

# HAZARDOUS WASTE LAW

Syllabus

Prof. Mary C. Wood

Spring, 2005

## **Class time:**

Tues., 6:30-8:20 p.m., room 142

**Office hours:** Office hours will be by appointment in the ENR Center on the 2nd floor.

## **Learning objectives:**

1. To understand the complex interaction of case law, statutes, regulations and agency documents that make up the field of hazardous waste law.
2. To gain a practical understanding of the field through in-class simulations and other exercises.
3. To understand the policy choices involved in developing hazardous waste liability schemes and environmental enforcement schemes.
4. To develop lawyering skills of regulatory analysis, drafting, computerized research, oral presentation and negotiation, through class exercises and assignments.
5. To understand the growing role of Alternative Dispute Resolution (ADR) in resolving complex hazardous waste cleanup and liability issues.

## **Texts:**

Miller and Johnston, THE LAW OF HAZARDOUS WASTE DISPOSAL AND REMEDIATION (West, 1996)

West, Environmental Statutes (2004-2005 edition) (encouraged, but optional)\*

**\*Note:** This book contains the full text of the two statutes which are the focus of this course: the Comprehensive Environmental Response, Cleanup and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). Students may opt to copy these statutes from the U.S.C. rather than purchase the book. In any case, students are responsible for acquiring their own copies of all statutes discussed in class.

Exercise/portfolio packet - handed out in class

Additional handouts will be available in class. If a student misses a class s/he is responsible for acquiring any handouts for that class. Extra handouts will be available from Dianne Bass, third floor (6-3845).

**Attendance:**

Attendance is mandatory, and **unexcused absences will affect the final grade received in the course**. Students will be expected to maintain an attendance record for the class. Each student may have **one** unexcused absence without affecting his/her grade, however every unexcused absence thereafter **will** affect the grade by lowering the student's overall score in the class by 5% (for each absence). Excused absences will not affect the grade. Excused absences include absences due to illness, compelling family needs, work demands and job interviews. Attending conferences, doing outside extracurricular work and vacationing are **not** excused absences.

**Class exercises and portfolio:**

This seminar incorporates discussion groups and hypothetical role-playing exercises, including a settlement exercise using ADR techniques. The exercises are compiled in a packet, which will be distributed in the first part of the semester. There are six exercises, each dedicated to a separate part of the course coverage. The exercises require both a written product and oral participation in class.

Students must turn in their written “portfolio” of exercises on April 22, by 4:00 to the administration office, using student numbers instead of names (for anonymous grading). There will be a penalty of 5% deduction from the overall score in the class for each day late.

Each exercise has a page limit (double-spaced type) and grading weight as follows:

Exercise #1 (CERCLA policy) (3 pages)	<b>15%</b> of grade
Exercise #2 (CERCLA generator liability) (3 pages)	<b>15%</b> of grade
Exercise #3 (CERLA parent corp. liability) (3 pages)	<b>15%</b> of grade
Exercise #4 (CERCLA real estate transactions) (3 pages)	<b>15%</b> of grade
Exercise #5 (TRIS/NPL computer research) (2 pages)	<b>5%</b> of grade
Exercise #6 (CERCLA settlement) (4 pages)	<b>20%</b> of grade

**Class participation**

Fifteen percent (15%) of the grade in this course reflects oral participation in these exercises and in group discussion. Students must prepare discussion questions in the syllabus and all assigned exercises ahead of class time (students need not, however, have a final written portfolio product until the end of the semester). Students should bring their statutory supplement to every class session to enable discussion of statutory provisions.

**Grade:**

There is no exam in this class. The grade in this class is based on class participation (15%) and the written portfolio (85%). The written portfolio will be evaluated based on both writing ability and content. The grading weight for each exercise is indicated above. As noted above, unexcused absences from class can detract from a student’s grade.

A self-evaluation form discussing the student's participation in class is attached to this syllabus and should be turned into Prof. Wood at the end of the semester on the last day of class (but it should NOT accompany the written portfolio).

## **CLASS DISCUSSION TOPICS AND READINGS:**

### **PART I: INTRODUCTION**

#### **Class #1 – Jan. 11**

Topic:

1. Course introduction
2. Overview of environmental law
3. Administrative framework
4. The role of science in hazardous waste practice

Assignment:

Text, pp. 1-13; 39-58, 63-65

Discussion questions:

1. What is the interaction of statutory law and tort law in hazardous waste liability?
2. What are the strengths and weaknesses of tort law and statutory law in addressing hazardous waste liability?
3. What are the separate roles of CERCLA and RCRA in hazardous waste law?
4. Can lawyers without science backgrounds adequately represent clients on hazardous waste issues?
5. What are the advantages and drawbacks of having a science background in this field?
6. How can lawyers more effectively work with technical staff and consultants?

