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The 7 Myths of Environmental Liability

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Why it matters...

- CERCLA fines can be up to \$32,000 per day per occurrence
- Liability is joint and several so any liability can equate to large sums
- Cases are very long and often involve large numbers of Defendants, aka. they are expensive to litigate

Myth #1

The Texas Solid Waste Disposal Act applies to “solids”

Truth #1

“Solid Waste” includes “solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities”

Myth #2

Local governments are
immune from liability under
environmental laws

Truth #2

Local governments are specifically listed as being liable under CERCLA and the TSWDA

Myth #3

Cities do not produce
hazardous wastes

Truth #3

Examples of waste attributable to cities:

- Used motor oil
- Material from sewer maintenance
- Soil
- Wastewater treatment byproducts
- Fire Department household waste acceptance programs

Myth #4

If you hire qualified people to handle your waste, you have no liability

Truth #4

your local government may
retain liability as a generator
AND as an arranger of
transport under CERCLA

Myth #5

Environmental laws only
punish people and
organizations that do
something wrong

Truth #5

Many environmental laws
are about cost shifting and
may not even require
intentional action

Myth #6

If in doubt, it is better to treat material as hazardous just to be safe

Truth #6

Material disposed of at a hazardous waste disposal site is considered hazardous until you can prove it was not

Myth #7

A general indemnity clause in your contracts will protect you

Truth #7

Indemnity clauses must be “specific enough to include CERCLA liability or general enough to include any and all [future] environmental liability.”

Halliburton Energy Servs., Inc. v. NL Indus., 648 F. Supp. 2d 840, 880 (S.D. Tex. 2009).

Summary

- Think about environmental liability when starting transactions, writing documents, or designing procedures
- Remember a general indemnity clause is not good enough
- Be sure (instead of just safe) in determining composition of waste material
- Hire competent contractors, but protect yourself

Questions

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