first attempting to impose a duty of remedy on the potentially responsible parties, and then seeking alternate ways of dealing with such hazards when they simply cannot be ignored. Where it is too late to take such preventative measures, the legislation also authorizes remedial measures.

While much regulation focuses on the regulation of hazardous materials, this guide will focus primarily on research relating to hazardous contamination. As such, The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 will be the heaviest area of focus.

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Primary Sources

RCRA - Regulating Waste Disposal

The Resources Conservation Recovery Act, 42 U.S.C. 6901, was enacted as an amendment to the Solid Waste Disposal Act. It deals with the disposal of solid waste and the treatment of hazardous waste. The RCRA functions by 1)Categorizing the different types of waste which fall within its regulatory ambit; 2)Mandating a system which tracks hazardous waste from the cradle to the grave; 3)Establishing standards which must be met at each stage of the hazardous waste life cycle; and 4) Providing the authority to impose a mandatory clean-up of contaminated treatment, storage, and disposal sites.

- Subchapter 1 - General Provisions
- Subchapter 2 - Office of Solid Waste; Authorities of the Administrator
- Subchapter 3 - Hazardous Waste Management
- Subchapter 4 - State or Regional Solid Waste Plans
- Subchapter 5 - Duties of Secretary of Commerce in Resource and Recovery
- Subchapter 6 - Federal Responsibilities
- Subchapter 7 - Miscellaneous Provisions
- Subchapter 8 - Research, Development, Demonstration, and Information
- Subchapter 9 - Regulation of Underground Storage Tanks
- Subchapter 10 - Demonstration Medical Waste Tracking Program
- RCRA ABRIDGED.

Federal Statutes Governing Cleanup

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, alternatively known as CERCLA and the "superfund law" addresses contamination stemming from current and prior waste disposal practices.

- Subchapter 1 - Hazardous substances releases, liability, compensation
- Subchapter 2 - Hazardous substance response revenue
- Subchapter 3 - Miscellaneous provisions
- Subchapter 4 - Pollution insurance
- CERCLA ABRIDGED.

In 1986, CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986. These amendments were incorporated to deal with some of the challenges faced by the EPA in executing the original Superfund legislation.

- CERCLA as amended - 42 U.S.C.A. 9606.
- SARA ABRIDGED - a brief overview of how SARA changed CERCLA.

CERCLA Cases

- United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992).
  - Holding - CERCLA was intended as a remedial statute. It is to be interpreted very broadly in order to effectuate the goals of the statute.
- S.C. Dept. of Health v. Commerce & Indus., 372 F.3d 245 (4th Cir. 2004).
  - Holding - CERCLA's primary goals are 1) promoting timely and effective hazardous waste cleanup; and 2) imposing financial responsibility on all parties who created the hazard.
- Emhart Indus. v. Century Indem. Co., 559 F.3d 57 (1st Cir. 2009).
  - Holding - CERCLA imposes strict liability which may be joint and several.
- State v. Howe Cleaners, Inc., 9 A.3d 276 (Vt. 2010).
  - Holding - Court uses federal statutory criteria to evaluate and accept the defendant's innocent owner defense.
- United States v. United Nuclear Corp., 814 F. Supp. 1552 (D.N.M. 1992).
  - Holding - Court defines what a 'federally permitted release' is within the meaning of 42 U.S.C. 9601 (10).
- United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989).
  - Holding - Court determines whether a release has occurred within the meaning of 42 U.S.C. 9601.
- Burlington Northern & Santa Fe Ry. v. United States, 556 U.S. 559 (2009).
  - Holding - Appropriateness of joint and several liability depends on the existence of a reasonable basis for apportioning damages.
  - Also held - Government may seek reimbursement for cleanup expenses from any potentially responsible party.
- Karras v. Teledyne Indus., 191 F. Supp. 2d 1162 (S.D. Cal. 2002).
  - Holding - Court determines that CERCLA does not prevent parties from contracting into potentially responsible party status.
- Guidice v. BFG Electroplating & Mfg., 732 F. Supp. 556 (W.D. Pa. 1989).
  - Holding - Court examines the potentially responsible party status of defendant.
- B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992).
  - Holding - Court gives statutorily driven guidelines for determining hazardous waste.
- Cooper Indus. v. Aviall Servs., 543 U.S. 157. (2004).
  - Holding - Court limits the ability of a private party to recover clean up costs from a potentially responsible party.
- U.S. v. Brighton, 153 F.3d 307 (6th Cir. 1998).
  - Holding - Court designates the standards by which a party is deemed an owner operator under CERCLA.

