

Clean Land: Hazardous Waste and Sites

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OVERVIEW

- Topics to be Covered
 - Who we are
 - Our Practice
 - How we ended up as environmental attorneys
 - CERCLA
 - Background and Goals
 - Liability for Contaminated Sites
 - Contribution and Cost Recovery Actions
 - Managing CERCLA Risk in Practice
 - RCRA
 - Background and Goals
 - What is “Hazardous Waste?”
 - Regulating solid waste landfills
 - Underground Storage Tanks
 - Enforcement and Corrective Action under RCRA

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Who We Are

WHO AM I? HOW DID GET HERE? (How do I work this?)

- Jeffrey Allmon
 - Associate at Paul Hastings LLP
 - Environmental & Energy Practice Group
 - Transactional and Regulatory Practice
 - Focus on:
 - Corporate Mergers, Acquisitions, & Financings (e.g., leverage financed transactions);
 - Real Property Acquisitions & Financings;
 - Compliance Counseling (e.g., solid waste industry);
 - Project Development
 - Clean-ups/Remedial Projects; and
 - Environmental compliance counseling.

CERCLA and RCRA – OVERVIEW

CERCLA – Background and Goals

- The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (“CERCLA” or “Superfund”) generally addresses abandoned hazardous waste sites.
- Superfund is the name of the cleanup “trust fund” established by CERCLA. Also, the common nickname for CERCLA.

CERCLA – Background and Overview

- Goals of CERCLA:
 - address contaminated properties by (i) empowering the EPA to address dirty sites; (ii) allocating liability for contamination; (iii) allowing the government and private parties to recover cleanup costs from responsible parties
 - make contaminated property viable for reuse

CERCLA – Background and Overview

- Liability for “response costs” associated with a “release” of “hazardous substances” at a “facility”
 - 4 Types of Potentially Responsible Parties:
 - Current owners & operators
 - Past owners & operators at the time of disposal
 - Arrangers
 - Transporters

- Hammer: Joint and several liability

- Very few defenses: (Acts of God/War; Innocent Purchasers; Lender Protections)

RCRA – Background and Overview

- RCRA is a groundwater protection statute
 - Treatment of hazardous waste preferred over land disposal
 - “Minimum technology requirements” for land-based units
- RCRA creates a very prescriptive set of practices
 - It tells facilities how to manage the waste they generate (“cradle”)
 - It imposes detailed record keeping requirements; most notably the manifest
 - It compels ultimate management in prescribed manner (“grave”)
- RCRA focuses on BEFORE
 - Control waste streams to prevent contamination, through regulation.
 - CERCLA focuses on AFTER
 - Dealing with sites that have already been contaminated by hazardous waste, through liability.

Three Major Programs, Shared Enforcement

- Subtitle C – Hazardous Waste
 - Cradle-to-grave tracking system for hazardous waste
 - Standards for generators and transporters of hazardous waste, and for operators and facilities that treat/store/dispose of hazardous waste
- Subtitle I – Underground Storage Tanks
 - Protect underground drinking water from contamination from underground storage tanks
- Subtitle D – Nonhazardous Waste
 - State-run permitting program for owners/operators of municipal landfills
 - Federally uniform, minimum technology standards

**CERCLA and RCRA – A Story in Three
Parts**

CERCLA and RCRA – A Story

- The People in our Story:
 - **Walter:** Owns a boutique chemical company in New Mexico; *White Pharmaceuticals*
 - **Jesse:** Owns a hazardous waste hauling business, also in New Mexico; *Pinkman Waste Hauling*
 - **Gus:** Owns his own farm outside of Santa Fe; *Los Pollos Hermanos Farms*

