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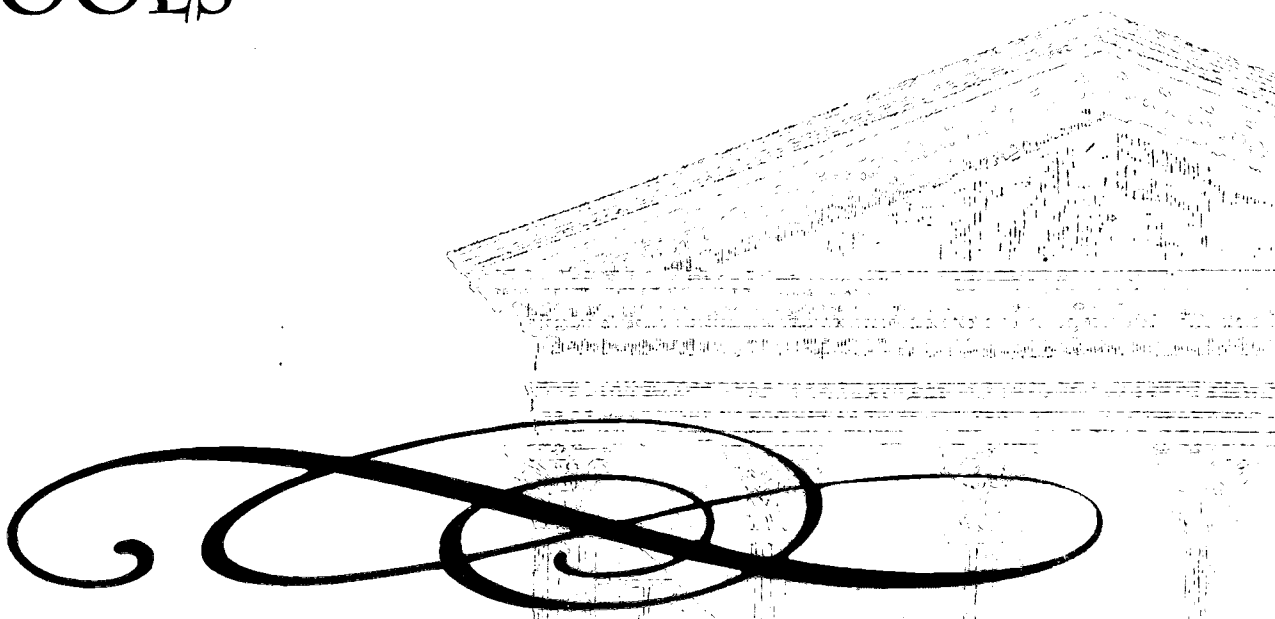
ABSTRACT

This booklet outlines the environmental problems most likely to arise in schools. An overview provides a fundamental analysis of environmental issues rather than comprehensive analysis and advice. The text examines the concerns that surround superfund cleanups, focusing on the legal framework, and furnishes some practical pointers, such as what to do if the school district is identified as a potentially responsible party. The document discusses ways to minimize future superfund liability in real-estate acquisitions, the identification of hazardous waste produced by schools, and definitions for "hazardous substance" and "environmental damage." Strategies for handling underground storage tanks and dangers within the school, such as asbestos, radon, lead, and other toxic substances are also detailed. An entire chapter is devoted to toxic torts and the unique proof problems that must be addressed in such cases. Information on the prevention of and response to environmental crises, such as those precipitated by construction and maintenance activities, are also addressed. The last chapter provides an environmental check list so that lawyers and administrators can check their compliance with applicable environmental laws and assess their preparedness for an environmental crisis. (RJM)

ENVIRONMENTAL LAW: FUNDAMENTALS FOR SCHOOLS



AN NSBA
COUNCIL OF SCHOOL
ATTORNEYS PUBLICATION

ENVIRONMENTAL LAW: FUNDAMENTALS FOR SCHOOLS

by

David R. Day
Johnson, Smith, Densborn, Wright & Heath
Indianapolis, Indiana

March 1995

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Leadership in legal advocacy for public schools has been the overriding mission of the NSBA Council of School Attorneys throughout its celebrated history. Almost 3,000 members strong today, the Council was formed in 1967 to provide information and practical assistance to attorneys who represent public school districts. It is the only national advocacy organization composed exclusively of attorneys representing school boards. It offers continuing legal education, specialized publications, a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association. For information on membership, contact your state school boards association or the NSBA Council of School Attorneys.

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ENVIRONMENTAL LAW: FUNDAMENTALS FOR SCHOOLS by David R. Day is a publication of the NSBA Council of School Attorneys. NSBA's Office of General Counsel provides professional and executive staff support to the Council and its varied programming for school attorneys across the United States. For more information about Council membership, publications and programs, call NSBA at 703/838-6722 or write NSBA Council of School Attorneys, 1680 Duke Street, Alexandria, Virginia 22314.

