7 Myths of Environmental Liability

I. Why does environmental liability matter to you and your client?

The first myth of environmental liability is that there are a finite number of myths. That being said, this is a review of seven commonly perpetuated statements in the context of environmental liability that are not only false, but also incredibly damaging to clients when believed to be true. For example, under the federal Comprehensive Environmental Response, Compensation and Liability Act[1] (CERCLA) fines can be up to $53,907 per day per occurrence.[2] Environmental lawsuits are very long and often involve large numbers of defendants so they can be expensive to litigate, putting pressure on defendants to settle early in order to avoid costly legal bills.[3] Further, most environmental laws contain an option to impose criminal penalties. While these criminal penalties have been limited in the 5th circuit to those who knowingly violated the law, [4] not all circuit courts have been so forgiving.[5] Environmental liability laws have two characteristics that impact local governments: these laws generally contain express waivers of sovereign or governmental immunity, and tend to impose strict liability. These characteristics, combined with high litigation costs and multi-million dollar potential damages, make the perpetuation of myths about environmental liability especially dangerous for local governments.

II. What do we mean by environmental liability?

The term environmental liability refers to any law designed to protect the environment. CERCLA is one of the most expansive environmental liability laws, and the one most people have heard about. It was enacted in 1980 and amended in 1988. The law was designed to shift costs of environmental cleanup of hazardous wastes to those who had some involvement in creating the problem.[6] Local governments are most likely to be involved in claims under CERCLA, or its state counterpart, the Texas Solid Waste Disposal Act[7] (TSWDA). However, there are other environmental laws for local governments to worry about. The Endangered

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[1] 42 U.S.C. Section 9601 *et seq.*

[2] 42 U.S.C. Section 9606(b)(1), adjusted for inflation by EPA memorandum re revised penalty matrix issued Sept. 5, 2016

[3] E.g., *USOR Site PRP Group v. A&M Contractors, Inc. et al*, Cause No. 4:14-cv-02441 (Texas Southern Dist. Filed August 24, 2014) involved more than 1200 defendants who were brought into the case, with many settling before the case even progressed to the initial discovery phase; *See also* Howard F. Chang and Hilary Sigman , "Incentives to Settle under Joint and Several Liability: An Empirical Analysis of Superfund Litigation," *The Journal of Legal Studies* 29, no. 1 (January 2000): 205-236.

[4] *See e.g., United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 489 (5th Cir. 2015)(holding that violation of the Migratory Bird Treaty Act required more than omission or accident)

[5] *E.g., United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir.2010)(holding that the Migratory Bird Treaty Act was a strict liability statute that did not require a defendant to knowingly violate the law to be guilty under the misdemeanor provision); *United States v. FMC Corp.*, 572 F.2d 902, 905-06 (2d Cir.1978).

[6] *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602, 129 S.Ct. 1870 (2009).

[7] Texas Health and Safety Code Chapter 361; *See* Jeffrey M. Gaba "Understanding Cleanup Statutes," *Texas Layer* March 9, 2012 for a good explanation of the differences between CERCLA and TSWDA.

Species Act[8] (ESA), for instance, applies to local governments the same way it applies to private individuals.[9] Other lesser-known environmental laws, to name only a few include: the Migratory Bird Treaty Act, the Coastal Zone Management Act, the Dune Protection Act, and the Bald Eagle Protection Act. The "myths" generally relate to CERCLA and TSWDA, but one should keep in mind that these other environmental laws exist. To identify potential liability under environmental laws for any particular operation or transaction, ask whether there could be an impact to wildlife, natural resources, workers, or potential future buyers or users of property. These risks should be considered in addition to any potential for liability related to hazardous waste.

III. What are the 7 myths of environmental liability?

Myth #1: The Texas Solid Waste Disposal Act applies to "solids".

Most states have adopted a state counterpart to CERCLA. One reason for this is to allow state agencies to assist in enforcement and state courts to have jurisdiction over the state claims. In addition, the EPA has delegated authority to state agencies like TCEQ to enforce certain types of violations. TSWDA is a good example of how environmental law tends to be counter intuitive. Though "Solid" appears in the name of the Act, it actually applies to "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, mining, and agricultural operations, and from community activities".[10]

Myth #2: Local governments are immune from liability under environmental laws.

To put CERCLA into perspective, not even the federal government is immune from liability under this law.[11] Local political subdivisions can be liable under CERCLA. With the exception of certain special districts,[12] there are no additional hurdles required to prove a government liable under CERCLA. Consequently, environmental laws are one of the rare times that a government entity is in exactly the same position that a private entity would be under the same circumstances. Also noteworthy is that local governments are not immune from liability under the Endangered Species Act.[13] Consequently, if you find an endangered cave spider or a spotted owl on the land where you intended to build your new fire station, you must stop immediately and contact the EPA the same way a private developer would.

