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ELI Summer School Series

Session 8: Hazardous Waste & Sites

July 30, 2024

The webinar will begin shortly.



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Today's Speakers

- **Kevin Murray**, Partner, Holland & Hart LLP
Moderator
- **Craig Johnston**, Professor of Law, Lewis & Clark Law School
- **Martha Thomsen**, Partner, Baker Botts LLP



AGENDA

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
 - Response and remediation for hazardous substances
- Resource Conservation and Recovery Act (RCRA)
 - Treatment, storage and disposal of hazardous waste
 - Corrective Action
 - Underground Storage Tanks

CERCLA OBJECTIVES

- Identifying and ranking **hazardous sites** according to the risks they pose
- A **legal mechanism** for recovering costs
- Identifying **responsible parties**
- A “**superfund**” to cover cleanup costs
- A **notification system** to identify the occurrence and location of releases

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CERCLA ELEMENTS OF LIABILITY

- Responsible Party Status
- Release or Threatened Release
- Hazardous Substance
- Incurred Response Costs

4 CATEGORIES OF LIABLE PARTIES - § 107(A) – P. 720 & W2000-2001

- Current Owners and Operators
- Owners and Operators at time of disposal
- Generators – “arranged for disposal or treatment”
- Transporters, in very narrow circumstances

THREE OVERARCHING PRINCIPLES OF LIABILITY

- Strict
- Joint and Several
- Retroactive

THE SEVEN MOST IMPORTANT LIABILITY DECISIONS EVER ISSUED BY THE COURTS

- New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985);
- United States v. Wade, 577 F.Supp. 1326 (E.D.Pa. 1983);
- United States v. Chem-Dyne Corp., 572 F.Supp. 802 (S.D. Ohio 1983);
- United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997);
- United States v. Monsanto Co., 858 F.2d 1019 (4th Cir. 1988);
- Burlington Northern and Santa Fe Railway Co. v. United States, 556 U.S. 599 (U.S. 2009); and
- United States v. Bestfoods, 524 U.S. 51 (U.S. 1998)

CERCLA IN PRACTICE: INITIAL CONSIDERATIONS

- **Scope of the site** – small upland site vs. large river sediment “mega-site”
- **Scope of the parties** – one party site vs. two party vs. hundreds of parties
 - Viability of parties
- **Cleanup lead** – EPA, state, or private party