### **PART II: THE RCRA REGULATORY SCHEME AND ENFORCEMENT**

#### **Class #2- Jan. 18**

Topic:

1. RCRA regulatory overview
  - a. statutory background
  - b. regulated substances and entities
  - c. generator, transporter, and TSD (treatment, storage, disposal) requirements
  - d. cleanup provisions and land ban
2. The problem of illegal dumping

Video clip

Assignment:

1. Text, pp. 131-42, 180 (note “d” on)-185, 191-194 (to 2<sup>nd</sup> full par.), 197-206
2. Review (skim) RCRA statutory provisions: 42 U.S.C. 6921-6925 (requirements for handling hazardous waste)

Discussion questions:

1. In statutory terms, what is the legal “trigger” for regulation under RCRA?
2. Explain the purpose of “cradle to grave regulation” and how RCRA implements it.
3. Is RCRA over-inclusive? Does it discourage recycling of wastes?
4. Is the RCRA regulatory scheme too complex for effective implementation?
5. What factors contribute to illegal dumping? What measures can be taken to address it?

### **Class #3 – Jan. 25**

Topic:

1. RCRA enforcement overview
  - a. administrative enforcement options
  - b. civil enforcement
  - c. criminal liability and the responsible corporate officer doctrine
  - d. federal facilities
2. Video: What Went Wrong at Aberdeen?

Assignment:

1. Text, pp. 307-10, 319-21, 333-36 (top of page), 351-64 (skip prob. 8 on p. 360)
2. Review RCRA provisions: 42 U.S.C. 6928 (enforcement); 6973 (imminent hazard); 6961 (federal facilities)

Discussion questions:

1. What is the purpose of civil liability and of criminal liability?
2. What is the nature of an administrative order? From an agency perspective, what are the advantages and disadvantages of administrative enforcement versus enforcement in court?
3. Is it fair to impose criminal responsibility on individuals for violating hazardous waste laws?
4. What would be the likely effect of a rule allowing only civil liability? Would corporations treat environmental penalties as a cost of business?
5. How are federal facilities treated under RCRA?
6. What dynamics have caused federal facilities to be such environmental offenders?
7. How can the legal system more effectively bring about environmental compliance in these facilities?
8. What is the role of "whistle blowers" in achieving federal compliance?

**Class #4 – Feb. 1**

Topic: RCRA enforcement, continued

1. The role of citizen suits
2. The role of audits in achieving corporate compliance

Assignment:

1. Text, pp. 381-85, 389-94, 402-08
2. Review RCRA provision: 42 U.S.C. 6972 (citizen suits)

Discussion questions:

1. What is the role of citizen suits in the RCRA liability scheme?
2. What impediments do citizens face in bringing suits against a violator?
3. What are the countervailing policy arguments underlying a rule allowing an audit privilege for corporations that discover environmental violations?
4. How can an in-house attorney effectively use the audit procedure to achieve a higher level of corporate environmental responsibility?
5. What is the ethical duty of an attorney and a consultant who find that the corporation they represent has released highly toxic chemicals into a community, without informing any of the exposed citizens or authorities?

### **PART III: THE CERCLA LIABILITY AND CLEANUP SCHEME**

#### **Class #5 – Feb. 8**

Topic: CERCLA liability scheme

1. Overview of CERCLA
  - a. response options
  - b. response costs and natural resource damages
  - c. elements of a CERCLA claim
    - i. release
    - ii. of a hazardous substance
    - iii. from a facility
    - iv. exclusions
  - d. nature of liability
    - i. retroactive
    - ii. strict
    - iii. joint and several

Assignment:

1. Text, pp. 479-96, 501-02 (notes b and c only), 545-554, 567 (bottom of page) -71
2. Skim CERCLA provisions: 42 U.S.C. 9707(a)(elements, liability and response costs); 42 U.S.C. 9604 (response authority); 9606 (judicial relief)

