

This presentation was developed under the auspices of the CIWMB (now CalRecycle) for specific technical training purposes and is posted as a reference document for the local government and CIWMB staff who attended this training. It is not intended to stand alone as informational or training material.

If you require assistance in obtaining access to this presentation, call the Public Affairs Office at (916) 341-6300 or contact [Mike Wochnick](#).

**PCLU SYMPOSIUM
LEGAL AND ECONOMIC
ISSUES SESSION**

February 16, 2006

*Liability from Closed Landfills
Issues Confronting Private Landowners*

Richard Montevideo
Rutan & Tucker, LLP
(714) 662-4242
rmontevideo@rutan.com

Numerous statutory and common law theories of liability against owners of closed or abandoned landfills exist. Some of the more common theories are:

- **State Common Law Theories of Recovery**
- **RCRA**
- **The Porter-Cologne Act**
- **CERCLA/HSAA**
- **The Polanco Redevelopment Act**

Liability Under State Common Law

Nuisance and Trespass claims based on the existence and migration of contamination, are not uncommon. (See, e.g., *Mangini v. Aerojet* (1996) 12 Cal. 4th 1087.)

Liability Under State Common Law

Nuisance

“Anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.” (Cal. Civ. Code §3479)

Liability Under State Common Law

**Under California law: “Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefore in the same manner as the one who first created it.”
(Civ. Code § 3483.)**

Liability Under State Common Law

Nuisance per se

Responsibility for compliance with the standards in this chapter shall rest with both the owner and the operator. If specifically designated, the operator is considered to have prime responsibility for compliance; however, this does not relieve the owner of the duty to take all reasonable steps to assure compliance with these standards and any assigned conditions. (27 CCR § 20180)

Liability Under State Common Law

Trespass

A trespass is an invasion of the interest in the exclusive possession of land. A cause of action for trespass is designed to protect possessory interest in land from unlawful interference. (*Capogeannis v. Superior Court* (1993) 12 Cal.App 4th 668, 674.)

Liability Under RCRA

RCRA contains what is known as a “citizen’s suit” provision. Under 42 U.S.C. § 6972, any person, after providing appropriate notice and an opportunity for the state or federal agencies to pursue the action, may:

Liability Under RCRA

(1) bring suit against any other person, including a governmental agency, who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition or order under RCRA, or

Liability Under RCRA (cont'd)

(2) bring suit against any person including a “past or present owner or operator of a treatment, storage, or disposal facility,” to abate an “imminent and substantial endangerment to health or the environment.” (42 U.S.C. § 6972(a)(1)(A) and (B).)

Liability Under RCRA

The RCRA citizens suit provisions do not require that the violation or endangerment occur as a result of the existence of any “hazardous substance” or “hazardous waste.” A citizen suit may be brought based on a disposal of “any solid or hazardous waste.”

Liability Under RCRA

The relief under a citizens suit is limited to injunctive relief, i.e., abatement of the condition causing the imminent and substantial endangerment. Past response costs, i.e., cleanup costs, are not recoverable. (Meghrlg v. KFC Western, Inc., 516 U.S. 479 (1995).) A prevailing party, however, may recover reasonable attorney and expert witness fees. (42 U.S.C. § 6972(e).)

Liability Under RCRA

In a citizen suit, a plaintiff need not show the harm is existing, but only an ongoing threat of future harm. (*Albany Bank & Trust v. Exxon Mobil Corp.*, 310 F.3d 969, 972 (7th Cir. 2002.) “Imminent” refers to the nature of the threat, i.e., an endangerment can only be “imminent” if it “threatens to occur immediately.” (*Meghrlg v. KFC Western, Inc.*, supra, 516 U.S. 479, 486.)

Liability Under The PCA

Under the Porter-Cologne Act, any person who has discharged waste into waters of the State, in violation of WDRs, or who has caused or permitted waste to be discharged, which creates or threatens to create a condition of pollution or nuisance, is subject to a Cleanup and Abatement Order. (Water Code § 13304.)

Liability Under The PCA (cont'd)

A C&A Order may be issued by the Regional Board to force the cleanup of waste, or to require the effects of the waste to be abated. (Water Code § 13304(a).)

Liability Under The PCA

Under Section 13304, the Regional Board may recover its costs of performing any cleanup, abatement or remedial work from a responsible party. A cost recovery action may also be filed by any other governmental agency to the extent such other agency incurs reasonable costs in cleaning up or overseeing the cleanup. (Water Code § 13304(c).)

Liability Under the CERCLA/HSAA

Under the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) and California’s Hazardous Substances Account Act (“HSAA”), persons who are classified as “liable” or “responsible” parties may be sued by the State and/or federal governments to force the clean up of property where “hazardous substances” have been released thereon, or forced to pay for “response costs.”

Liability Under the CERCLA/HSAA

“Liable” or “responsible” parties under the CERCLA/HSAA include:

- (1) the present owner or operator of the contaminated property;**
- (2) the owner or operator of the contaminated property at the time of the disposal of the hazardous substances in issue;**
- (3) those persons who arranged for the disposal of the hazardous substances onto the property; and**
- (4) those persons who transported the hazardous substances to the facility for disposal. (42 USC § 9607(a).)**

Liability Under the CERCLA/HSAA

Although the term “hazardous substance” does not include methane gas itself, it may well include substances which generate methane gas, and, to the extent such substances are otherwise hazardous, their cleanup could be compelled. (42 USC §§ 9606 & 9607(a).)

Liability Under the CERCLA/HSAA

Claims brought by private parties for response costs or contribution who themselves are liable may be limited. Where the private party is a liable party under CERCLA, it will need to either have first been sued by or settled with the State or federal government before bringing suit. (See *Cooper Industries v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004).)

Liability Under the Polanco Redevelopment Act

California Health & Safety Code Section 33459.4 provides a statutory right of action for redevelopment agencies to seek injunctive relief or response costs from responsible parties for the cleanup of property within a redevelopment area, resulting from the existence of “hazardous substances,” as defined under Section 25281 (which includes petroleum contamination).

The Section allows for the recovery of reasonable attorneys fees.