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[8] 16 U.S.C. Section 1531 *et seq.*
[9] *Id*. at Section 1532(13).
[10] Tex. Health & Safety Code Section 361.003(35).
[11] *E.g.*, *Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486, 491 (S.D. Tex. 2015).
[12] *Id*. at 9601(20)(C)-(D); Tex. Health & Safety Code Section 361.003(23); *See Celanese Corp., v Coastal Water Authority*, 475 F. Supp.2d 623, 634-35 (S.D.Tx. 2007) (finding that CWA had 11th amendment immunity under CERCLA, but that governmental immunity was waived under the TSWDA).
[13] *Id*. at Section 1532(13).

Myth #3: Cities do not produce hazardous wastes.

To establish a CERCLA claim, a plaintiff must establish that:

1) The site of the contamination is a "facility" at which
2) there was a release or threatened release of hazardous substances
3) causing the incurrence of response costs necessary and consistent with the national contingency plan and
4) the defendant is a covered person under CERCLA 107(a), which means the defendant either (i) "arranged for disposal or treatment" or "arranged with a transporter for transport for disposal or treatment of hazardous substances" to the facility (known as "arranger liability"), (ii) transported hazardous substances to the facility ("transporter liability"), or (iii) generated hazardous substances accepted for treatment at the facility ("generator liability").[14]

There are two categories of waste covered by CERCLA: (1) listed substances, which include a long and sleep-inducing list of chemical names, and (2) substances that are covered due to a particular characteristic, such as being too flammable or too toxic.[15] I say "too flammable" because almost every substance is flammable under a high enough temperature. The same is true of toxicity; most substances in a high enough quantity over a short period of time may be toxic.

To further complicate matters, there are substances that are commonly known to exhibit hazardous characteristics, yet these substances are specifically excluded from CERCLA coverage. An exclusion commonly known as the "petroleum exclusion" would appear to remove all petroleum products from CERCLA coverage.[16] However, the petroleum exclusion only applies to oil and gas related "exploration and production" activities. Consequently, any used petroleum products will still be covered by CERCLA and TSWDA. So, even the exclusions to environmental laws can breed myths.

As discussed above, there is more than one way for a substance to be considered hazardous waste under CERCLA and TSWDA. Consequently, almost every local government will have some involvement with hazardous waste. This may be in the form of wastewater treatment byproducts, household waste acceptance programs, vehicle maintenance activities, material produced during sewer maintenance, or real estate transactions.

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[14] 42 U.S.C. 9607; Tex. Health & Safety Code Section 361.344; *E.g., Uniroyal Chemical Co. v. Deltech Corp.*, 160 F.3d 238, 242–43 (5th Cir. 1998) as modified on rehr'g (Jan. 8, 1999).

[15] See EPA's Designation of Hazardous Substances at 40 CFR 302.4.

[16] There is no petroleum exclusion in the TSWDA (Understanding Cleanup Statutes, Jeffrey M. Gaba, Texas Layer 03/09/2012).

Myth #4: If you hire qualified people to handle your waste, you have no liability.

While you certainly want a qualified company handling your client's waste, the more qualified companies also know how to protect themselves. They may use formal documentation only to the extent it protects them. For instance, the required DOT and TCEQ forms turned in to the disposal site can be filled in to name the city as a generator of waste and may or may not identify the actual composition of the waste. Cities may have an employee that signs such a form on their behalf, but the employee is often unaware of the legal implications of signing. Further, some companies will have the city sign an agent form that states the transporting company is acting as the city's agent for the purposes of choosing the disposal site. This means the city picks up liability, not only as a generator under CERCLA, but also as a transporter and arranger of transport. Moreover, these same companies may treat a string of emails as a contract, never requiring nor prompting the city to provide a formal agreement. This means there may be no indemnity clause to interpret. Or if there is a contract, it may be on the back of a receipt provided to the city and signed by a city employee when the waste was picked up.

Myth #5: If in doubt, it is better to treat material as hazardous just to be safe.

Under CERCLA, a plaintiff has no obligation to prove that certain hazardous substances, attributable to the defendant, are the same hazardous substances currently being released or threatened to be released, or that the hazardous substances attributable to a defendant exceed a particular contaminant threshold.[17] So, the mere labeling of a substance as hazardous on any documents may be enough to impose CERCLA liability. Many local governments will try to do the "right thing" by treating material as if it is hazardous if there is even a possibility the material is hazardous. However, a better approach is to have the material sampled and analyzed, then treated accordingly. This method protects a local government that disposes of non-hazardous material by providing evidence that the material was not hazardous, and therefore the local government is no longer a "covered person" under CERCLA. CERCLA has a three-year and six-year statute of limitations.[18] However, these limitations periods do not begin to run until some form of removal or remedial action is taken, either physically at the site or through legal action. So, documentation of the analysis should be kept by the local government indefinitely.

Myth #6: Environmental laws only punish people and organizations that do something wrong.

[17] *Uniroyal Chemical Co. v. Deltech Corp.*, 160 F.3d 238, 242-43 (5th Cir. 1998) as modified on rehr'g (Jan. 8, 1999).
[18] 42 U.S.C. Sections 9613(g)(2)-(3).