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Governing Bodies

Federal

- The Environmental Protection Agency (EPA) is the Federal Agency which is responsible for executing environmental legislation.
  - The EPA was created in 1970 via Executive Order. Through Reorganization Plan No. 3 of 1970 President Nixon created the nation's first federal agency focused entirely on environmental conservation..
- The Office of Solid Waste and Emergency Response (OSWER) is the office within the EPA and actually oversees the Superfund program.
  - Within the OSWER three offices are also responsible for different levels of Superfund oversight:
    - The Office of Emergency Management is responsible for Superfund's short term responses.

  - The Office of Superfund Remediation and Technology is responsible for managing long term Superfund responses.
  - The Federal Facilities Response and Reuse Office also manages long term Superfund responses, but only where Federal Facilities are concerned.
- The Agency for Toxic Substances and Disease Registry (ATSDR) was mandated by the CERCLA legislation for the purpose of implementing the health related portions of CERCLA which were specifically meant to protect the public from hazardous wastes.

State

State agencies generally work with the EPA to effectuate environmental goals. The EPA sets standards with which states must comply. Very few states choose to set their own standards at a point above the federally mandated standards.

- List of environmental agencies organized by state.
- Robert V. Percival, Environmental Federalism: Historical Roots and Contemporary Models, 54 Md. L. Rev. 1141 (1995).
  - A history of the interplay between federal and state governments regarding environmental affairs.

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Agency Materials

United States Environmental Protection Agency Materials Relating to CERCLA

- Hazard Ranking System (HRS) - The HRS is a ranking system which the EPA and state agencies use to categorize a site's potential to develop into an environmental and health hazard. The EPA together with the relevant state agency utilize the HRS to assign a site a score based on actual or threatened releases of hazardous materials, and the subsequent danger posed to public health and the environment. This number ranges from 0 to 100.
  - Agency Guidelines - The EPA uses various guidelines in evaluating factors and assigning scores to sites under the HRS.
  - The HRS is not the only way to place a site on the NPL. Including HRS scoring, the EPA offers three scenarios which may result in cleanup eligibility.
- National Priorities List (NPL) - If a site is given a score of 28.5 or higher it is placed on the NPL, which makes it eligible for a long term cleanup financed by potentially responsible parties (PRPs), or by the Superfund if there is no discernible or solvent PRP.
- Superfund Sites - listed throughout the country.
- The RCRA, CERCLA & EPCRA Hotline Training Module is the EPA's own statutory overview of CERCLA.
- Superfund Cleanup Policies and Guidance.
- Key Policies and Guidance - EPA documents describing the central policies and guidance followed in administering the Superfund program.
- Remedial Investigations/Feasibility Studies - This is the guidance the EPA follows in determining the various costs associated with a cleanup.
- EPA Record of Decision - The EPA maintains a database of documents which explain the choice of cleanup alternative for each site.
- ROD Guidance - Developed to implement the remedy process at various levels.

EPA Decisions and Orders

- The EPA Office of Administrative Law Judges (AOLJ)is an independent body within the EPA resposible for rendering decisions in proceedings between the EPA and organizations which fall under EPA regulation.
- The Environmental Appeals Board is the court of appeals for decisions rendered by the Office of Administrative Law Judges. It is the final decision making body within the EPA.
- Cases regarding failure to report releases of hazardous materials in a timely fashion:
  - In re Peco Foods, No. EPCRA-IV-93-234, (1995).

- In re Thoro Products, No. EPCRA-VIII-90-04, (1992).
- In re Mobil Oil Corp., No. EPCRA-91-0120, (1993).
- In re Basin Refining, Inc., No. RCRA-VI-626-H. (1990).

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Secondary Sources

Environmental Law Reviews

- The Georgetown International Environmental Law Review
  http://www.law.georgetown.edu/journals/gielr/
- Harvard Environmental Law Review
  http://www.law.harvard.edu/students/orgs/elr/index.php
- Lewis & Clark Law School: Environmental Law
  http://law.lclark.edu/law_reviews/environmental_law/
- Boston College Environmental Affairs Law Review
  http://www.bc.edu/schools/law/lawreviews/environmental/
- Fordham Environmental Law Review
  http://law.fordham.edu/fordham-environmental-law-review/elr.htm

Specific Articles

- Major Kenneth Michael Theurer, Sharing the Burden: Allocating the Risk of Cercla Cleanup Costs, 50 A.F.L. Rev. 65 (2001).
- Lieutenant Colonel Brian J. Hopkins, Environmental Crimes: Recent Case Law and Practice, 39 A.F.L. Rev. 1 (1996).
- Martha L. Judy, Coming Full Cercla: Why Burlington Northern is Not the Sword of Damocles For Joint and Several Liability, 44 New Eng. L. Rev. 249 (2010).
- Dustin M. Glazier, A Game of Old Maid: The Ninth Circuit Establishes when the Owner-Operator is Determined for CERCLA Liability in California v. Hearthside Residential Corp., 2011 BYU L. Rev. 117 (2011).

