CONTRACTOR ENVIRONMENTAL LIABILITY 101

Violation of environmental laws may result in fine or imprisonment or both.

To avoid potential liability, contractors must be aware of the requirements of the various environmental laws, including:

- CAA, the Clean Air Act, 42 U.S.C. §§ 7401 - 7661q.
- EPCRA, the Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001- 11050.

CERCLA

CERCLA was enacted in 1980 to:

1. Control the spread of hazardous substances.
2. Place burden of cleaning costs on parties responsible for contamination.

An entity (person or company) is liable under CERCLA if it is a responsible party and in any way caused or contributed to a release of a hazardous substance from a facility.

Release

The term “release” is defined as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, emitting, leaching, dumping or disposing into the environment.” 42 U.S.C. § 9601(22).

Hazardous Substance

- A list of hazardous substances can be found at 40 CFR Part 302, Table 302.4.
- Any release of reportable quantity of a hazardous substance must be reported to the National Response Center and to all appropriate state and local agencies. 42 U.S.C. § 9603.
• Failure to notify appropriate authorities of a release of a reportable quantity of a hazardous substance may result in fines and/or imprisonment. 42 U.S.C. § 9603(b).

Exclusions for List of Hazardous Substance

• Petroleum, crude oil, natural gas or synthetic gas.

Note - the presence of a reportable quantity of hazardous substance in a petroleum product may negate this exclusion.

Facility

A facility is defined as (A) any building, structure, installation, equipment, pipe or pipeline . . ., well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft; or (B) any site or area where a hazardous substance has been deposited, store, disposed of, placed or otherwise come to located . . ..” 42 U.S.C. § 9601(9) (emphasis added).

Responsible Parties

(1) Owners and past owners of facility
(2) Operators and past operators of facility
(3) Those that “arranged for” the transport of hazardous substances
(4) Transporters of hazardous substances

Operator Liability

An operator is a party who has the “authority to control the cause of the contamination at the time the hazardous substances were released into the environment.”

Example:

*Kaiser Aluminum and Chemical Corp. v. Cattellus Development Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992) (site-work contractor that excavated contaminated soil and spread it from initial location over uncontaminated property had enough control to be an operator).

Contrary example:

*InterState Power Co. v. Kansas City Power and Light Co.*, 909 F. Supp. 1284 (N.D. Iowa 1994) (contractor hired to perform demolition and construction services not operator because under control of two other contractors at site).
Arranger Liability

A contractor may be liable as an “arranger” by disposing of contaminants

- Excavation and grading contaminated soil can be considered disposal
- Arranging to have hazardous materials removed from site may also be considered disposal.

Example:

*Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489 (11th Cir. 1996) (construction contractor excavated, graded and filled land-dispersed contaminants that had been buried by previous owner. Court ruled that such dispersal could constitute disposal under CERCLA).

Transporter Liability

Construction contractors may also be liable as transporters under CERCLA.

Example:

*Danella Southwest, Inc. v. Southwestern Bell*, 775 F.Supp. 1227 (E.D. Mo. 1991), *aff’d*, 978 F.2d 1263 (8th Cir. 1992) (a utility contractor who unknowingly excavated and transported dioxin contaminated soil found to be transporter).

Contractors may be liable as transporters of hazardous waste even if they only move contaminated soil across the site and never cross property lines.

Example:

*Tanglewood East Homeowners v. Charles Thomas, Inc.*, 849 F.2d 1568 5th (Cir. 1988) (sitework contractor who moved soil from one area on site to another crossing property lines found liable as transporter).

Liability of a Responsible Party

Liability is strict

- Each responsible party is liable for all costs associated with cleanup and/or removal at the site irrespective of their relative fault.

Liability is joint and several

- Each and all responsible parties are liable for all costs associated with cleanup and/or removal at the site but may seek contribution from one another for costs incurred.
Costs may include natural resource damages.

