Recent Legal Developments Regarding TCE Exposure Liability and “Risk-Based” Closures

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Vapor Intrusion (VI) – Exposure Pathways
“Risk” Based Clean-Up Decisions

• Genesis of risk-based cleanups and closures

• Pros and cons -- lessons from groundwater

• Effective Liability Management – finding the balance between source reduction and risk management for residual contamination, “responsible” and “innocent” owners/operators

• Hot button issues affecting risk-based cleanups
  – “Vapor intrusion”
  – Preferential exposure pathways
  – Non-Cancer (NC) screening levels for TCE
  – Assessment methodologies
  – Jurisdictional disputes (Environmental, Public Health, OSHA)
Risk Management

• In most States, Institutional Controls (ICs) are generally necessary unless the site meets unlimited use and unrestricted exposure (UU/UE) (i.e., Generic Residential Clean-up)

• Regulatory cleanup levels for UU/UE are virtually impracticable to achieve (TCE NC risk)
  – Off-site issues can complicate pathway to Closure
  – Site-specific criteria development

• The more contamination that is left, the longer your tail of post-closure obligations will be, which will potentially increase liability and “taint” real estate
TCE Toxicity 5-YR Review

• Uncertainty over last 5 years:
  – Increasing National trend for immediate action (e.g., evacuation)
  – Re-opening of Closed/NFA Sites
  – OSHA PELs vs EPA Jurisdiction
  – ATSDR draft TCE (and PCE) Toxicity Profiles (2014)
  – Hazard Ranking Rule for VI (effective 5/2017)
  – US EPA Aug 2014 Memo (deference)
U.S. EPA Early/Interim Actions and TCE Risk Assessment

- U.S. EPA July 26, 2017 response to American Chemistry Council:
  - “Office of Superfund Remediation and Technology Innovation (OSRTI) August 27, 2014 memorandum, *Compilation of Information Relating to Early/Interim Actions at Superfund Sites and the TCE IRIS Assessment*. ...existing guidance about the use of early or interim actions and consideration of non-cancer health effects.”
  - “After canvassing EPA’s regional offices, we have been unable to confirm that there has been a significant increase in remediation costs at TCE-contaminated Superfund sites as a result of the 2014 policy.”
  - “We are aware of the ongoing hazard assessment for TCE that is currently being conducted by OCSPP [EPA Office of Chemical Safety & Pollution Prevention] which may incorporate additional data not considered by the IRIS program. When that assessment becomes available, OLEM will consider whether it would be appropriate to update our assessments for TCE to reflect the findings of the OCSPP assessment.”
Georgia EPD Vapor Intrusion Guidance—Technical Advisory Committee

- Timing/Status = “Soon”? 
- Site Assessment changes
- Remedial Action Criteria/Screening Levels
- Brownfield Redevelopment implications
Re-evaluating Remedial Actions

• Feasibility Evaluation focus shifts:
  – Receptor Survey
  – Off-Site VI
  – Preferential pathways
  – Off-Site Groundwater
  – Groundwater VI screening levels

• Post-closing & stewardship considerations
ASTM “Continuing Obligations”

• Review soil, groundwater, soil gas/indoor air data at property (and downgradient properties?) considering screening levels
• Install vapor barriers or mitigation systems to control VI exposure and allow for the continued safe use of facility
• Remove VOC source materials?
• Notify adjacent property owners of VOC migration and potential vapor intrusion
• Notify utility workers/contractors of potential vapor intrusion risks
• Comply with environmental land use restrictions
• Contaminated soil relocation
ASTM “Continuing Obligations”

• ASTM Guidance on “continuing obligations” (ASTM E 2790-11)
  – Documentation not required, but may be a good idea for:
    • Finding of No Continuing Obligations
    • Continuing Obligations Plan (COP)
    • O&M/Inspection Reports
    • Any other documentation related to site work that can help support no exacerbation

  – Developer could not support BFPP defense (under either CERCLA or state law) because could not show that it did not exacerbate conditions (by breaking up concrete slab barrier to rain infiltration allowing vinyl chloride contamination to leach and migrate)
ASTM “Continuing Obligations”