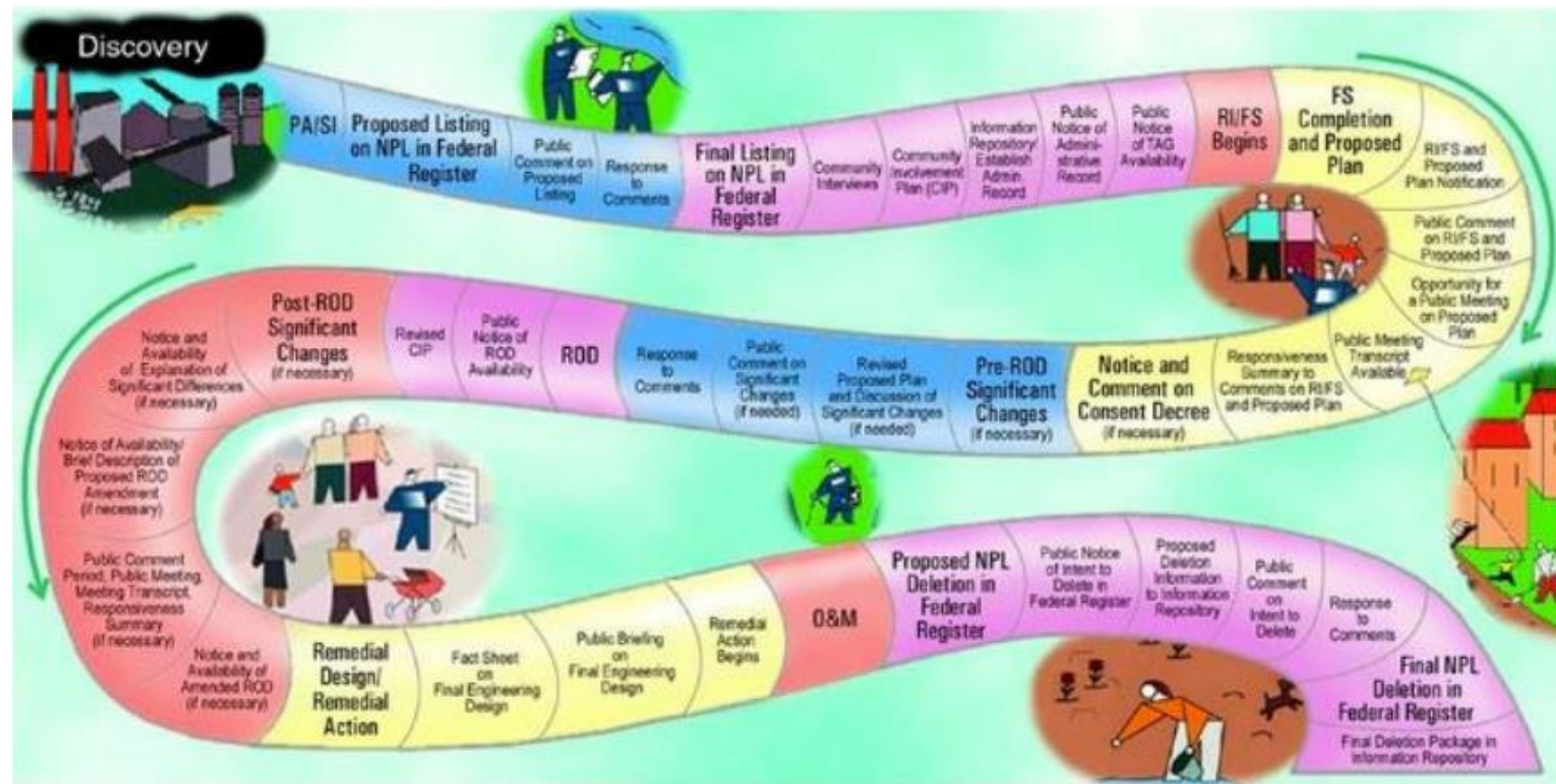
CERCLA IN PRACTICE: LIABILITY CONSIDERATIONS