Other Print Sources

- Environmental Law Reporter
  - This resource is a product of the Environmental Law Institute. It is not free, but it is cited as one of the most cost effective resources for those in the environmental field.
- Chemical Waste Litigation Reporter
  - Monthly service which provides comprehensive reporting on Superfund, RCRA and other relevant environmental/environmentally related cases. It is a pay service, but it is one of the most often used sources by experts in this field.
- EPA Administrative Law Reporter
  - Monthly service which compiles and analyzes all administrative decisions which delineate the powers of the EPA. This is a pay service, and while decisions themselves are available for free online, this reporter is valuable for its analysis of the cases.

Books

- Environmental Law in a Nutshell by Daniel A. Farber
  ISBN: 9780314233561
  http://gilfind.gsu.edu/vufind/Record/1683650
- Environmental Law and Policy by James Salzman and Barton H. Thompson, Jr.
  ISBN: 1566629845
  http://gilfind.gsu.edu/vufind/Record/1293603/Description#tabnav
- The Complete Guide to the Hazardous Waste Regulations by Travis Wagner
  ISBN: 0471292486
  http://gilfind.gsu.edu/vufind/Record/40320/Holdings#tabnav

- Taming Regulation: Superfund and the Challenge of Regulatory Reform by Robert T. Nakamura
  ISBN: 0815759436
  http://gilfind.gsu.edu/vufind/Record/1330132/Holdings#tabnav
- The Quest for Environmental Justice: Human Rights and the Politics of Pollution by Robert D. Bullard
  ISBN: 1578051207
  http://gilfind.gsu.edu/vufind/Record/1484350/Details#tabnav
- Environmental Law: RCRA, CERCLA, and the Management of Hazardous Waste by John S. Applegate
  ISBN: 1587787180
  http://gilfind.gsu.edu/vufind/Record/1568790/Holdings#tabnav
- Superfund: The Political Economy of Environmental Risk by John A. Hird
  ISBN: 0801848075
  http://gilfind.gsu.edu/vufind/Record/746046/Holdings#tabnav

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Intersecting Areas of Law

Bankruptcy Law

- Cases:
  - In re Lyondell Chem. Co., No. 09-10023 (REG), 442 B.R. 236 (Bankr. S.D.N.Y. Jan. 4, 2011).
    - Holding - For purposes or bankruptcy proceedings, court finds that Remediation costs which are an accounting for future costs are contingent claims for reimbursement or "contribution of entity that was liable with debtor to third party creditor." As such, these claims are disallowed.
  - Midlantic Nat'l Bank v. N.J. Dept. of Envtl. Prot., 474 U.S. 494 (1986).
    - Holding - Court finds that in enacting 11 U.S.C.S. 554(a), abandonment statute, Congress did not intend to permit abandonment of property of a bankrupt estate where doing so would violate state environmental protection laws.
- Articles:
  - Ingrid Michelsen Hillinger, Environmental Affairs in Bankruptcy, 12 Am. Bankr. Inst. L. Rev. 331 (2004).
    - Article examines how lower courts have interpreted the Midlantic case, and subsequently found their own tests for allowing abandonment of contaminated properties in bankruptcy proceedings.
  - Michael H. Reed, Supreme Court's recent CERCLA Decision Could Affect Bankruptcy Cases, 26 Am. Bankr. Inst. J. 40 (2007).

Land Use Law

- The Brownfield Program provides a way to integrate formerly unusable contaminated property back into productive land use.
  - The Brownfield program is administered by the Office of Solid Waste and Emergency Response (OSWER).
  - EPA's Site Reuse and Redevelopment information.
- Brownfield Legislation:
  - Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (Jan. 11, 2002).
    - Meant to limit liability to encourage the re-assimilation of contaminated properties into productive use.
- Article on Brownfields:
  - Brownfields Redevelopment: A Practicioner's Guide to EPA's "All Appropriate Inquiries" Rule, Nancy A. Mangone, State Bar of Arizona Arizona Attorney, Dec. 2006.
    - Background on All Appropriate Inquiries Rule.

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Special Interest Groups

Pro Environmental Control Groups

- Consortium for International Earth Science Information Network - CIESIN states their mission as providing access to information that will promote informed decision making on an international level in regards to the environment. This group's site contains a wealth of diversified information on various facets of the environment.
- Environmental Defense Fund - This group seeks to combine science and economics to take on what they perceive to be the most serious threats to the climate, oceans, ecosystems, and human health.
- The Sierra Club - The Sierra Club works to protect communities, "wild places", and the planet in general. It has been referred to as the largest environmental grass-root movement.

Groups Advocating Against Environmental Control

- American Land Rights Association - ALRA is a group focused on fighting against various threats to the land owning public such as eminent domain and condemnation.
- Northwest Timber Workers Resource Council - This group is comprised of timber workers who are dedicated to the preservation of such jobs through ecologically sound and economically workable timber resource management.

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