• 3000 E. Imperial LLC v. Robert Shaw Controls Co. (CD Cal., December 29, 2010)
  – Purchaser qualified as BFPP by removing TCE from underground storage tanks promptly after purchase, and excavating and removing empty USTs 2 years later

• Ashley II of Charleston LLC v. PCS Nitrogen, Inc. (D S.C. 2011, affirmed 4th Circuit 2013)
  – Purchaser not qualified as BFPP because cracked concrete slabs and sumps not capped, filled or removed allowing rain infiltration; purchaser’s indemnification of responsible seller violated “no affiliation” requirement of BFPP status
Some Suggested VI Strategies

- Re-evaluate your Company’s policy and approach for making and documenting environmental, health and safety risk-based decisions
- Consider conducting an internal audit to identify potential “closed” sites or sites being “managed” for new pathways (VI) and dramatically lower screening levels (TCE)
- If appropriately managed, TCE NC risk and the VI pathway will not kill your deal, chill your redevelopment project, bankrupt your company or delay your Closure goals
  - Develop a VI play book and clear communication protocols
  - VI pathway is complex and science is evolving, but you can successfully navigate to closure with cost effective and practical approaches
- Develop and strategically implement an IC Plan to manage potential long term stewardship obligations
- Once the total life-cycle costs of implementing, monitoring, and enforcing an IC, which may exceed 30 years, are fully calculated, it may actually be less costly to reduce source(s)
- Develop a multi-disciplinary team to critically review feasibility studies to fine-tune aggressive source reduction with risk management tools to reduce future environmental liability
Tip #1: Upfront Planning

• Develop Risk Communication talking points with employees, neighbors, and other stakeholders

• Coordinate upfront with regulators and health department (*e.g.*, radon, background/indoor air)

• Agency public outreach
Tip #2: VI Sampling & Analysis Plan

• Develop a consistent sampling and analysis plan
• Use experts to collect and analyze data
• Determine process to interpret data and plan next steps
• Incorporate developing technology - Mobile Labs, FROG (hand-held field detection), portable GCs
Tip #3: VI Conceptual Site Model

• If you don’t adequately identify the problem, and goal(s), you will be challenged to find a cost-effective solution
• VI CSM may be the most critical component
• Starts with geologists in the field
• Source areas, preferential pathways, soil gas movement, land use, etc.
Tip #4: Mitigation Considerations

• Tailor Closure/NFA strategy and mitigation based on site-specific approach flowing from applicable state/federal policy, risk tolerance, and degree of sophistication

• Cost-benefit analysis – mitigation vs. trying to “screen” back out vs. site-specific criteria

• What is the end game and at what point is the mitigation system no longer necessary?

• Do I need a deed restriction or local ordinance?
Toxic Tort Litigation Risks

• Class Actions
• Property Damage
• Bodily/Personal Injury
• Statutory Enforcement
• Attorneys’ Fees
• Public Relations
Toxic Tort Litigation – Relief Requested

• Certifying Class Actions (types/groups of classes)
• Declaring Defendants’ conduct unlawful/liable for causes of action
• Injunctive Relief compelling response/corrective actions
• RemEDIATE harm (including repairs of private property, establishment of a medical monitoring fund, and monitor/oversee operations, maintenance & monitoring)
• Compensatory damages (injuries to person and property, loss of business)
• Punitive damages (treble damages under RICO)
• Damages for unjust enrichment/economic benefit
• Attorneys’ fees
Toxic Tort Litigation – Class Action

• Class Actions generally require numerous plaintiffs with common questions of fact and law that predominate over individual claims, and the representative plaintiffs are typical of the remainder of the class and will fairly protect their class interests
  – Are toxic tort claims appropriate for class action?
  – Costs and benefits of toxic tort class certification

• “Class Action Fairness Act” (CAFA) enacted in 2005
  – CAFA expands federal court jurisdiction to minimize “forum-shopping” limit excessive Plaintiff’s attorney fees
  – Potential remand to state court for “local controversies”

• Recent case precedent: Hostetler v. Johnson Controls (N.D. Ind. 2017): Court rejects remand to state court under CAFA “local controversy” exception; accord: Millman v. United Technologies Corp. (N.D. Ind. 2017)
“Private Attorney General” Claims

• Environmental Enforcement Priorities of NGOs (e.g., Industry Sector, Media, Geographic Region, Program, etc.)