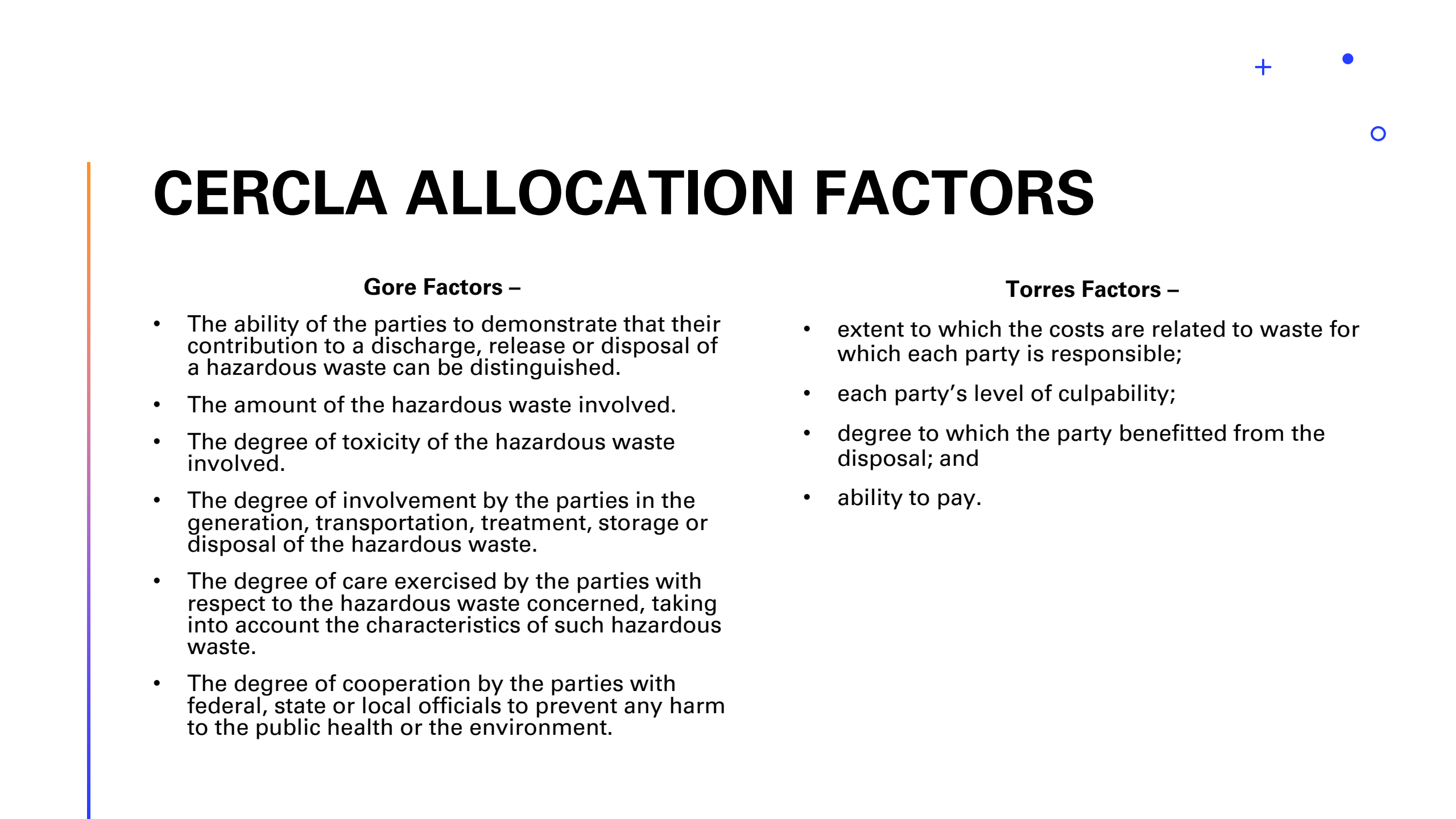
- **Nexus to the site** – off-site disposal site (generator site) vs. owner/operator liability
- **Age of the contaminating activities** – twenty years ago or a decade ago? Witnesses or documents only?
 - Impacts availability of witnesses
 - Does NOT impact SOL → CERCLA SOL runs from cleanup-related dates
- **Weight of evidence supporting (1) liability and (2) equitable share**
 - Defenses to liability

CERCLA IN PRACTICE: KEY DECISIONS

- **Cleanup decisions –**
 - Remedial actions
 - Investigation activities (RI/FS)
 - Design activities (RD)
 - Remedial action (RA)
 - Removal action
- **Allocation decisions**
 - EPA/states may identify primary responsible parties
 - Allocation/mediation proceedings
 - Court proceedings