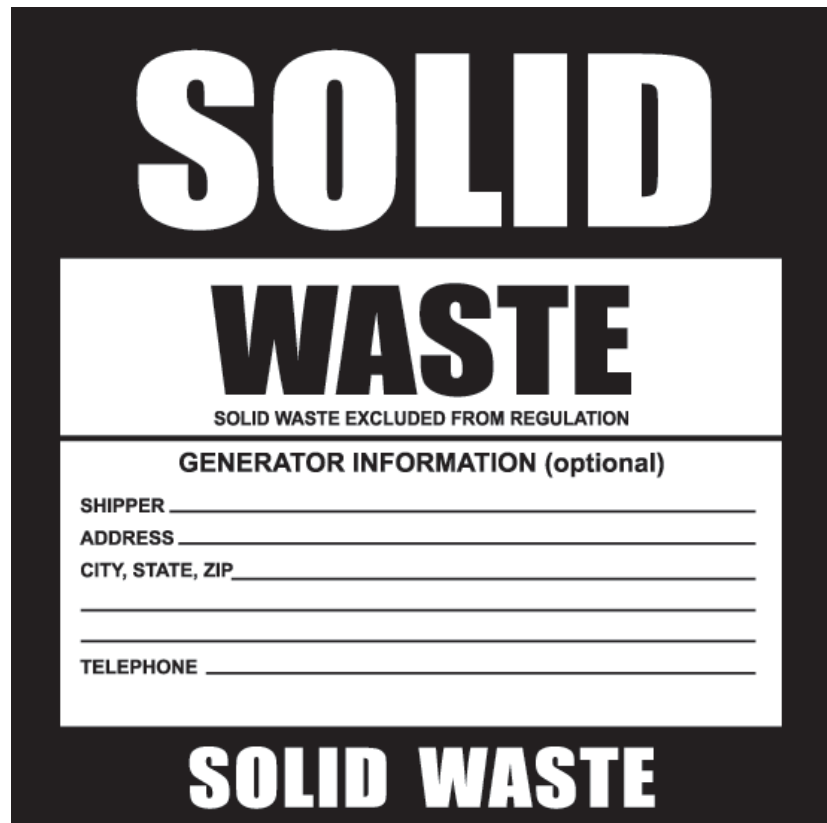
CERCLA and RCRA – A Story

- As with all great stories, our story starts with:



CERCLA and RCRA – A Story

- Walter does not know what he should do with his barrel. His first step, he figures, is to determine what exactly he has:



CERCLA and RCRA – A Story

Why does this matter?

- It determines whether or not RCRA Subtitle C applies; it is the gatekeeper to the prescriptive regulations that Subtitle C is so famous for.
- All generators have a statutory obligation to:
 - **Characterize:** identify their own hazardous waste streams,
 - **Registration Requirements:** register themselves with EPA or delegated state agencies,
 - **Manifesting & Documentation Requirements:** record their out-going waste shipments on a uniform manifest,
 - **On-site Storage and Management Requirements:** store materials on-site properly and for the required period of time,
 - **Record-Keeping Requirements:** keep the required records for the required period of time,
 - **Training Requirements:** train their employees in hazardous waste management, and
 - **Accident & Release Response Requirements:** respond properly to accidents and releases.

CERCLA and RCRA – A Story

Excluded



Recycling

- Use or Reuse
- Secondary Material used as Generated

VS.

Solid Waste



Discarding

- Reclamation
- Extraction from Secondary Material

- *See* RCRA § 1004(27); 40 C.F.R. § 261.2
- Finalized Revisions to Definition of Solid Waste, 73 Fed. Reg. 64667 (Oct. 30, 2008); *but see* Proposed Revisions to Recycling Reclamation Standards, 76 Fed. Reg. 44094 (July 22, 2011)

CERCLA and RCRA – A Story

- So Walter knows his barrel has solid waste inside, but is it:



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Is Walter's waste
either:

Listed



or

Characteristic



- A few more rules about hazardous waste identification . . .
 - Mixture Rule: solid wastes plus a listed waste equals hazardous waste (always); but solid wastes plus a characteristic waste equals hazardous waste only if the mixture still exhibits a hazardous characteristic.
 - “Contained In” Rule: environmental media (e.g., soil) containing hazardous waste must be managed as such.
 - “Derived From” Rule: waste by-products arising from the permanent treatment or disposal of hazardous waste is itself treated as hazardous (e.g., incineration ash).

Key Exemptions from Subtitle C Regulation:

- Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas (See RCRA § 3001(b)(2)(B); 53 Fed. Reg. 25,447 (July 6, 1988))

- Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated from coal or other fossil fuel combustion (See RCRA § 3001(b)(3)(A))
 - But this could change any day now . . .
 - EPA is currently mulling over a proposal, issued in 2010, to regulate CCR under either Subtitle C or Subtitle D.
 - The consensus seems to be that Subtitle D is the more likely result.
 - See 75 Fed. Reg. 35,127 (June 21, 2010)

CERCLA and RCRA – A Story

- So now that Walter knows that his barrel is full of hazardous waste, he calls Jesse.



- Jesse says he can not pick up the barrel for 45 days.

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Walter is worried. Can he keep his barrel for 45 days?

- It all depends on how much total hazardous waste Walter generates, regardless of type or classification:

Conditionally Exempt
Small Quantity
Generators



= Indefinitely

Small Quantity
Generators



= 180/270
Days

Large Quantity
Generators



= 90 Days

CERCLA and RCRA – A Story

- 45 Days of a Barrel

<h1>Hazardous Waste</h1> <p>FEDERAL LAW PROHIBITS IMPROPER DISPOSAL</p> <p>If found, contact the nearest police or public safety authority, and the Washington State Department of Ecology or the Environmental Protection Agency</p>	
Accumulation Start Date:	Generator Name:
Reportable Quantities (RQ): <small>40 CFR Subchapter J, Part 302, Table 302.4</small>	Address:
Manifest Document #:	City:
Emergency Response Guide #:	State:
EPA Waste Code(s) and/or Characteristic(s)	Zip:
	EPA ID #:
EPA/DOT Shipping Name:	
Hazard Class:	
UN/NA #:	
Packing Group (PG):	
In the event of a spill or release of this hazardous waste, contact the US Coast Guard National Response Center at 1-800-424-8802 for information and assistance.	

CERCLA and RCRA – A Story

- 45 Days of a Barrel



CERCLA and RCRA – A Story

- 45 Days of a Barrel
 - Manifests, waste determinations, test results, exception reports; for LQG, also maintain biennial reports
 - Keep your records for three years



CERCLA and RCRA – A Story

- Finally...45 days has passed and Jesse is on his way. What must Walter do?



CERCLA and RCRA – A Story

- The Manifest



Please print or type. (Form designed for use on elite (12-pitch) typewriter.) Form Approved. C

UNIFORM HAZARDOUS WASTE MANIFEST		1. Generator ID No. GAD004157418	2. Page 1 of 1	3. Emergency Response Phone 561 222-1212	4. Manifest Tracking Number	
5. Generator's Name and Mailing Address Acme Chemical Manuf. P.O. Box 134 West Palm Beach, TX 33416				Generator's Site Address (if different than mailing address) Acme Chemical Manuf. 8901 N. Flagler Drive West Palm Beach, TX 33416		
Generator's Phone: 561 387-0134 Attn: Joe Winslow						
6. Transporter 1 Company Name AGGREGATE HAULERS				U.S. EPA ID Number TR123456789X		
7. Transporter 2 Company Name				U.S. EPA ID Number		
8. Designated Facility Name and Site Address SOUTHDOWN ENV SYS. (ALLWORTH-TN) 101 S. PARK DRIVE PO BOX 12345 MT. PLEASANT, OK 38474				U.S. EPA ID Number TND982920119		
Facility's Phone: 615 379-3215						
9a. HM	9b. U.S. DOT Description (including Proper Shipping Name, Hazard Class, ID Number, and Packing Group (if any))	10. Containers		11. Total Quantity	12. Unit Wt./Vol.	13. Wa
		No.	Type			
X	¹ UN3165, Aircraft hydraulic power unit fuel tank (c containing a mixture of anhydrous hydrazine and monomethyl hydrazine) (M86 fuel), 3, PG I Waste Profile # CH4134134F	1	DM	12	G	D001 D004 ST67B
X	² RO WASTE FLAMMABLE LIQUID, N.O.S. (BENZENE, TETRAETHYL LEAD), 3, UN1993, I (D001) (D008) (D018)	1	DM	40	G	D001
X	³ RO WASTE FLAMMABLE LIQUID, N.O.S. (BENZENE, TETRAETHYL LEAD), 3, UN1993, I (D001) (D008) (D018)	1	TT	100	P	D001
	4.					
14. Special Handling Instructions and Additional Information Call Alcon Manufacturing Company in case of an emergency. Phone: (800) 433-0988 - Regional Dispatcher						
				2) WASTE OIL		
				3) WASTE OIL		

CERCLA and RCRA – A Story

- As Walter watches Jesse take his barrel away, he daydreams about his barrel's new home...