• Enforcement Target Risk Reduction Strategies
“Private Attorney General” Claims

• Pre-Suit “Notice of Intent to Sue”
  – Response by agency (e.g., diligent prosecution, collaboration/resource coordination, etc.)
  – Response by PRP
    • Defenses/denial
    • Agency settlement approach
    • Settlement with NGO Plaintiff group
    • Silence
  – Insurance coverage?
“Private Attorney General” Claims

• Anticipation of Litigation Work-Product
  – Experts
  – Compliance Self-Audit
  – Public Relations

• Complaint & Court Proceedings
  – Discovery Strategy (e.g., Rule 30(b)(6) deposition)
  – Bifurcation
  – ADR
“Private Attorney General” Claims

• Settlement negotiations
  – Fines/penalties
  – Attorneys’ fees and costs
  – Supplemental Environmental Project (SEP)
  – Judicial approval
  – Notice to Agency
Rising Tide: RCRA Citizen Suits
Two Types of RCRA Citizen Suits

• *Any* “person” may commence a suit against *any other* “person” . . .
  - “(a)(1)(A)” claim: “who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order” made effective pursuant to RCRA
  - “(a)(1)(B)” claim: imminent and substantial endangerment

• Are VOCs “hazardous wastes”?  
  
42 U.S.C. § 6972 (a)(1)(A) & (b)
Notice and Delay

No action can be commenced until notice given to the EPA, the State, and the alleged violator and:

- RCRA (a)(1)(A) suits: 60 days have passed
- or
- RCRA (a)(1)(B) suits: 90 days have passed
RCRA (a)(1)(B): “Imminent and Substantial” Endangerment

Three Requirements:

(1) Defendant has generated solid or hazardous waste.

(2) The defendant is contributing or has contributed to the handling, storage, treatment, transportation, or disposal of that waste.

(3) The waste may present an imminent and substantial endangerment to health or the environment.
RCRA (a)(1)(B):
Imminent and Substantial Endangerment

“The waste may present an imminent and substantial endangerment to health or the environment.”

Guiding Principles
RCRA (a)(1)(B): Imminent and Substantial Endangerment

“The waste may present an **imminent** and substantial **endangerment** to health or the environment.”

What is an “imminent” endangerment?
RCRA (a)(1)(B): Imminent and Substantial Endangerment

“The waste may present an imminent and **substantial endangerment** to health or the environment.”

What is a “substantial” endangerment?
RCRA (a)(1)(B):
Imminent and Substantial Endangerment

“The waste may present an imminent and substantial endangerment to health or the environment.”

Whose Health?
RCRA (a)(1)(B): Imminent and Substantial Endangerment

“The waste may present an imminent and substantial endangerment to health or the environment.”

What is endangerment to the environment?
RCRA (a)(1)(B): Imminent and Substantial Endangerment

“The waste may present an imminent and substantial endangerment to health or the environment.”

The Dreaded “May”
RCRA (a)(1)(B): Imminent and Substantial Endangerment

“The waste may present an imminent and substantial endangerment to health or the environment.”

→ Injunctive Relief
RCRA (a)(1)(B): 
Imminent and Substantial Endangerment

“The waste may present an imminent and substantial endangerment to health or the environment.”

PUTTING IT ALL TOGETHER
RCRA (a)(1)(A): Violations of Seven Things

Defendant Owner/Operator alleged to “be in violation of”

- Permit
- Standard
- Regulation
- Condition
- Requirement
- Prohibition
- Order

“made effective” pursuant to RCRA.
RCRA (a)(1)(A):
Violations of Seven Things

* Permit * Standard * Regulation * Condition * Requirement * Prohibition * Order * “made effective” pursuant to RCRA.

“To be in Violation?”
RCRA (a)(1)(A):
Violations of Seven Things

* Permit * Standard * Regulation * Condition * Requirement * Prohibition * Order * “made effective” pursuant to RCRA.