CERCLA CLEANUP PROCESS





CERCLA ALLOCATION FACTORS

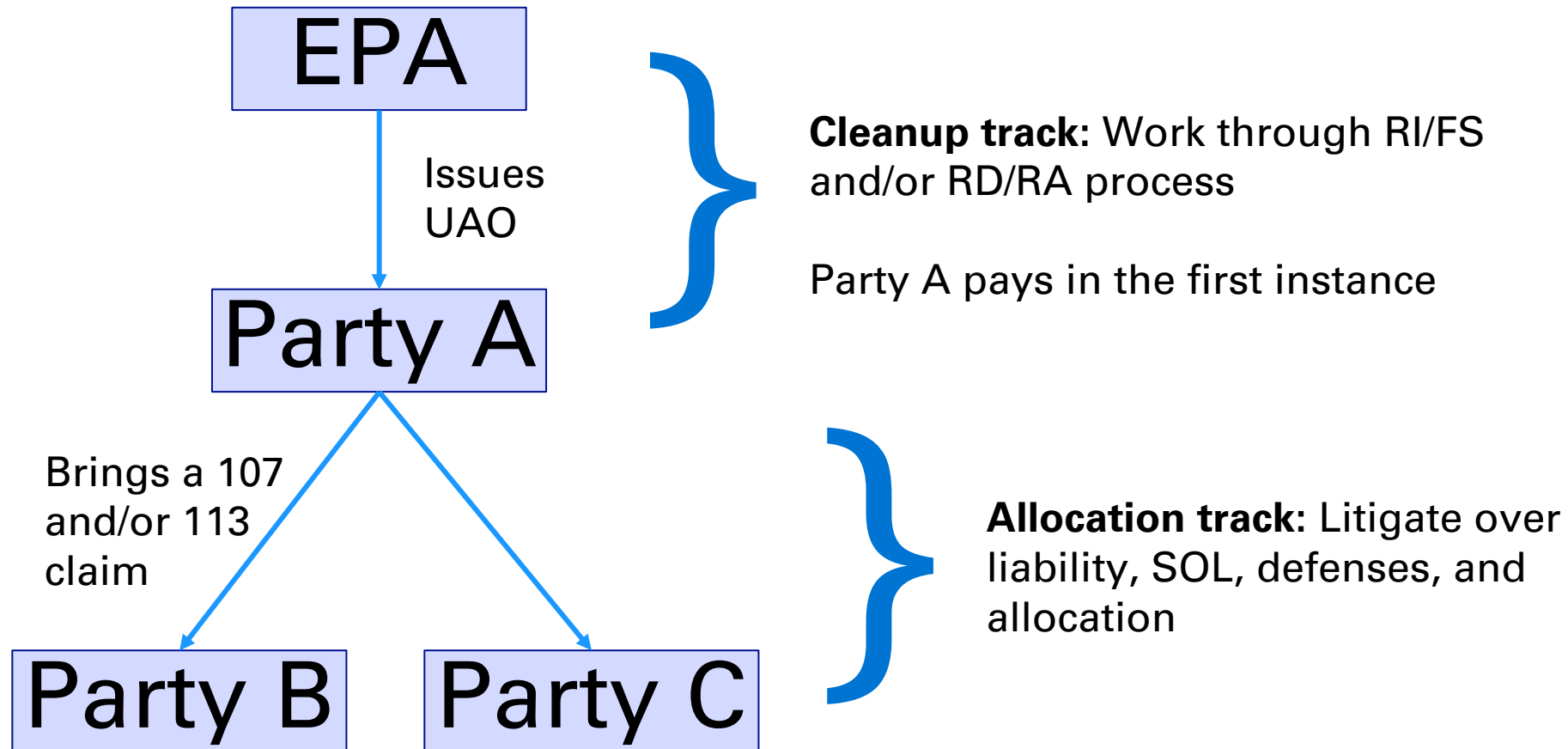
Gore Factors –

- The ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished.
- The amount of the hazardous waste involved.
- The degree of toxicity of the hazardous waste involved.
- The degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste.
- The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste.
- The degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment.

Torres Factors –

- extent to which the costs are related to waste for which each party is responsible;
- each party's level of culpability;
- degree to which the party benefitted from the disposal; and
- ability to pay.