CERCLA and TSWDA, along with most other environmental laws, impose strict liability.[19] Consequently, under CERCLA "a plaintiff generally does not need to prove that the defendant *caused* the contamination, only that the defendant is a 'covered person.' "[20] In addition, liability may be joint and several so any amount of liability, no matter how small a percentage, may equate to large sums of money.[21] Because CERCLA and TSWDA are about cost shifting, as opposed to punishment, a local government may have done nothing "wrong" and still be held liable for cleanup costs.

Myth #7: A general indemnity clause in contracts is sufficient.

Parties entering into contracts after the enactment of CERCLA are presumed to know of the existence of environmental laws and the possibility of liability. Consequently, courts often presume that if the parties intended for an indemnity clause to cover environmental liability, they would have put that into the contract. "Indemnity clauses must be "specific enough to include CERCLA liability or general enough to include any and all [future] environmental liability."[22] Local governments should also be aware of covenants, warranties and representations. Remember also that well drafted contract provisions can protect against other parties, but will not limit a party's liability to a state or federal enforcement agency. "Agreements to indemnify or hold harmless are enforceable between the parties but not against the government."[23]

IV. Truth revealed!

To prevent costly liability for your clients, remember the following 7 Truths of Environmental Liability instead of the damaging myths that are frequently perpetuated.

Truth #1: The Texas Solid Waste Disposal Act applies to much more than just solids; TSWDA is the state equivalent of CERCLA.

Truth #2: Sovereign Immunity does not protect you from CERCLA and TSWDA.

Truth #3: Most local governments deal with materials that are covered by CERCLA and TSWDA in the normal course of business.

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[19] *E.g., Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 897 (5th Cir. 1993).
[20] *Halliburton Energy Servs., Inc. v. NL Indus.*, 648 F. Supp. 2d 840, 848 (S.D. Tex. 2009) (citing *OHM Remediation Servs. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1578 (5th Cir. 1997)(emphasis added).
[21] *Matter of Bell Petroleum Servs., Inc.*, 3 F.3d at 903.
[22] *Halliburton Energy Servs., Inc. v. NL Indus.*, 648 F. Supp. 2d at 880.
[23] *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206 (3d Cir. 1994)(stated with regard to indemnities and CERCLA liability).

Truth #4: Hire qualified people to handle disposal, but remember that a local government may retain liability as a generator AND as an arranger of transport under CERCLA.

Truth #5: Material disposed of at a hazardous waste disposal site is considered hazardous until you can prove it was not; so if in doubt, analyze the material and save the records of the analysis, and even a sample if possible.

Truth #6: Many environmental laws are about cost shifting and do not even require intentional action so you may be liable even if you did nothing wrong; your local government can be liable merely for owning property or handling someone else's waste.

Truth #7: Indemnity clauses must be "specific enough to include CERCLA liability or general enough to include any and all [future] environmental liability."

Besides knowing the difference between myth and truth, the most beneficial action you can take to protect your clients is to think about environmental liability when performing common tasks, such as drafting or reviewing contracts. The following checklist is provided to assist you in remembering when environmental liability may be an issue.

7 Myths of Environmental Liability - Checklist

Land purchases, sales, leases, and easements

1. Due diligence – Include a sufficient period for inspection of site records and completion of a Phase I environmental site assessment by a qualified consultant.

2. Environmental liability indemnity clause – Include a specific clause for environmental liability, not just a general indemnity clause or "as-is" provision.

3. Evaluate risk – If contamination is found on site or documents suggest it is likely, the purchaser does not have the "*bonafide* protected purchaser" defense under CERCLA .

4. Protect the local government – If leasing the land or providing a partial property interest, the local government retains liability as the land owner so the documents must be specific about the operations allowed, cleanup required, and liability allocation between the parties.

5. Wildlife Protection Statutes – CERCLA and TSWDA are not the only form of environmental statute that can impose liability.

Contracts in general

1. Insurance coverage – Hire consultants with adequate errors-and-omissions (E&O) insurance coverage in case the consultant fails to identify an environmental condition at the property.

2. Asbestos – Include the option for asbestos testing in buildings constructed in or before the 1970s when contracting for renovation or demolition work.

3. Environmental liability indemnity clause – include a specific clause for environmental liability, not just a general indemnity clause or "as-is" provision; review warranties and covenants.

Local government operations

1. Know your waste – Identify operations that generate waste and evaluate these processes for potential risk.

2. Local governments as transporters – Where the local government acts as a transporter, e.g. cleaning out a blocked sewer line and removing restaurant grease, document the origin of the material and analyze before transporting; If possible, get documentation where the generator agrees to liability for the transport and the choice of disposal site.

3. Local governments as landowners – Environmental laws may impose liability on landowners even if they did not contribute to the contamination; know your potential risks and consider these when planning operations.

Environmental waste clean-up

1. Environmental hazard mitigation contracts – When dealing with environmental response companies, require a full contract with clear indemnity provisions.

2. Sampling and analysis – Require thorough sampling of the waste prior to disposal and keep copies of the results in local government records.

3. Arranger/Generator Liability – If possible, require the response company to be solely liable for transporting and arranging for disposal, including the choice of disposal site; the local government retains liability as the generator of the waste in most cases, so analysis of the actual composition of the waste may be the only defense.