

Groundwater Contamination Liability Issues

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GENERAL SOURCES OF LIABILITY

Groundwater contamination from non-natural sources is subject to three areas of potential liability, for both the discharger/polluter, and the affected property owner.

- Federal Law
- State Law
- Tort Law

FEDERAL LAW SOURCES OF CONTAMINATION LIABILITY

Federal Law Regarding Discharges and the Handling of Hazardous Materials:

- The Clean Water Act (CWA), 33 USC §§ 1251-1387
 - Applies to surface/navigable waters and the pollution thereof
- Safe Drinking Water Act (SDWA), 42 USC §§ 300f-300j-26
 - EPA sets enforceable standards for public drinking water, overseeing state and local implementation thereof
 - State DNR enforces
- Resource Conservation and Recovery Act (RCRA), 42 USC §§ 6901-6992k
 - Addresses the handling and disposal of hazardous and non-hazardous waste, and underground storage tanks

CERCLA, aka the Superfund Law

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC §§ 9601-9675

- Imposes strict liability on responsible parties (generally the current property owner or the owner/operator at the time of the disposal) to clean up spills of hazardous substances
 - “Hazardous” substances covered by CERCLA are determined by EPA, and include tetrachloroethylene (PCE), the substance spilled at Madison Kipp
- Superfund allows EPA to fund cleanup, and recover costs from responsible parties, if responsible party does not do so
- CERCLA liability does not extend to owners of receiving properties, and originating property will be liable for the clean-up of receiving properties
- Only clean ups funded by State/Federal government are recoverable from discharger
- No third party claim under CERCLA (City can't sue discharger under CERCLA)

STATE LAW SOURCES OF CONTAMINATION LIABILITY

Generally, State laws regarding the spilling of hazardous substances are contained in Chapter 292 and Wis. Admin. Ch. NR 700-754. Of importance regarding spills are Sections 292.11 and 292.13.

- Sec. 292.11: Hazardous substance spills

- Requires any person who possesses or controls a hazardous substance who causes a discharge to notify the DNR
- Person must take actions to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of the state
- Does allow state to implement clean up activities and seek reimbursement from discharger (similar to CERCLA)
- For nonemergency spills, if discharge doesn't endanger public health, DNR may enter into agreement with discharging party for monitoring and clean up activity.
 - Madison Kipp has such an agreement with DNR regarding its spill of PCEs

- Sec. 292.13: Property affected by off-site discharge
 - This section provides an exemption from the clean-up responsibilities of 292.11 for groundwater or soil contamination if specified criteria are met
 - For exemption to apply,
 - Discharge must have originated off-site by another party and owner must cooperate with DNR and discharger's clean-up activity for exemption to apply
 - Must demonstrate that receiving property was not the source of the discharge
 - Must avoid actions that worsen the discharge

- Sec. 292.13, cont.
 - Under statute, a property owner can obtain a written liability exemption from DNR
 - In order to obtain this liability exemption, a property owner must demonstrate that:
 - Contamination on his or her property originated somewhere else;
 - The owner did not possess or control the property where the contamination originated; and
 - The owner did not possess or control the hazardous substance that contaminated the property where the contamination originated, and did not cause the discharge of this hazardous substance.

- Sec. 292.13, cont.

- If a property owner is found to be eligible for a liability exemption for contamination from another property, the owner will be exempt from the following statutory requirements for that contamination on the property:

- Taking environmental response actions, including investigation and cleanup of contamination and responding to state orders for environmental preventive measures;

- Reimbursing DNR for costs associated with any DNR response to that contamination; and

- Emergency or special orders for protection of public health, safety or welfare.

- This statute is very relevant to owners of properties that receive discharged materials.

TORT LAW SOURCES OF CONTAMINATION LIABILITY

Torts, in general

Tort law is based upon statutory and common law and addresses injuries caused by one party to another. Some common examples include:

- Personal injuries
- Trespass
- Negligence
- Product liability
- Nuisances
- Defamation
- Invasion of privacy
- Fraud

Environmental Law and Torts

Restatement (Second) of Torts § 849 (1979):

- Three sources of environmental tort liability—negligence, nuisance or trespass.
- Regarding groundwater contamination, an interference with the use of water caused by an act or conduct that is not itself a use of water but that affects the quality or quantity of the water may subject the actor to liability if the act or conduct:
 - Constitutes a nuisance,
 - Constitutes a trespass, or
 - Is negligent, reckless or abnormally dangerous with respect to the use.

Negligence as a Source of liability

- In the context of groundwater contamination, negligence is a claim of action against a discharger of hazardous materials for the damages caused by the discharge
- These are usually the so called “toxic tort” cases and arise from harms to third parties based upon spills (e.g., “Erin Brockovich” type harms)
- To establish a cause of action, the Plaintiff would have to show negligence on the part of the Defendant (the discharger). To do so, the Plaintiff would have to show the following:
 - The Defendant owed a duty of care to the Plaintiff;
 - The Defendant breached this duty of care;
 - The breach proximately caused injury to the Plaintiff; and,
 - There were actual losses or damages arising from the injury.

Negligence, cont.

- Causation is usually the hardest thing to prove (e.g., did defendant's spill cause the cancer?)
- Whether the discharger owes a duty, and the type of duty owed, can also be an issue
 - A duty to clean-up or remediate may exist for certain spills, especially highly toxic ones

Trespass as a Source of Liability

- In the context of groundwater contamination, a claim of trespass is a claim of action against a discharger of hazardous materials for the unwanted entry of hazardous materials onto the land of another.
- Restatement (Second) of Torts § 158 (1965): One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally does any of the following:
 - Enters land in the possession of the other, or causes a thing or a third person to do so;
 - It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter.
 - Remains on the land of another; or
 - Fails to remove from the land of another a thing which he is under a duty to remove.

Nuisance as a Source of Liability

There are two types of actionable nuisance activity, both of which may apply to groundwater contamination:

- Public Nuisance
- Private Nuisance

Public Nuisance

- Public Nuisance, Restatement (Second) of Torts § 821B (1979): A public nuisance is an unreasonable interference with a right common to the general public.
- Elements of a public nuisance (WIS JI-1928) are:
 1. A public nuisance exists/existed.
 - A public nuisance is a condition or activity which unreasonably interferes with the use of a public place or with the activities of an entire community.
 - In determining whether an interference was unreasonable, can consider whether the conduct involves a significant interference with the public health, the public peace, the public comfort or the public convenience; and whether the conduct is prescribed by statute/ordinance/regulation.
 2. The interference resulted in harm to the plaintiff that was both significant and different from the harm suffered by other members of the public exercising the common right that was the subject of the interference.
 - Harm must be more than a slight inconvenience or petty annoyance.

Public Nuisance, cont.

3. Defendant was negligent.

- Defendant must fail to exercise ordinary care, or the care that a reasonable person would use in similar circumstances.
- Defendant may be negligent for failing to abate nuisance if knew or should have known of the nuisance and could have remedied it within a reasonable period of time.

4. Defendant's negligence caused the public nuisance.

Private Nuisance

- Private Nuisance, Restatement (Second) of Torts § 821D (1979): A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.
- Elements of a private nuisance (WIS JI-CIVIL 1922) are:
 1. A private nuisance exists/existed.
 - A private nuisance is an invasion of or interference with the plaintiff's interest in the private use and enjoyment of his land.
 2. The invasion or interference resulted in significant harm.
 - Must involve more than just a slight inconvenience or petty annoyance.
 3. Defendant was negligent.
 - Defendant must fail to exercise ordinary care, or the care that a reasonable person would use in similar circumstances.
 - Defendant may be negligent for failing to abate nuisance if knew or should have known of the nuisance and could have remedied it within a reasonable period of time.
 - Defendant's negligence caused the private nuisance.

General Tort Issues

- All tort claims must be filed within 6 years from when cause of action accrues (Wis. Stat. Sec. 893.52)
 - In the context of spill, this date would depend on the type of injury being alleged.
- Assumption of Risk: A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm. Restatement (Second) of Torts § 496A (1965).
 - This is a defense to negligence in which the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it.
 - Building a well where a known plume exists, could be argued to be assumption of risk. However, it could be argued that there would be no assumption of risk if DNR were to permit the well despite knowing of the plume.
- All tort claims require the use of expert testimony and may involve significant expenditures in order to prove harm, injury, negligence, damages or other elements.