Citizen Suit Authority
Vs.
EPA/State Authority
RCRA (a)(1)(A):
Violations of Seven Things

* Permit * Standard * Regulation * Condition * Requirement * Prohibition * Order *
“made effective” pursuant to RCRA.

→ Injunctive Relief ?
RCRA (a)(1)(A): Violations of Seven Things

* Permit * Standard * Regulation * Condition * Requirement * Prohibition * Order *
“made effective” pursuant to RCRA.

PUTTING IT ALL TOGETHER

• Case precedent: *Schmucker v. Johnson Controls* (N.D. Ind. 2017): Summary judgment granted dismissing plaintiffs’ RCRA (a)(1)(A) claims against Interim Status facility with closed SWMUs and no Agency violations
RCRA (a)(1)(A) & (a)(1)(B)

Civil Penalties?

“The district court shall have jurisdiction . . . to apply any appropriate civil penalties under section 6928(a) and (g) of this title.”

42 U.S.C. 6972(a).
RCRA (a)(1)(A) & (a)(1)(B)

Attorney Fees?

In issuing a final order in connection with a citizen suit, the Court “may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.”

42 USC 6972(e).
RCRA (a)(1)(A) & (a)(1)(B)

What if the Government is Acting?
Toxic Tort Litigation – Case Precedent

• *Adkins v. VIM Recycling, Inc.*, 644 F3d 483 (7th Cir 2011)
• After IDEM filed suit in state court to enforce an agreed order regarding the removal of “C” grade waste from VIM facility, local residents filed a RCRA citizen suit seeking broader relief, including removal of “A” and “B” grades of waste.
• Subsequently, IDEM filed a second suit in state court regarding “B” grade waste.

Holding:
• The first IDEM suit did not bar the citizen suit because residents were pursuing RCRA claims that were beyond scope of first IDEM suit.
• The second IDEM suit did not bar the residents’ citizen suit because the citizen suit was filed first. RCRA permits citizen and government lawsuits to be prosecuted simultaneously, so long as the citizen-plaintiffs have complied with the notice and prior filing requirements in the statute.
Toxic Tort Litigation – Case Precedent


• CNA moved to intervene in suit brought by United States and State of California against owners and operators of the Stringfellow dumpsite, as well as other potentially responsible parties.

• CNA claimed intervention as of right, pursuant to citizen suit provisions of various environmental statutes and Federal Rules of Civil Procedure.

• CNA was denied request to intervene as of right, but granted permissive intervenor status – with conditions. CNA sought interlocutory review.

**Holding:** Pretrial grant of intervention not subject to immediate appeal.
Toxic Tort Litigation – Case Precedent

• *Meghrig v. KFC Western*, 516 US 479 (1996)

  Property owner spent over $200,000 to clean up contaminated soil discovered during construction of a KFC restaurant. The property owner subsequently filed a citizen suit under § 7002 of Resource Conservation and Recovery Act seeking to recover cleanup costs from prior owners.

**Holding:**

• RCRA § 7002 allows citizens to seek mandatory or prohibitory injunctions to address contamination that endangers health or environment at the time suit is filed.

• RCRA citizen suit provision does not authorize a private cause of action to recover prior cleanup costs or other damages.
Toxic Tort Litigation – Case Precedent

• *Raytheon v. McGraw Edison*, 979 F Supp 858 (7th Cir 1997)
• Raytheon filed a RCRA § 7002 citizen suit alleging that contaminants in the soil on property purchased from McGraw Edison may pose an imminent and substantial threat to persons or the environment.
• McGraw-Edison contended that Raytheon’s request for injunctive relief under RCRA § 7002 was an attempt to reduce its own potential liability for cleanup costs, rather than an action on behalf of the public good.

**Holding:** 7th Circuit has already rejected this position in Datacard. Raytheon qualifies as “any person” within the meaning of the statute and thus may pursue a citizen suit under RCRA irrespective of its motive.
Toxic Tort Litigation – Case Precedent

- **Avondale Fed Sav Bank v. AMOCO Oil Co, 170 F3d 692 (7th Cir 1999)**
- Avondale filed RCRA citizen suit seeking restitution for cleanup costs from prior property owner.