CERCLA IN PRACTICE: EXAMPLE



PRIMARY DEFENSES TO CERCLA LIABILITY

- An act of God
- An act of War
- An act or omission of a third party
 - Qualification for landowner liability protection as either Bona Fide Prospective Purchaser, Contagious Property Owner, or Innocent landowner

THIRD PARTY DEFENSE

- Act or omission of a third party, not an employee or agent;
- No direct or indirect contractual relationship with the defendant;
- Demonstration that defendant exercised due care with respect to the hazardous substance; and
- Demonstration that defendant took precautions against foreseeable acts or omissions of such third party

“CONTRACTUAL RELATIONSHIP” (INNOCENT LANDOWNER DEFENSE)

- Acquired after the disposal or placement of a hazardous substance and:
 - At the time acquired the defendant did not know and “had **no reason to know**,” or
 - Defendant is a government entity and acquired the facility through involuntary transfer or the exercise of eminent domain, or
 - Inheritance or bequest

“REASON TO KNOW”

- The defendant must have undertaken at the time of acquisition, “**all appropriate inquiry**” into the previous ownership and uses of the property consistent with good commercial or customary practice, in an effort to minimize liability.

PROSPECTIVE PURCHASER

- If you have actual knowledge after all-appropriate inquiry, no owner liability
 - Acquire the property after January 11, 2002
 - Do not impede the performance of a response action or natural resource restoration.
 - And meet the threshold criteria and ongoing obligation outlined in the statute {and supporting guidance}.

CONTIGUOUS PROPERTY OWNER

- Intended to solve problem of passive migration
- Essentially the same as the Innocent Landowner Provision (no knowledge after all appropriate inquiry and reasonable steps required)

Common Elements and other Requirements	Bona Fide Prospective Purchaser	Contiguous Property Owner	Innocent Landowner - Section 101(35)(A)(i)
	Can acquire with knowledge of contamination	Cannot acquire with knowledge of contamination	Cannot acquire with knowledge of contamination
Threshold Criteria			
Perform All Appropriate Inquiries	✓ § 101(40)(B)(ii)	✓ § 107(q)(1)(A)(viii)	✓ § 101(35)(A)(i), (B)(i)
"No affiliation" demonstration	✓ § 101(40)(B)(viii)	✓ § 107(q)(1)(A)(ii)	See Footnote 1
Acquisition after January 11, 2002	✓ § 101(40)(A)(i)(I)		

COMMON ELEMENTS/ CONTINUING OBLIGATIONS

Continuing Obligation			
No disposal after acquisition	✓ § 101(40)(B)(i)		✓ § 101(35)(A)
Compliance with land use restrictions and not impeding institutional controls	✓ § 101(40)(B)(vi)	✓ § 107(q)(1)(A)(v)	✓ § 101(35)(A)
Taking "reasonable steps" to manage releases	✓ Exercise appropriate care 101(40)(B)(iv)	✓ § 107(q)(1)(A)(iii)	✓ § 101(35)(B)(i)(II)
Providing full cooperation/assistance/access	✓ § 101(40)(B)(v)	✓ § 107(q)(1)(A)(iv)	✓ § 101(35)(A)
Compliance with information requests and administrative subpoenas	✓ § 101(40)(B)(vii)	✓ § 107(q)(1)(A)(vi)	See Footnote 2
Providing legally required notices	✓ § 101(40)(B)(iii)	✓ § 107(q)(1)(A)(vii)	See Footnote 3
No impeding performance of response action or natural resource restoration	✓ § 107(r)(1)		
Did not cause/contribute to contamination		✓ § 107(q)(1)(A)(i)	
Third Party Defense requirements (due care and precautions)			✓ § 107(b)(3)

Footnote 1: The innocent landowner provision does not contain similar “no affiliation” language. In order to meet the statutory criteria of the innocent landowner liability protection, however, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. The term “contractual relationship” for the purpose of the innocent landowner liability protection is defined in CERCLA § 101(35)(A).

Footnote 2: Compliance with information requests and administrative subpoenas is not specified as a statutory criterion for achieving and maintaining the § 101(35)(A)(i) innocent landowner liability protection. However, CERCLA requires compliance with administrative subpoenas from all persons, and timely, accurate, and complete responses from all recipients of EPA information requests.

