

Qualifying Waste Management
Companies:
Liability Matters Again
Conference

April 2004

Overview

- History
- Trends
- Legislation
- Requirements
- Indicators
- Ramifications
- Answer the “why” question; Why go through all this work?

Waste Services Decision Hierarchy

- 1980's
 1. Liability
 2. Service
 3. Price
- With CERCLA Sites reduced in the 1990's; Generators have flipped this Hierarchy, with Liability only a passing concern.

Liability Matters Again

- Chemical Security and Homeland Security
- State Programs have advanced to a higher level than CERCLA
- Sabanes Oxley Act includes Environmental issues.
- Accounting Laws require accruals and adjustments for known environmental liabilities.
- Deregulation of waste creates more risk, not less.
- Insurance coverage for pollution issues is more costly and difficult to obtain.

Chemical Security Act, S1602

- Passed by Senate Committee
- Vulnerability Assessments
- Identify potential hazards from release
- Prepare a Prevention, Preparedness and Response Plan, for approval by EPA.
- High priority sources to be identified by EPA, Homeland Security, and local planning agencies.
- Local ER Planning Agencies are more focused on chemical risks.

Sabanes Oxley Act

- Passed by Congress to address Enron and World Com Crisis
- Corporations must have transparency with regard to risk factors, and communicate to investors/employees.
- Includes environmental risks.
- CEO must provide certification under penalty of law.
- 2003 new accounting procedures require accruals and reporting for know environmental liabilities.

Deregulation of Hazardous Waste

- A number of proposed rules from EPA would deregulate many types of hazardous waste: waste amenable to recycle/reuse; solvent contaminated wipes.
- Allows waste to go to un-permitted facilities with less Environmental Controls.
- CERCLA and State PRP liability is focused on hazardous substances. Waste Deregulation does not exempt releases of pollutants.

Auditing Is Vital

- RCRA only requires that the generator confirm that the TSD is permitted (40CFR262.20).

Audit Because Of Potential for:

- CERCLA and State PRP Liability.
- Common Law Liability. Toxic Tort Cases.
- RCRA & CERCLA Citizen Suit Provisions
- Environmental Stewardship
- Only true shield against liability.

CERCLA Liability

- Authorizes EPA to clean-up hazardous substances, and then collect costs from responsible parties
- Any person who arranged for disposal of hazardous substances at a facility, or who selected a site and sent a hazardous substance there may be liable for all costs of removal and remedial action.
- Courts impose liability on “non-negligent” past generators. (US v. Wade, 1982)
- Joint and Several Liability.
- Private parties can bring cost recovery actions.

Common Law Liability

- One who injures another through environmental pollution can be held liable and subject to injunctive relief.
- Negligence: Conduct falls below standard.
- Trespass: Interference with property rights.
- Nuisance: Interference with general public right.
- Strict Liability: Defective product liability.
- Enterprise Liability: Entire group in chain of parties from which harm resulted.
- Citizen Suit Provisions under RCRA & CERCLA.

So What Do I Look Out For?

- Select protective type of management given properties of waste.
- Up-to-date Permits
- Good Compliance Status
- No Releases off-site
- Reliable Insurance
- Adequate Financial Assurances for Closure
- Good Housekeeping/Work Practices
- Thorough environmental management system.

Protective Management C or D Disposal?

- Subtitle C TSDFs are best risk management alternative.
- Only one C TSDF Site has been listed on NPL since 1980.
- Most sites on NPL are D Sites.
- RCRA Permitted HW facilities have more oversight, enforcement and Corrective Action provisions.
- C Disposal provides highest protection required by law. Useful in Tort defense.

Real World Example

- Non hazardous industrial waste incinerator: Oseola, Arkansas.
- Operational difficulties and opposition from City forced closure in December 2002.
- Over 4,000 drums of waste left at site. Owner bankrupt.
- ADEQ is pursuing actions against parties that shipped waste to site.

Permits

- Are permits in place, and current?
- What is the renewal status for expired permits?
- Are any permit conditions being challenged by the operator or other parties?
- Are all units requiring permits covered?
- Check with State Permit Writer to confirm information: Air, Water and Waste

Compliance Status

- Review inspection reports from last 5 years.
- Are there any unresolved violations? If so, what are the circumstances?
- Are violations administrative in nature, or directly related to environmental quality?
- Have the underlying issues been addressed, and the dispute is strictly legal in nature?
- Is an action plan in place to address violations?
- Has the site been disbarred to manage CERCLA, Government or State Waste?

Releases Off-Site

- Does site contamination of soil/groundwater exist?
- Is it off-site? If so, evaluate thoroughly.
- Where is the O/O with respect to corrective action: PA, RFA, RFI/RA, CMS, CMI, RADD, NFA?
- Have interim measures been initiated, or is active remediation in progress?
- Do Financial Assurances cover Corrective Action?
- Discuss status with Regulators: both State and EPA contacts.
- Ask if approval denied by other companies?

Insurance

- Obtain Certificates of Insurance. Is coverage adequate? Is excess coverage provided, higher than required by regulations? \$1/\$2 million is low.
- What is the deductible.
- Rating of Insurance Carrier?
- Captive Insurance?
- Claim history.

Financial Assurances for Closure, Post Closure and CA

- Obtain copy of latest annual update.
- Confirm with Agency that facility is in compliance, and mechanism is approved.
- Are Closure estimates reasonable? Basis should be maximum inventory and 3rd party management.
- 1996 EPA Study found that 54/100 facilities had inadequate closure estimates, off by more than 50%. 89/100 were deficient.
- Anything < \$1 million is worth questioning.

Financial Assurance Mechanism

Varied Levels of Comfort

Ranked from Lowest to Highest Comfort Level:

1. Corporate Test: No money up front and no third party. Relies on Financial Strength of parent.
2. Insurance/Surety Bond: Although third party, need to ensure the continued solvency of insurer.
3. Trust Fund: Like your 401K. Money not there until some future point in time.
4. Fully Funded: Escrow, LOC+ Standby Trust, etc. Money is actually there thru third party.

Check Insurance Ratings

- Captive Insurance may provide inadequate assurance.
- EPA Proposed Rule Requires Minimum Rating of:
 - Aaa, Aa or A by Moody's
 - A or A- by A.M. Best
 - or AAA, AA, or A by S & P

Financial Assurance – State Concerns

- Association of State and Territorial Solid Waste Management Officials have targeted recycling industry: “low-profit, risky business with high turnover rates”.
- SC requires escrow fund for certain TSDFs
- PA: Guardian Trust Program: Collect fees to build state-wide trust fund to oversee sites and financial assurances.

Certificates of Disposal

- CD's are not required by law and are not regulated.
- Be Careful. Wide variation in meaning. Some TSD's issue CD at point of receipt.
- Not a defense in a CERCLA case.
- Verify disposal/treatment directly.
- 40CFR268.50, after 1 year, storage is illegal land disposal.

Good Housekeeping and Work Practices

- Assess the housekeeping of the plant. Good indicator of quality of management.
- Compatible Storage Practices.
- Documentation and waste tracking programs.
- Knowledge level of employees.
- Check training records.

Safety Record

- Check Form 200's with regard to nature, severity and frequency of injuries.
- Review accident reports for chemical exposure cases.
- OSHA Case Rates are a good measure of performance. TCIR > 4 is cause for concern.

Environmental Management System

- Review program and accountability.
- EHS Staffing and Reporting.
- Example: documented issues with documented resolution.
- Overall Environmental Program.
- ISO Registration: 9000 and/or 14000.

Other Information

- Review reportable incidents over the past 5 years.
- Average inventory aging reports.
- Understand how waste will be managed. Will another party be used.
- Review record on disposal outlets of vendor. RCRIS and CERCLIS data bases. Has vendor audited their 3rd party outlets? If no, you should.
- Litigation or claims?
- Is facility new? If so, schedule follow-up audit within 3 months of shipping.

Valid Reasons for Rejection

- Off site contamination.
- On site contamination but no active remedial program. No evidence of reversal of plume.
- Inadequate financial assurances and/or insurance.
- Permits inadequate.
- Inventory aging criteria fails. (20% > 6 months)
- Unresolved enforcement actions.
- Frequent chemical exposure injuries.
- Claims against the facility that appear warranted.
- Concerns raised by Regulatory Agency contacts.

Valid Reasons for Rejection

- Technology not protective or suited for waste. Design flaws.
- Frequent incidents on similar wastes.
- Poor housekeeping and work practices.
- Inadequate environmental staffing and program.
- Third party outlets of vendor has similar issues.

Financial Instability/No Financial Assurance

- If continue to ship, you are increasing your documented proportional share as a PRP.
- High probability of Responsible Party status for the removal action phase.
- Vulnerable to a negligence claim in a toxic tort case, if know of problem and continue to ship.
- CERCLA Case History review shows that volume does matter. Chance of de minimis settlement.
- Contribution cases: Courts ruled that Responsible Parties are limited to actions of contribution.

Contribution Actions

Section 113(f)

- Court must apply equitable factors.
- Volume of Waste by each party.
- Relative Degree of toxicity of each party's waste.
- The degree of care exercised by the party.
- The degree of cooperation of the party to prevent harm to health and environment.

Conclusions!

- Many risk factors out there, but controllable with due diligence.
- Auditing is best shield.
- Focus on what matters in audits (key indicators- safety, management systems, compliance, financial health, permanence)
- Long term thinking important in controlling cost and risk.
- Define/re-define decision hierarchy