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UNITED STATES HAZARDOUS WASTE LAW AND POLICY

OUTLINE PREPARED FOR SECOND SINO-AMERICAN ENVIRONMENTAL LAW
CONFERENCE, UNIVERSITY OF COLORADO SCHOOL OF LAW NATURAL RESOURCES
LAW CENTER, OCTOBER 12- 13, 1989

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I. Structure of United States Hazardous Waste Law: United States hazardous waste law is based on two statutes, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) enacted in 1980, and the Superfund Amendments and Reauthorization Act of 1986 (SARA), which are referred to as CERCLA or the "Superfund Law," 42 United States Code §§ 9601- 9675. CERCLA creates a tight liability net on generators transporters and operators of hazardous waste disposal and treatment facilities. Private parties, states, *Pennsylvania v. Union Gas*, 109 S. Ct. 2273 (1989), and units of local government are subject to the Act. See Jones and McSlarrow, *Superfund Case Law*, 1981- 1989, 19 Environmental reporter, News and Analysis 10430 (October, 1989) for a complete review of CERCLA case law.

A. CERCLA applies to activities that were legal prior to the passage of the Act. It is not unconstitutional "retroactive" legislation. *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 108 S. Ct. 146 (1987) and *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988), cert.

denied, ___ U.S. ___ (1989).

B. CERCLA liability is triggered by a facility's release of a hazardous substance into the environment or the release of a pollutant that presents an imminent and substantial danger to public health and welfare. Facility, release and hazardous substance are broadly defined. A subdivision containing contaminated soil has been found to be a facility. *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988). Hazardous substances wastes regulated under other statutes, *United States v. A & F Materials, Inc.*, 583 F. Supp. 842 (S.D. Ill. 1984). If there is a release, the federal government or a state may undertake a response action and subsequently recover the costs from a liable party.

C. There are four classes of persons liable under CERCLA. These are past and present facility owners or operators and transporters and generators who shipped wastes to the site. Present owners can include lessees, bankruptcy estates and mortgage lenders who acquired title to the property through foreclosure, but not the person who designs a manufacturing facility and trains the facility workers. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1989). The liability of a present owner does not depend on ownership at the time of disposal. *New York v. Shore Realty Corp.*, 759 F.2d 1032

(2d Cir. 1985).

D. Liability is presumptively joint and several: a defendant is liable when the harm caused a defendant's release is indivisible from the harm caused by other releases. This includes so-called di minimus contributors to a site. The general defenses are lack of any causal relationship because of acts of war, God or third parties with whom the defendant has no contractual relationship.

2. Natural Resources Damages: The federal government and state governments as trustees for natural resources may bring actions to recover resource damages before expending any money to respond to the damage. Damages formulas must express a strong preference for restoration as opposed to use as the measure of damages. *Ohio v. Department of the Interior*, 880 F.2d 432 (D.C Cir. 1989).

3. Evaluation of Superfund: The Superfund program has been widely criticized on a number of grounds. The basic criticisms are that the EPA has not applied consistent health-based standards across the spectrum of sites on the National priorities List and that costs of implementing the remedies often bear no reasonable relationship to the benefits. See *Coalition on Superfund* (Center for Hazardous Waste Management Illinois Institute of Technology/IIT Research Institute), *Coalition on Superfund Research Report, Executive Summary and Consolidated Research Report* (1989).