### 3. **Prepare class exercise #1**

#### Discussion questions:

1. What are the policy justifications behind a loose causation requirement in hazardous waste law?
2. Why have courts been so willing to hold that CERCLA applies retroactively?
3. Is there a fundamental fairness problem in holding a company liable today for disposal activities conducted 30 years ago that were legal and customary at the time?
4. If CERCLA did not apply retroactively, what would be the consequences to society of dormant hazardous waste sites? Who would pay for their cleanup?
5. What is the legal justification for applying a strict liability standard to waste disposal activities?
6. As a policy matter, what kind of disposal behavior does a strict liability standard encourage? Are companies more likely to take care in disposal, or more likely to cut costs?
7. What effect would a negligence standard have on CERCLA enforcement actions?
8. What legal justification have courts used to impose joint and several liability in the CERCLA context?
9. Is it fair for one company that sent just a few drums of hazardous substances to a site to be liable for a total cleanup costing in the millions of dollars where there are over 100 parties and thousands of drums?
10. What policy reasons justify the imposition of joint and several liability?
11. As a practical matter, what companies are most at risk for paying more than their fair share of a cleanup?
12. What statutory provisions in CERCLA mitigate the harshness of a joint and several liability rule?

### **Class #6 – Feb. 15**

#### Topic:

1. CERCLA liability: first tier

- a. present and past owners/operators
- b. transporters
- c. generators

Assignment:

1. Text, pp. 571-95
2. Review CERCLA provision: 42 U.S.C. 9607(a)(liable parties)
3. **Prepare class exercise #2**

Discussion questions:

1. Are all landowners in the chain of title liable for releases of hazardous substances?  
Examine the language of section 107(a)(1),(2); 107(b)(3); 107(r) and 101(35) closely.
2. What policy arguments favor a broad reading of "arranger" liability? What policy arguments favor a more restricted liability net?
3. How is the recycling market affected by the scope of arranger liability under CERCLA?
4. Should the chemical industry be subject to "arranger" liability for producing products known to be hazardous?

### **Class #7- Feb. 22**

Topic:

1. CERCLA liability: second tier
  - a. officers/directors
  - b. parent/successor corporations
  - c. trustees
  - d. lenders

Assignment:

1. United States v. Best Foods, 524 U.S. 51 (1998)(exercise packet)
2. **Prepare class exercise #3**

Discussion questions:

1. What would be the effect of a rule absolving officers and directors from CERCLA liability?
2. What factors determine the extent of officer/director liability under current cases?
3. What is the effect of traditional corporate shields on CERCLA liability?
4. What is the test for parent corporation liability under the recent Supreme Court's Best Foods opinion?
5. What factors are relevant in a "veil-piercing" analysis for parent corporation liability?

**Class #8 – Mar. 1**

Topic:

1. CERCLA defenses
2. CERCLA and real estate transactions
  - a. innocent landowner defense
  - b. effect of defense on real estate transactions
  - c. environmental assessments

Assignment:

1. Text, pp. 637-49
2. Review CERCLA provisions: 42 U.S.C. 9607(b) (defenses); 9607(r) (new section relating to prospective purchasers); 9601(35) (definition of "contractual relationship," recently amended)
3. **Prepare class exercise #4**

Discussion questions:

1. What are the policy considerations underlying the rule imposing liability on landowners (even unsuspecting ones)?
2. Has this rule achieved significant cleanup? How does the strict liability scheme of CERCLA influence real estate transactions?
3. What are the policy justifications underlying the innocent landowner defense?

4. What level of inquiry is necessary to qualify for the innocent landowner defense? Refer to statutory language.

### **Class #9 – Mar. 8**

Topic:

1. The CERCLA cleanup process
  - a. cleanup mechanisms and cost recovery authorities
  - b. the National Contingency Plan (NCP)
  - c. response/remedial action costs and the role of the National Priorities List
  - d. How clean is clean: the issue of "brownfields"
2. Community Right to Know Act and the Toxic Release Inventory

Assignment:

1. Text, pp. 511-14; 542 (note 5) – 545; 650-70
2. Text, pp. 193 (bottom of page) -197 (review discussion of Toxic Release Inventory)
3. Review CERCLA provisions: 42 U.S.C. 9604(a) (response authorities); 9605(a) (National Contingency Plan); 9621 (cleanup standards); 9607(a)(4)(A),(B) (National Contingency Plan consistency provisions)
4. Review EPCRTKA, 42 U.S.C. 11001-11050 (skim)

### **Prepare class exercise #5**

Discussion questions:

1. What are the policy benefits and drawbacks to a rule requiring cleanup to baseline environmental parameters?
2. Should industrial sites be cleaned to pristine conditions, or are "brownfields" a more realistic outcome?
3. What is the broad policy effect of "brownfields" on the real estate market?
4. What is the purpose of the NCP? How does it relate to the liability provisions of CERCLA? Examine 42 U.S.C. 9607(a)(4)(A),(B).