Footnote 3: Provision of legally required notices is not specified as a statutory criterion for achieving and maintaining the § 101(35)(A)(i) innocent landowner liability protection. These landowners may, however, have notice obligations under federal, state and local laws.

LENDER LIABILITY

- EPA promulgated regulations in 1992
- Short lived—DC Circuit vacated the rule as beyond EPA authority
- In response Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 amending CERCLA

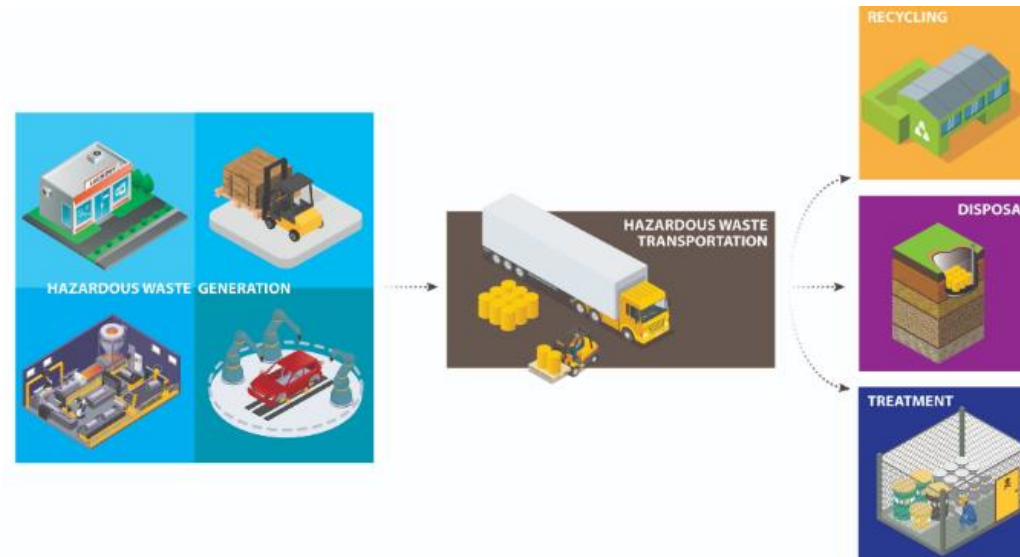
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ACT OF GOD

- Natural disaster or unforeseeable event

RCRA OVERVIEW

- Regulates hazardous waste cradle to grave
 - Subtitle C focuses on hazardous waste
 - Subtitle D focuses on non-hazardous (solid waste)
 - Subtitle I Underground storage tanks



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RCRA OVERVIEW, CONTINUED

- Hazardous Waste Generation
- Hazardous Waste Transportation
- Hazardous Waste Recycling, Treatment, Storage and Disposal

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RCRA OVERVIEW – SUBTITLE C, DEALING WITH “HAZARDOUS WASTE”

Prof. Craig N. Johnston
Lewis & Clark Law School

ELEMENTS OF REGULATORY JURISDICTION

- Is the material a “solid waste?”
 - Often referred to simply as whether the material is a “waste.”
- If it is a waste, is it also hazardous?

DETERMINING WHETHER A SECONDARY MATERIAL IS A “WASTE”

- By far the most difficult issue in the entire program
- Drawing the line between legitimate reuse/recycling and so-called sham recycling.
- There is still some significant chaos regarding this issue, with different rules applying in different states. Three main variants.
 - EPA’s old rules (1985)
 - The Obama rules (2015)
 - The post-American Petroleum Institute rules (2018)
- States are free to keep applying EPA’s old rules, if they so choose.