**Contractors and CERCLA, Avoiding Liability**

1. Contract language should be reviewed and protective.
2. Report any release of a reportable quantity of a hazardous substance to proper authorities—timely—within four hours of knowledge.
3. Before taking on work at a site, conduct due diligence to ensure that the site is not a CERCLA site.
4. If you encounter suspicious materials on a work-site, stop work and make an inquiry regarding the nature of the material.

**RCRA**

The Resource Conservation and Recovery Act was enacted in 1976.

- RCRA sets forth a “cradle to grave” regulatory scheme covering generation, use and transport and disposal of solid and hazardous wastes.
- Wastes include excess or out-of-spec materials and contaminated materials.

**Definition of hazardous waste under RCRA**

“A solid waste, or combination of solid wastes, which because of its quantity, concentration or physical, chemical or infectious characters may . . . pose a substantial present or potential hazard to human health and the environmental . . .” 42 U.S.C. 6903(5). Specific characteristics of wastes, lists of wastes and exemptions can be found in EPA regulations. *See* 40 CFR. Part 261.

**Persons Regulated Under RCRA**

- Persons covered included generators, owners/operators of disposal and storage facilities, and transporters.
- All parties covered by RCRA must comply with notification and record-keeping requirements.

**Generators**

- Required to obtain EPA ID numbers.
- Required to prepare manifests.
- Reporting and record keeping requirements.
• Contractors may be generators depending on the size and type of job being performed.

**Owners/Operators of Storage and Disposal Facilities**

• Status achieved when waste stored more than 90 days on site
  
  • Some exemptions for quantity
  
  • TSD permit Required

**Transporters**

• Regulated by DOT and EPA
• Must receive EPA ID number
• Must sign and date manifest
• Must comply with manifest
• Must maintain copy of manifest for 3 years
• Contractors may be transporters under RCRA.

**Example:**

Transporting raw materials or waste products to and from job site using company trucks, including pick-up trucks.

**Penalties Under RCRA**

Civil penalties

• $25,000 for each day of the violation

Criminal penalties

• $50,000 for each day of the violation

• two years imprisonment for knowing violations (5 years in certain cases)
  $250,000/15 yrs. prison for knowing endangerment

**RCRA and Contractors**

(1) Potential RCRA liability for handling and/or transporting waste.

(2) Take care when handling any materials potentially covered under RCRA.

(3) Know what is in the materials you are handling.
(4) Know that you cannot use up excess materials by spraying them on a job site or otherwise “appearing” to use the material as it was intended.

(5) Besides understanding the federal rules under RCRA, ensure you are familiar with the Nebraska hazardous waste regulations. See Neb. Admin. Code, Title 128.

**Clean Water Act**

Also known as the Federal Water Pollution and Prevention Control Act.

Enacted in 1972 to:

- restore and maintain integrity of the Nation’s waters
- eliminate discharge of pollutants into Nation’s waters
- achieve water quality levels that are fishable and swimmable
- require reporting of spills or releases of hazardous materials, including oil, gasoline, and diesel fuel.

**NPDES Program**

National Pollution Discharge Elimination System (NPDES).

Requires permit for discharges from any point source into the waters of the United States

**Stormwater Permits**

- Required for clearing, grading and excavating activities, road building, construction of residential homes, office buildings, industrial buildings or demolition activities.
- Phase I Permits—1990
  - Controls runoff from construction sites that disturb 5 or more acres
- Phase II Permits—Regulations effective December 8, 1999
  - Controls runoff from sites disturbing one to five acres of land
• Stormwater Permit Requirements

• Stormwater Pollution Prevention Plans (SWPPP)
• Erosion and sediment control design specifications
• Site inspection and SWPPP maintenance activities
• Regular inspections
• Reporting releases of hazardous substances
• Monitoring:
  1) storm water event monitoring
  2) sampling protocols
  3) effluent monitoring
• Notice of Intent Form (NOI)
  • Noticing the intent to discharge
• Notice of Termination Form (NOT)
  • Noticing completing of land disturbing activity

Penalty for NPDES Violations

Civil Class I

• Up to $25,000 per violation

Civil Class II

• Up to $10,000 per day of violation, not to exceed $125,000 in total. 33 U.S.C. § 1319.