5. What is the purpose of the NPL? How does the Hazard Ranking System prioritize sites for cleanup?
6. What is the purpose of the Emergency Planning Community Right to Know Act (EPCRTKA)? How did corporations respond to the act?
7. What use can citizens make of the act? How is it enforced?
8. Does EPCRTKA have a real impact on reducing waste? Does the success of the act depend on the political power of the exposed community? How can the act promote environmental justice?
9. How can an in-house corporate attorney employ the act to convince managers to proactively reduce emissions?
10. What effect does the act have on the tort liability of a corporation emitting hazardous substances?

#### **PART IV: ADR TECHNIQUES TO FACILITATE SETTLEMENTS IN HAZARDOUS WASTE LAW**

##### **Class #10– Mar. 15**

###### Topic:

1. CERCLA settlements
  - a. allocation of liability
  - b. contribution protection
  - c. de minimis status
  - d. premiums

###### Assignment:

1. Text, pp. 529, 763-68 (intro only), 775-805
2. Carefully review CERCLA section 122, 42 U.S.C. 9622

###### Discussion questions:

1. Why did Congress include a settlement provision in CERCLA?
2. What incentives do parties have to settle their CERCLA liability?
3. What are the policy considerations underlying "reopeners" in CERCLA settlements?

4. Is it highly unfair to allow the agency to "reopen" a settlement years after it was entered into to impose further costs? Is it unfair to society not to allow the agencies that flexibility?
5. Does the CERCLA settlement process, combined with the high cost of litigation, unduly penalize the "deep pocket" PRPs?
6. How does the EPA treat de minimis parties?
7. What is the court's role in approving consent decrees incorporating CERCLA settlements?
8. What is the effect of a CERCLA settlement on parties' liability to other PRPs?

**Class #11 – Mar. 29**

Topic: ADR Mediation in Environmental Law

**Guest speaker**

Assignment: readings to be distributed

Discussion questions:

1. What are various consensus-oriented tools in the spectrum of ADR?
2. What strengths does ADR bring for environmental conflict resolution?
3. What dangers does ADR hold for environmental conflict resolution?
4. Does ADR present an even playing field for all PRPs in a CERCLA setting? Does use of ADR for CERCLA settlements protect the public interest?
5. What procedural precautions can courts or EPA impose in ADR proceedings to assure a fair resolution?
6. What ADR techniques are most important to a hazardous waste attorney engaged in a CERCLA settlement?
7. What is the role of a professional mediator in a CERCLA settlement?
8. Does the CERCLA settlement provision (section 122) offer a process compatible with ADR techniques? What kind of "playing field" does it present, and how must ADR techniques adapt to that context?

**Class #12 – April 5**

Topic: CERCLA settlements/ADR continued

Mediation exercise: in-class working session

Assignment:

**Prepare class exercise #6**

**Class #13 – April 12**

In-class mediation of CERCLA settlement

**Class #14 – Apr. 19**

Mediation debriefing and portfolio workshop. **Self-evaluation due today to Dianne Bass, 3rd floor.**

**Portfolios due to administration office on April 22 by 4:00.** Use student exam number.

## Self Evaluation Form -- Class Participation

**1 = exceptionally good**

**2 = good**

**3 = fair**

**4 = poor**

**5 = very poor**

Student name: \_\_\_\_\_

1. Prepared for group discussion (i.e., had read materials thoroughly and had considered discussion questions prior to class session) \_\_\_\_/Comments:
  
2. Actively participated in group discussion \_\_\_\_/Comments:
  
3. Contributed innovative ideas to discussion \_\_\_\_/Comments:
  
4. Helped focus group discussion (and did not deviate into irrelevant discussion) \_\_\_\_/Comments:
  
5. Listened and responded to other members' points in constructive, respectful, and directed manner \_\_\_\_/Comments:
  
6. Articulated ideas and communicated effectively \_\_\_\_/Comments:
  
7. Demonstrated organized thought process \_\_\_\_/Comments:
  
8. Supported arguments and ideas with facts, case studies, and citations to the readings \_\_\_\_/Comments:

9. Integrated concepts from other sessions and lecture into the discussion at hand  
\_\_\_\_/Comments:
  
10. Brought to bear diverse perspectives (not just one's own) to the discussion  
\_\_\_\_/Comments: