



Good Samaritan Protection to Enhance AML Cleanup *Finding a Path Forward*

Legal Hurdles for AML Cleanup

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“Liability has always been the sticking point.”

Rep. Scott Tipton (R-CO)

House Natural Resources Hearing

Energy & Mineral Resources Subcommittee

March 15, 2018

Legal Constraints

- CERCLA Liability
- Clean Water Act
- RCRA
- A range of other state and federal environmental liabilities
 - NEPA
 - Cultural review
 - Endangered Species Act
 - Wetlands/Army Corps 404
 - More stringent state standards
 - Environmental permitting
 - Reclamation bonding
- Rigid legal framework

CERCLA Liability

- CERCLA §107(a) liability elements:
 - “Release” of a “Hazardous Substance”
 - From a “Facility”
 - Causing the incurrence of “Response Costs”
 - Consistent/Not Inconsistent with the National Contingency Plan
 - By a “Potential Responsible Party”
- Liability is Strict, Joint & Several
- Very limited defenses



CERCLA Definitions

▪ Release or threatened release

- any spilling, leaking, pumping, discharging, leaching, dumping, or disposing into the environment
- 42 USC § 9601(22), CERCLA §101(22)

▪ Hazardous Substance

- Sometimes referred to as the list of lists
- Includes anything listed under the CWA, CAA, or RCRA
- Excludes petroleum, crude oil or any fraction, and natural gas
- CERCLA § 101(14)

▪ Facility

- building, structure, equipment, pipe, well, pit, pond, lagoon, impoundment, any area where a hazardous substance has been deposited, disposed of, placed, or come to be located
- CERCLA § 101(9)

▪ Response Costs

- Costs to remove or remedy HS Releases, including assessment, PRP identification
- From CERCLA § 101(25) and cases

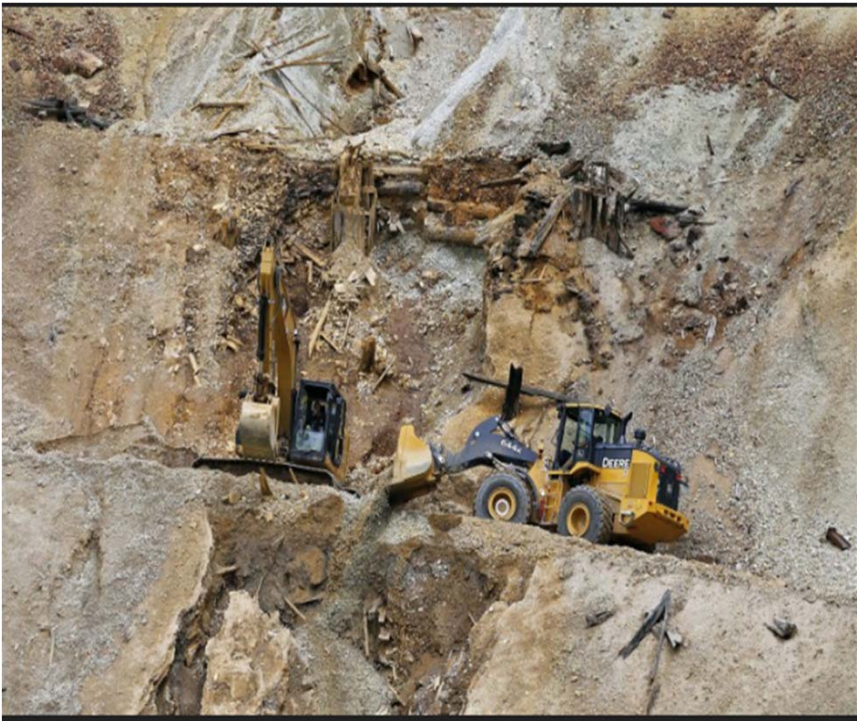
CERCLA Definitions (cont'd)

▪ Potentially Responsible Parties

- Current Owner or Operator
- (Past) Owner or Operator at the time of disposal
- Arranger
 - person who by contract, agreement, or otherwise arranged for disposal, transport, or treatment
- Transporter
 - person who accepts or accepted any hazardous substances for transport to disposal or treatment
- CERCLA § 107

Potentially Responsible Parties

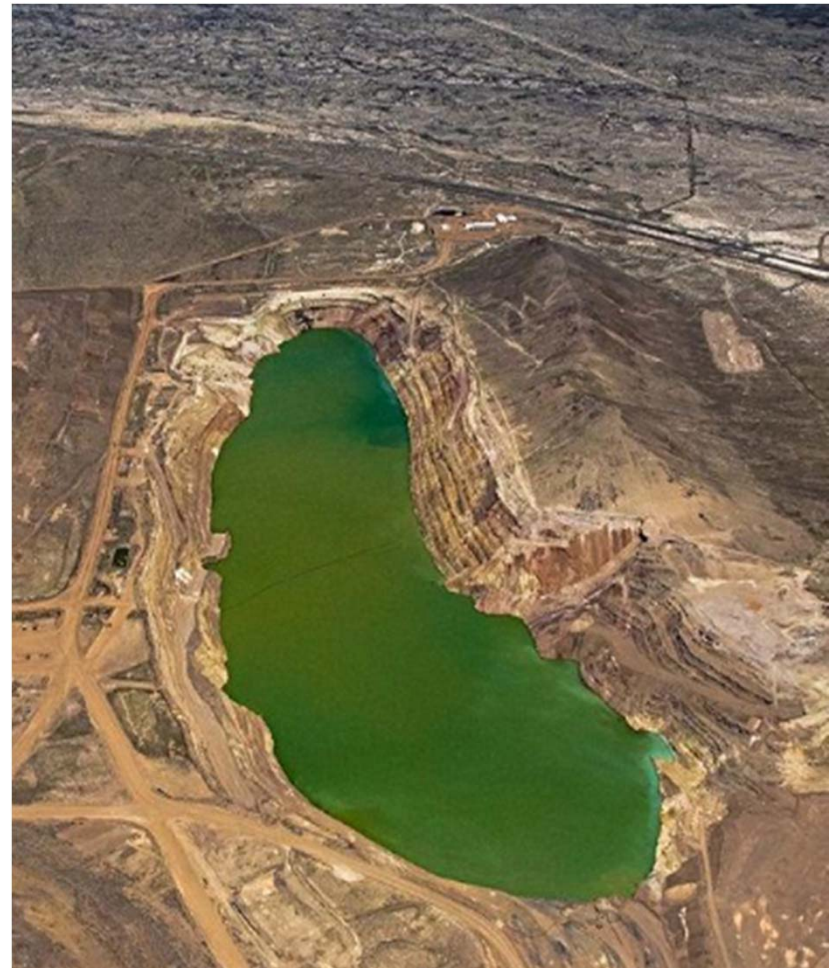
Case Law Nuances



- *Chevron Mining v. U.S.*, 863 F. 3d 1261, 1283 (10thCir. 2017): U.S. is an “Owner” due to legal title, without other indicia of ownership
- Environmental consultant can be an “Operator” if it *conducts operations* related to pollution. *New Mexico v. U.S.*, 20118 WL 84007, Feb. 12, 2018 (D.C. NM)
- An “Arranger” must have intent to dispose of HS. *U.S. v. Fed. Res. Corp.*, 691 Fed. Appx. 441 (9thCir. 2017)
- And must own or possess the HS. *Chevron.*

Other CERCLA Issues

- CERCLA doesn't preempt State law that may impose additional liability. CERCLA § 114(a)
- If HS remain onsite, remedies are supposed to meet
 - All legally applicable or relevant and appropriate standards, requirements, criteria, or limitations, federal or state
 - MCLs under the SDWA
 - Water quality criteria under the Clean Water Act §§ 303 & 304
 - CERCLA § 121(d)



CERCLA Citizen Suit Provision



- Any person may sue any other person, including the United States or other governmental agency (subject to the 11th Amendment)
- For an alleged violation of any standard, regulation, condition, requirement, or order under CERCLA
- To enforce the standard, regulation, condition, requirement, or order concerned, to order action to correct the violation, and to impose any civil penalty provided for the violation.
- Requires 60 days advance notice to President, State, alleged violator
- Includes award of costs of litigation to substantially prevailing party
- CERCLA § 310

Path Forward With CERCLA

■ CERCLA §119

- Response action contractors are not be liable under CERCLA or under any other Federal law to any person for injuries, costs, damages, expenses, or other liability resulting from HS releases or threatened releases
- Unless the release was caused by conduct of the Response Action Contractor which was negligent, grossly negligent, or constitutes intentional misconduct
- US can indemnify except for gross negligence or intentional misconduct
- State and local employees have same protection if acting within their authority
- Response action contractor not defined; protection requires written agreement

■ CERCLA §§101(39), 104(k)

- Brownfields grants available for real property, the expansion, reuse, or redevelopment of which may be complicated by the presence of a HS
- Excludes: Sites subject to CERCLA, RCRA or TSCA cleanup or enforcement
- Eligible entities: governmental or non-profit and they can make further grants
- Grants for assessment up to \$350k; Grants for remediation up to \$1 million

Clean Water Act Liability

- Clean Water Act (“CWA”) § 303 liability elements:
 - an unpermitted “Discharge” (or discharge violating a permit under § 402)
 - of a “Pollutant”
 - from a “Point Source”
 - into “Waters of the United States”
 - causing a violation of water quality standards
- Violation of state water quality standards under CWA §§ 303 & 305



Clean Water Act Definitions

▪ Discharge of a pollutant

- Any addition of any pollutant to navigable waters from any point source (33 USC § 1362(12))

▪ Pollutant

- Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water (33 USC § 1362(6))

▪ Point Source

- any discernible, confined and discrete conveyance, including but not limited to a pipe, ditch, channel, tunnel, conduit, well, discrete fissure, from which pollutants are or may be discharged (33 USC § 1362(14))

▪ Waters of the United States

- In a state of flux

Other CWA Issues

- State Effluent Limitations and Water Quality Standards can be more restrictive than federal
- State Certification requirements for permits
 - the discharge will comply with all applicable water quality provisions
 - CWA§401
- Non-point source or areas discharges



CWA Citizen Suit Provision



- Any citizen may sue any other person, including the United States, and any other governmental agency (subject to the 11th Amendment)
- For an alleged violation of an effluent standard or limitation or an order issued by EPA or a State with respect to a CWA standard
- Requires 60 days advance notice (w/exceptions) to the Administrator, the State, alleged violator
- There must be ongoing violations and failure of diligent prosecution
- Includes award of costs of litigation to substantially prevailing party
- CWA §505

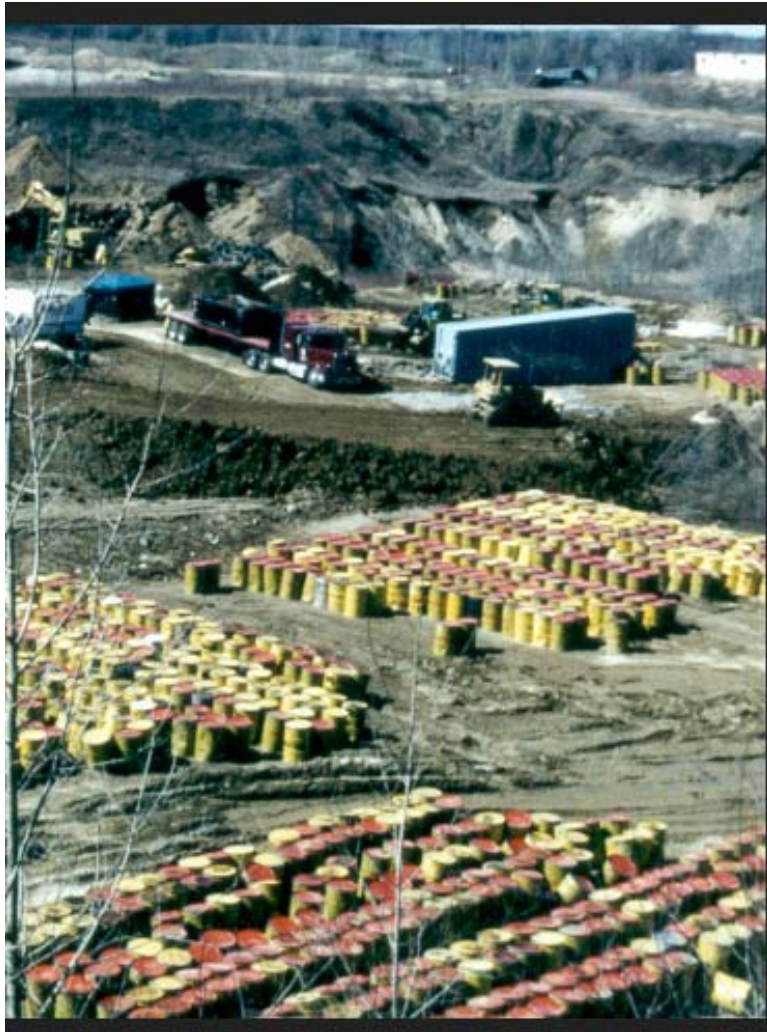
Path Forward With The CWA

■ CWA § 319

- Requires each state to identify navigable waters that do not meet water quality due to nonpoint sources
- Establishes management programs that apply best management practices to reduce pollutants
- Includes state AG certification that management plan can be legally implemented
- Watershed approach
- Eligible for State & Federal funding
- Funding can be used for demonstration projects



RCRA Liability



- RCRA § 3005 liability elements:
 - “Treatment,” “Storage,” or “Disposal” of
 - Solid Waste that is a Hazardous Waste
 - Without a permit
 - that may present imminent and substantial endangerment
 - to health or the environment
 - by person or entity with some degree of control over the facility
- Damages
- Beville waste—mining waste from the extraction, beneficiation or processing of ores & minerals is excluded (RCRA § 3004(x))

RCRA Definitions

▪ Disposal

- Discharge, deposit, injection, dumping, spilling, leaking, or placing of solid or hazardous waste into or on any land or water so that it or any constituent may enter the environment, including ground water (RCRA §1004(3))

▪ Solid Waste

- Garbage, refuse, sludge, other discarded material, including solid, liquid, semisolid or contained gaseous material, excluding domestic sewage (RCRA §1004(27))

▪ Hazardous Waste

- A solid waste or combination of solid wastes that because of quantity, concentration, physical, chemical or infectious characteristics may cause an increase in mortality or serious, irreversible illness or pose a substantial hazard to human health or the environment when improperly managed (RCRA §1004(5))

▪ Storage

- Containment of HW that does not constitute disposal (RCRA §1004(33))

▪ Treatment

- Any method, technique or process to change the physical, chemical, or biological character of any HW to neutralize or render the waste nonhazardous, safer to transport, amenable to recovery or storage or reduced in volume (RCRA § 1004(34))

Persons/Entities with Control

- Similar to CERCLA owner, operator, arranger, transporter
- RCRA § 7002 identifies:
 - Past or present generator
 - Past or present transporter
 - Past or present owner or operator of a treatment, storage, or disposal facility
 - Who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or HW
 - That may present an imminent & substantial endangerment



RCRA Citizen Suit Provision

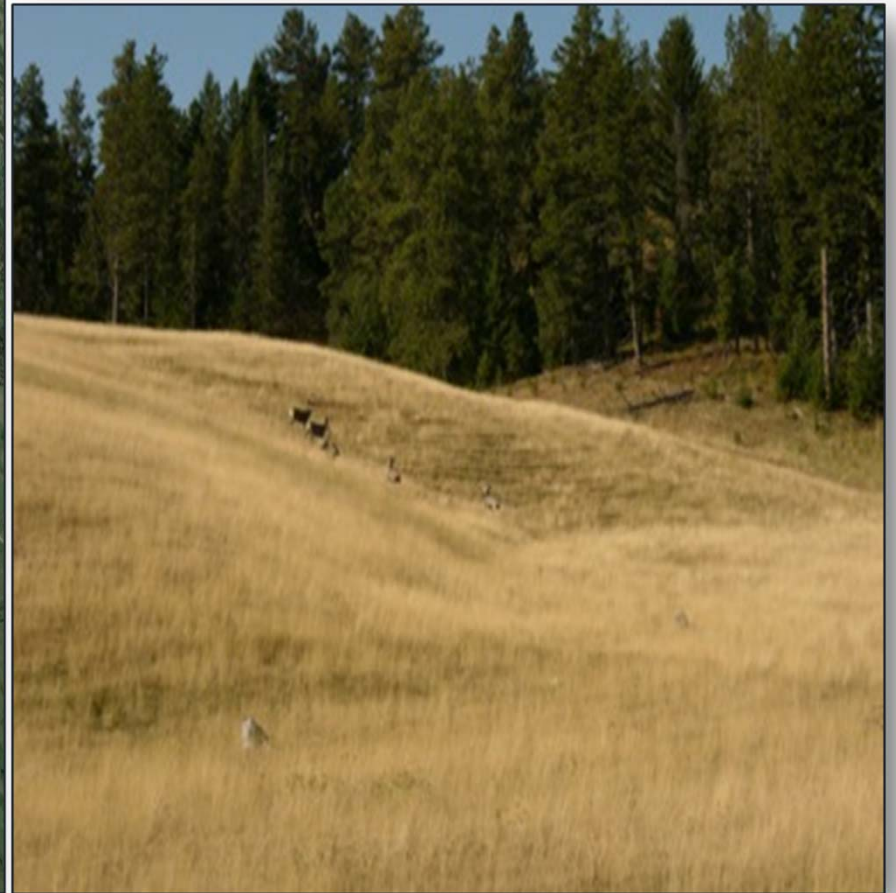


- Any citizen may sue any other person “with control”, including the United States, and any other governmental agency (subject to the 11th Amendment)
- For an alleged violation of any permit, standard, regulation, condition, requirement, prohibition or order issued by EPA or a State with respect to a CWA standard
- Requires 60 days (in some cases 90) advance notice (w/exceptions) to the Administrator, the State, alleged violator
- Precluded if government is diligently enforcing or is taking CERCLA action
- Includes award of costs of litigation to substantially prevailing party
- RCRA § 7002

Successes: CR Kendall Mine, MT



BEFORE



AFTER

Conclusions & Recommendations

- Potential sites exist in many states that meet criteria and can be addressed
- Identify appropriate initial sites for pilots
- Identify and navigate the various legal liability pitfalls
- Work with eligible Response Action Contractors
- Use CERCLA §§ 104(k), 119 and CWA § 319
- Small Steps
- Justify legal framework flexibility
- Document the basis for Good Sam
- Environmental improvement should be the goal