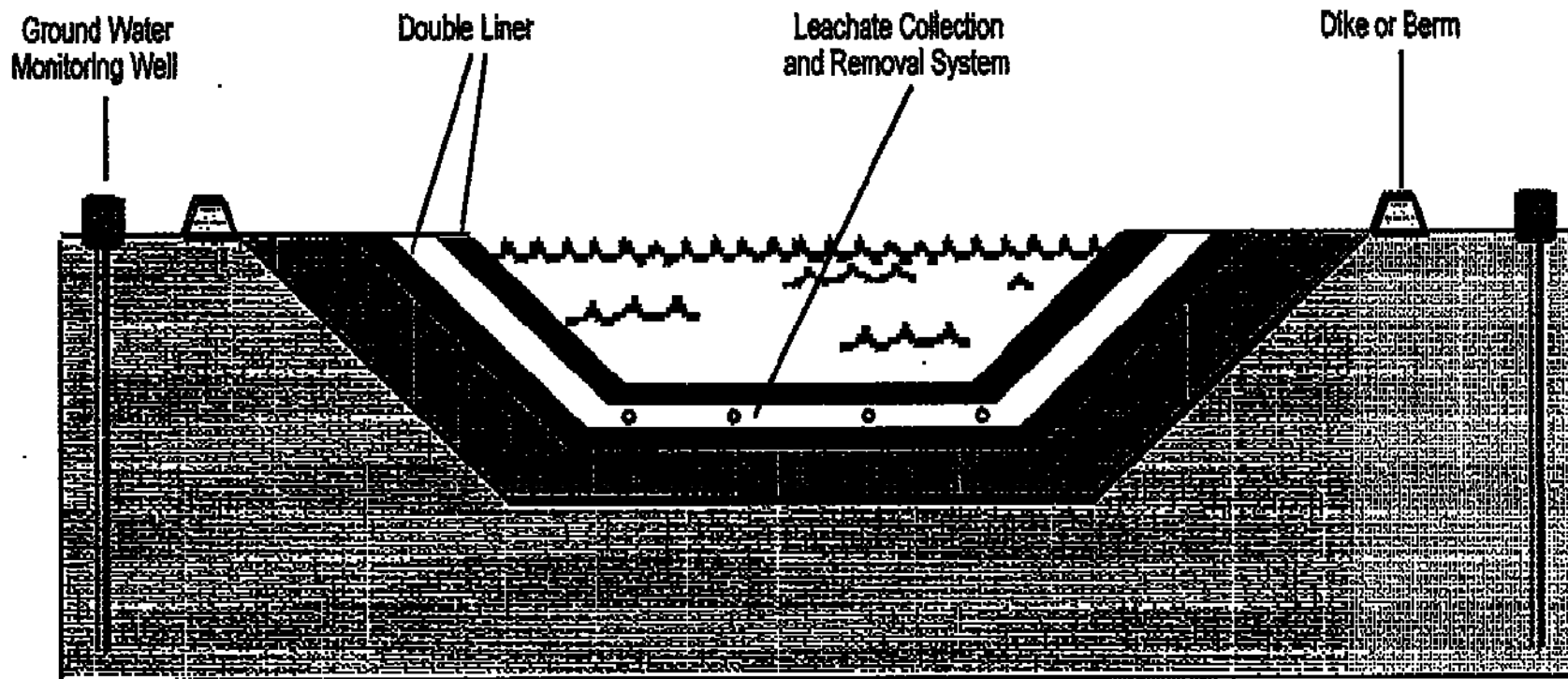


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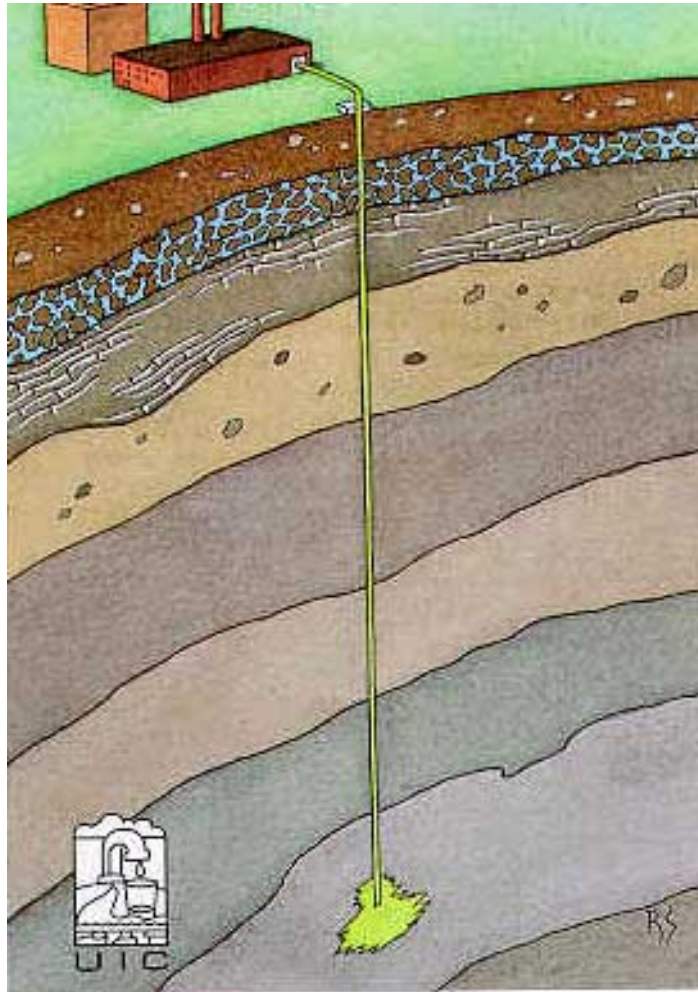
TSDF General Components of Regulation

- Waste Management Units
 - *Containing waste during treatment, storage or disposal*
- Land Disposal Restrictions
 - *Reducing toxicity or the likelihood of migration*
- Minimum Technology Requirements
 - *Basic design requirements for land-based disposal units*
- Closure Planning
 - *What do we do once we've all gone home (like, forever)*
- Financial Assurance
 - *And, who pays for it . . .*

Minimum Technology Diagram



CERCLA and RCRA – A Story



CERCLA and RCRA – A Story

- Walter is also comforted by the fact that he knows RCRA has both:

Comprehensive Corrective Action Provisions

e.g., Veolia ES
Azusa, CA



A Strict Enforcement Regime

e.g., Waste
Management
Kettleman Hills,
CA

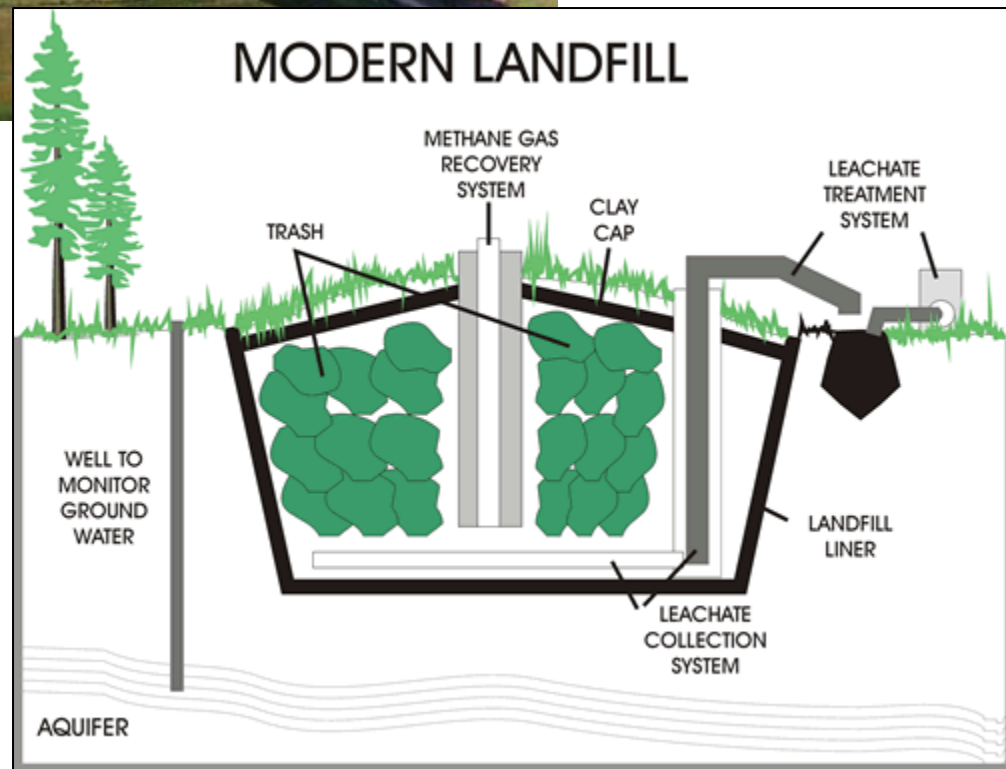


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- Jesse, however, has a different idea. He wants to save some money, so he first tries:

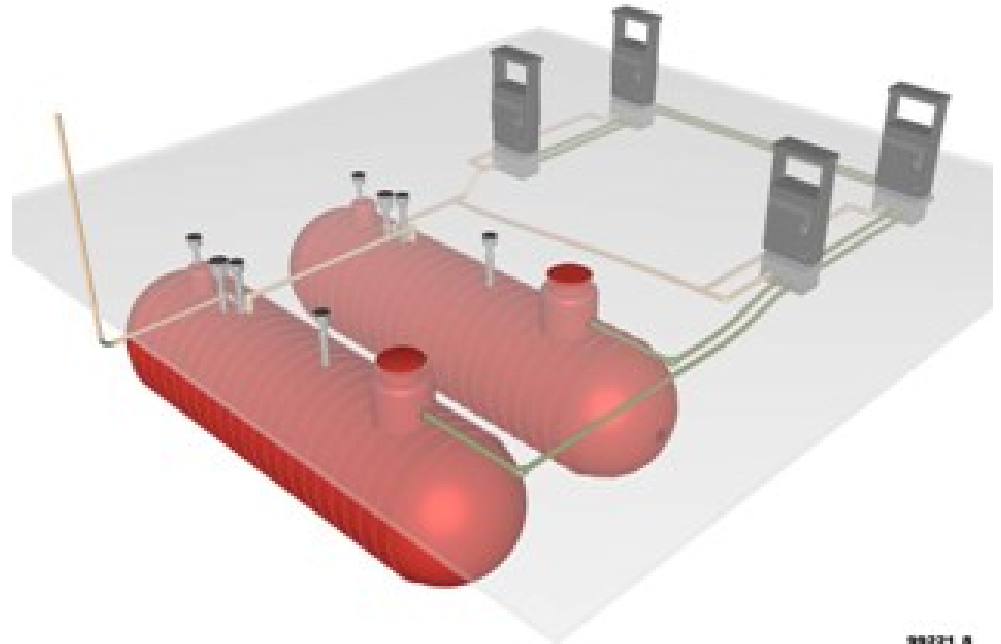


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CERCLA and RCRA – A Story

- Having been turned away at the landfill, Jesse continues to drive around (and, of course, stops for gas)...



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- All gassed up with no where to go, Jesse remembers an old friend who has a farm out in the sticks.



- The farmer happily lets Jesse drop the barrels off, and then, a few months later, sells the farm to Gus.

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- Two years go by... Gus is out for a walk one day when he finds:



Walter's drum..
Abandoned and empty...



And among friends.

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- Not knowing what to do, Gus calls the EPA, which begins an investigation.



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- In response, the EPA undertakes a cleanup at Gus' farm:



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- Once the EPA is done with the cleanup, they start talking to Gus about **WHO** is going to pay for the cleanup:
- So the EPA seeks to recover its costs from . . .