DETERMINING WHICH WASTES ARE HAZARDOUS

- Listed Wastes
 - K-series
 - F-series
 - U-series
 - P-series (acute)
- Characteristic wastes
 - Ignitability
 - Corrosivity
 - Reactivity
 - Toxicity

TOXICITY CHARACTERISTIC LEACHATE PROCEDURE (TCLP)

- Animating concern – That the contaminants will leach into groundwater and migrate to drinking water wells
- Levels set at 100x the drinking water standards established under the Safe Drinking Water Act.
 - Based on assumptions re dilution and attenuation
- Testing dynamics re characteristic wastes
 - Don't need to test every batch
 - Can rely on knowledge of waste stream

THREE EXPANSIVE PRINCIPLES THAT APPLY TO LISTED WASTES

- Mixture Rule
- Derived-From Rule
- "Contained-in" Policy
- All three apply only to listed wastes
 - Characteristic wastes are no longer HW if they no longer exhibit characteristic

CATEGORIES OF REGULATED ENTITIES

- Generators (Part 262)
- Transporters (Part 263)
- Treatment, Storage, and Disposal Facilities (TSDs) (Parts 264 and 265, and permitting requirements in Part 270)

CATEGORIES OF GENERATORS

- Fully regulated generators – More than 1,000 kg/month
 - Roughly 4 or more 55-gallon drums (55 gallons of water weighs 625 pounds)
 - 2% of generators; 99% of haz. waste
 - Aggregate totals at the relevant facility
 - Can vary from month to month
- Small quantity generators – 100-1,000 kg/month
 - Slightly requirements
- Very small quantity generators – less than 100 kg/month
 - Do waste determination
 - Never accumulate more than 1,000 kg
 - Send HW to either a subtitle D facility or to a facility that reuse or reclaim them

MAJOR REQUIREMENTS FOR FULLY-REGULATED GENERATORS

- Don't have to have permits
- 5 main requirements
 - Waste determination - 40 C.F.R. § 262.11
 - Storage requirements - § 262.34(a) at 562. Now in § 262.17.
 - Must store in accordance w/ specified storage requirements – 262.34(a) (now in § 262.17)
 - Can only store for 90 days – 262.34(a) – at 562. Now 262.17(a).
 - Exception – satellite accumulations – 262.34(c) – at 562-563. Now § 262.15.
 - Manifest – “cradle to the grave” – 262 Subpart B
 - Must investigate if don't get a signed copy back from TSD w/in 35 days
 - And report to EPA after 60.
 - Record-keeping
 - Identify treatment standard for “land ban”

TREATMENT, STORAGE, AND DISPOSAL FACILITIES (TSDS)

- Commercial TSDs and Manufacturers
- Unlike generators, TSDs need to have permits (or interim status)
- Two Types of Permit Status
 - Interim Status
 - Fully Permitted Facilities
 - Requirements largely the same

OVERVIEW OF TSD REQUIREMENTS

- Generic standards - e.g., personnel training and contingency plans
- Facility standards – e.g., re construction of landfills or incinerators
- Cross-cutting significant requirements
 - Groundwater monitoring
 - Closure and post-closure
 - Financial Responsibility
 - Financial assurance
 - Financial Insurance

STATE COUNTERPARTS

- CERCLA is not a delegated program
 - Parallel or additional state statutes similar to CERCLA
- RCRA is a delegated program
 - As of May 29, 2024, all states and territories have the authority to implement the Resource Conservation and Recovery Act (RCRA) program, with the exception of Alaska and Iowa

UNDERGROUND STORAGE TANKS

- Typically not a CERCLA issue – petroleum exclusion
- Regulated under RCRA
- Most state LUST programs operate under delegation of authority
- Many states have insurance program

KEY REGULATORY DEVELOPMENTS

- **Proposed PFAS listing** (select PFAS as hazardous constituents, not hazardous waste)
- **Proposed hazardous waste definition change rule** –
 - **Statutory definition** - RCRA hazardous waste includes solid wastes that may cause or significantly contribute to an increase in mortality or serious illness, or which otherwise pose a “substantial present or potential hazard to human health or the environment when improperly” managed. 42 U.S.C. § 6903.
 - **Current regulatory definition** - listed or characteristic waste
 - **Proposed revised regulatory definition** – corrective action requirements attach any time statutory definition is met, even if not listed/characteristic

CONCLUSION AND QUESTIONS?