Criminal—for knowing endangerment

• Up to $250,000 fine or 15 years or both for 1st conviction. If person committing violation is an organization, the organization may be fined up to $1,000,000. 30 years and double the fine for subsequent conviction.

Contractors and NPDES

Know your role in obtaining and complying with all NPDES-related permits.

Understand your role in working with facility owners and other contractors regarding storm water control measures.

Know what is expected of you regarding erosion and sediment control on work-sites. Besides understanding the federal NPDES regulations, ensure you are familiar with the Nebraska NPDES regulations. See Neb. Admin. Code, Ch. 119.
404 Permits

CWA § 404 prevents discharge of dredged or fill material into the waters of the U.S. without a permit. 33 U.S.C. § 1344.

Army Corps of Engineers and EPA are the entities responsible for enforcement.

Individual 404 Permits

Lengthy process including:

- Public notice period, comment period, public hearing, permit evaluation, environmental assessment, statement of finding.

General 404 Permits

- Allowed for discharges that will have only minimal adverse effects
- Not to exceed 5 years
- Identification and description of activity
- Reporting of non-compliance
- Monitoring and record keeping
- Entry and inspection provisions

404 Permit Violations - Penalties

Civil

- Up to $25,000 per day of violation.

Contractors and 404 Permitting

Ensure that the appropriate permit is obtained for any dredge and fill work you contract to perform

Do not automatically assume that another entity has obtained the correct permits.

Example:

In re Urban Drainage and Flood Control Dist. And Kemp & Hoffman, Inc., No. CWA-VIII-094020, 1998 EPA ALJ Lexis 42 (June 24, 1998) (earthmoving and construction contractor assessed $5,000 of $80,000 civil penalty for failure to ensure 404 permit was obtained before beginning dredge and fill work for Flood Control district).
Clean Air Act

Air Pollution and Prevention and Control Act enacted in 1990.

Sets limits on amount of pollutants allowed in air.

Primarily implemented by states using State Implementation Plans (SIPs).

Nebraska enforcement regulations approved by EPA. *See* 40 CFR. § 52.1420.

Emission Standards

Mobile Sources


Stationary Sources

Nebraska SIP provides for two types of stationary permits.

- Class I - (Title V. Sources)
- Class II - Facilities - (Non-Title V. Sources)

Regulation of Fugitive Emissions and Particulate Matter

- Element of Class I and Class II permits
- Requires regulated person to prevent and particulate matter from becoming airborne so that it remains visible beyond the premises subject to the permit. *See* Neb. Admin. Code § 129, Ch. 32.

EPCRA

Emergency Planning and Community Right-to-Know Act.

Encourages emergency planning and increase public awareness about chemical hazards.

Subtitle A - Emergency planning and notification.

Subtitle B - Reporting of hazardous chemicals inventories and toxic releases.

Subtitle C - Administration, enforcement and trade secret protection.
Chemical Lists Under EPCRA

(6) Extremely hazardous substances (EHSs)
(7) CERCLA hazardous substances
(8) Toxic chemicals - 286 listed chemicals and categories
(9) OSHA Hazardous Chemicals - requiring a material safety data sheet (MSDS)

Requirements

Details of the requirements dependent upon the type of chemical handled

- Reporting
- Emergency planning activities
- Risk management programs
- Submission of MSDS sheets to local government

Penalties Under EPCRA

Civil

- $25,000 per day for 1st violation
- $75,000 per day subsequent violations

Criminal

- Knowing and willful non-compliance
- 2 yrs. imprisonment - 1st violation
- 5 yrs. second or subsequent convictions

Contractors and EPCRA

Know your role in assuring that EPCRA reporting requirements are met on sites on which you are working.

Your environmental manager must be knowledgeable about substances used by the company and substances with which you employees work.

OTHER POTENTIALLY RELEVANT LAWS


Regulates noise sources, including “transportation vehicles and equipment, machinery, appliances . . .”