CERCLA's Liable Parties

Gus as Current
Owner/Operator

Jesse as Transporter

Old Farmer as Prior
Owner/Operator

Walter as Arranger

WHAT can EPA (or another party incurring response costs) recover?

- All necessary response costs for actions undertaken by the U.S. Government or “any other person consistent with the national contingency plan”;
- Damages for injury to, destruction or loss of natural resources (including costs of assessment of damage); and
- The costs of any health assessments carried out pursuant to CERCLA’s guidelines for such.

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- Between
 - the contaminated site,
 - the money spent to clean it up, and
 - persons considered responsible for it under CERCLA,

- You end up with: the Essential Elements to a CERCLA Cost Recovery Suit

- Stated in terms used by the statutory text:
 - a Release of Hazardous Substances at a Facility
 - that results in the Incurrence of Response Costs
 - Involving one or more classes of PRPs

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- Now that Walter, Jesse and Gus have all been judged liable for cleanup costs, they turn to their own lawyer to try and recover some of their costs:



§ 107(a)

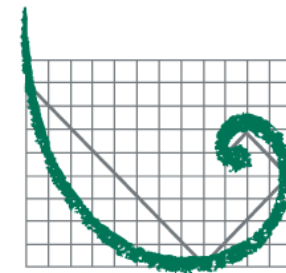
- “any other necessary costs of response incurred by any other person”
- can be used both by (1) innocent parties (i.e., those who are not PRPs, not liable parties under CERCLA) and (2) PRPs (i.e., liable parties under CERCLA) who have not yet been subject to a corresponding legal action (including both suits and settlements) by EPA or a state under CERCLA’s §§ 107(a) or 106 (i.e., the enforcement provisions); either of whom who wish to recover response costs under CERCLA

§ 113(f)

- “[a]ny person may seek contribution from any other person who is liable or potentially liable under § 107(a) of this title, during or following any civil action under § 106 or under § 107(a) of this title.”
- can be used only for contribution actions to recover response costs when the suing PRP has first been subjected to a “civil action” brought under either §§ 106 or 107(a).

CERCLA and RCRA – A Story

- Gus is very sad, because he did not take the necessary precautions when buying the property. He knows he should have hired:



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Three classes of Property Owners or Prospective Purchasers of Property can escape CERCLA ownership liability:

1. Innocent Landowners

2. Contiguous Property Owners

3. Bona Fide Prospective Purchasers (Most Significant/Common Category)

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- Gus' lender, however, is not sad at all, because he has lender liability protection:



UBS



Morgan
Stanley



CERCLA and RCRA – A Story

- Lender Liability Protections have, essentially, two requirements:
 1. Pre-Foreclosure – No Participation in the Management of a Facility; and
 2. Post-Foreclosure – Divesting the Property and Running it as a Conscientious Property Owner/Operator

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Key Points from Elk-River Fact Pattern

- On January 9, 2014, approximately 10,000 gallons of crude 4-methylcyclohexanemethanol (MCHM) and polyglycol ethers leaked from a hole in one of Freedom's storage tanks.
- The spilled chemicals seeped into the ground and contaminated the groundwater and nearby Elk River.
- DEP traced the source of the chemicals to Freedom Industries. When DEP arrived to investigate the site, they discovered a pool of spilled chemicals of about 400 square feet outside the leaking storage tank.
- The chemicals were flowing across the floor of the containment dike in a stream several feet wide and seeping into the ground. No cleanup or containment measures were in place. Workers had noticed the spill, but no one had reported it to DEP or any other state or federal regulatory authorities.

Epilogue – The Elk Creek, “Freedom Industries” Spill

RCRA?

Nope; the substances the Freedom Industries stored in their tanks was not hazardous waste because it wasn't solid waste. This material was not discarded; far from it, MCHM and the polyglycol ethers in question were stored as useful products for sale.

CERCLA?

Nope; MCHM and polyglycol ethers, believe it or not, are not designated as hazardous substances under CERCLA. See 42 U.S.C. § 9601; 40 C.F.R. § 302.4.

CERCLA §§ 103,
106, & 107 =
“Hazardous
Substances”

vs.

CERCLA § 106 =
“Hazardous Substances”
but also “Pollutants and
Contaminants”

QUESTIONS?

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