**Holding:** In *Meghrig* Supreme Court painstakingly analyzed language of RCRA citizen suit provision and concluded that RCRA “is not directed at providing compensation for past cleanup efforts.”

- Instead, RCRA offers a choice of two remedies: “a mandatory injunction, *i.e.*, one that orders a responsible party to ‘take action’ by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, *i.e.*, one that ‘restrains’ a responsible party from further violating RCRA.”

- “Neither remedy, however, . . . contemplates the award of past cleanup costs, whether these are denominated ‘damages’ or ‘equitable restitution.’” This precise language bars remedy Avondale seeks.
Toxic Tort Litigation – Case Precedent

• *Albany Bank & Trust Co v. Exxon Mobil Corp*, 310 F3d 969 (7th Cir 2002)

• Property owner filed RCRA § 7002 citizen suit, seeking to recover costs of investigating contamination that migrated from adjacent gas station.

**Holding:**

• RCRA § 7002 bars damages and deliberately limits remedies to injunctive relief.

• While litigation costs and attorney fees may be awarded, nothing in this provision mandates recovery of pre-litigation costs to determine whether a plaintiff should bring a suit in the first place . . . “investigation” costs are no more recoverable than “cleanup” costs.
Toxic Tort Litigation – Case Precedent

• *Albany Bank* (cont.)
  
  • 7th Circuit found that plaintiff had made prima facie claim under the RCRA citizen suit provision:
    
    (1) defendant has generated solid or hazardous waste
    (2) defendant is contributing/has contributed to handling of waste
    (3) waste may present an imminent and substantial danger to health or the environment

• In remanding case to District Court, 7th Circuit noted that the District Court may issue an injunction ordering future remediation to occur at the expense of defendant Exxon, if Exxon proves to be responsible for the environmental harm.
Toxic Tort – Recent Trends

• *Increasing environmental citizen lawsuits in response to EPA de-regulation?*

• Can air emissions constitute disposal of waste?
  – *Little Hocking Water Assoc. v. DuPont* (S.D. Ohio 2015): particulate emissions constituted disposal of solid waste to ground and water endangering environment (but not human health due to pre-treatment)
  – *West Coast Homebuilders v. Aventis CropScience USA* (ND Cal. 2009): potential future vapor intrusion from groundwater plume not “imminent endangerment” and no current exposure for court to remedy

• Is the design and construction of a RCRA storage facility relative to climate change risks actionable in RCRA citizens suit?

• Disposal of fluids from fracking allegedly causing earthquakes(!) not actionable as RCRA endangerment, but deferred to state agencies/courts: *Sierra Club v. Chesapeake Energy Corp.* (W.D. Okla. 2017)
EPA Rulemaking Challenges

• Public Comments
• Pre-Promulgation Suit
• Final Rulemaking Appeal
  – Individual and/or trade association petitioner
  – Intervenors
  – Consolidation
• “Sue and Settle” Strategy
• Judicial Deference to Agency (Chevron)
EPA Methylene Chloride Rulemaking

• March 2019 U.S. EPA prohibits methylene chloride in paint removers, but only consumer use; despite January 2017 EPA proposal to ban consumer and commercial uses

• October 2019 Natural Resources Defense Council files lawsuit in 2nd Circuit Federal Court of Appeals claiming EPA rule violates TSCA by failing to regulate methylene chloride to avoid “unreasonable risks”
Communication of Risk – Flint Drinking Water Legacy

- Public interest groups, advocacy groups, local units of government, prosecuting attorneys, and private citizens enforce environmental laws in court, and in public/media relations
- “Risk” = hazard + likelihood
- Sense of outrage raises risk significance perception (does perception = reality?)
- Different segments of public/audience with varying interests
- Recognize possible “psychological distance” from the risk (e.g., temporal, geographical, socioeconomic, likelihood)
- Exchange of information; but “information deficit” may not overcome perceptions/mistrust
QUESTIONS?

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