FOREWORD

The Council of School Attorneys presents this publication on environmental law as a primer for school attorneys and administrators who need to know the basic issues and legal standards that affect schools. This monograph provides an overview and practical pointers in several areas of environmental law, including Superfund, RCRA, underground storage tanks, radon, asbestos, lead, toxic torts and prevention and response to environmental crises. Without delving into the complexities of environmental law and litigation, this guide provides the reader with an awareness of relevant issues and an understanding of the essentials of federal environmental statutes and regulations. However, the information presented is not intended as legal advice, and the reader should consult legal counsel for advice on specific issues.

The Council wishes to thank David Day and the NSBA staff members who prepared this monograph for publication.

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Chapter 1

Environmental Issues in Public Schools: A Growing Reality

Do environmental laws and environmental problems really have much relevance to the day-to-day issues facing most school districts or school lawyers? Consider the following: A search of computerized news databases for the 1992 calendar year alone revealed over 50 instances of newsworthy events at schools arising from environmental issues.[1] These events ranged from complaints by students and teachers of illnesses attributed to the existence of toxic substances in the schools[2] to reports of schools being shut down due to their location next to hazardous waste landfills.[3] Sometimes the problems arose because of actions by the school itself, such as the use of lead paint on school walls.[4] Other times the situations were beyond the school's control, such as the presence of rusted and leaking drums in a wetland area behind a new elementary school.[5] These occurrences are convincing evidence that every school lawyer and every school district should have at least a passing familiarity with environmental issues and laws in order to recognize and react to a myriad of potential environmental problems in the school setting.

Situations illustrating the intersection of environmental law and school law arise on almost a daily basis and originate in some of the most unexpected ways. For example, one would not be surprised to find that the recent Northridge earthquakes in California caused substantial damage to a school building. But who would surmise that a sizeable portion of the cost to repair that damage would be associated with the removal of asbestos exposed by cracks caused by the earthquake? Yet one California school district estimated that removing the asbestos insulation that was exposed in a library, a multi-purpose room and two classrooms would cost in excess of $500,000, nearly 10% of the total project cost.[6] Asbestos also played a role in the April, 1994 closing of Warwick, Rhode Island's 27 public schools.[7] The superintendent ordered the schools closed after asbestos levels in five elementary schools were found to be above the limits prescribed by the Environmental Protection Agency. Finally, late last year, a school in Maryland closed due to health risks caused by a fire at a landfill that adjoined school property.[8] School officials planned to scrub down both that elementary school and another nearby elementary school to remove signs of the smoke. In summary, neither school lawyers nor school administrators can ignore environmental regulations.

The history of environmental law reveals the cause for this upsurge in environmental problems in the public schools. Early legislation regulating activities that threatened the environment or that imposed liability for environmental damage had little effect on school districts. These early efforts, such as the forerunners to the Clean Water Act[9] and

1. A synopsis of 17 of these news stories describing environmental problems faced by school districts appears in Day, "Environmental Problems at School: Prevention and Response" *Crisis Management in Schools: The Legal Implications* (National School Boards Association, 1992).
2. Chicago Tribune, Sept. 16, 1992; Los Angeles Times, Aug. 9, 1992; Los Angeles Times, Mar. 1, 1992.
3. Washington Post, June 21, 1992.
4. Newsday, June 19, 1992.
5. Seattle Times, Aug. 5, 1992.
6. Los Angeles Times, July 12, 1994.
7. Washington Post, April 1, 1994.
8. Washington Post, Dec. 13, 1994.
9. In 1972, Congress passed the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376. The act was renamed the Clean Water Act during 1977 amendments. Pub. L. No. 95-217, 91 Stat. 1567 (1977).

the Clean Air Act,[10] were aimed primarily at industrial concerns that emitted pollution in the course of their activities. These laws generally set permissible emissions standards and required entities engaged in polluting activities to obtain operating permits. Because schools did not engage in such activities, these laws had little impact on school districts.

Of course, there were exceptions to this general statement. For example, some school buildings with no access to sewers had to construct sewage treatment plants. These plants had to be approved by federal and/or state agencies and also had to obtain operating permits under the Clean Water Act. In addition, the Environmental Protection Agency ("EPA") took action foreshadowing current asbestos legislation so that schools had to pay some attention to the amount and condition of the asbestos in their school buildings.[11] Finally, long-standing common law theories, such as nuisance and trespass, could impose liability on the school if its activities caused environmental damage to surrounding properties. All in all, however, most school lawyers and administrators did not come into contact with the emerging specialty of environmental law.

Events of the 1980s brought a dramatic end to this isolation. Federal environmental legislation moved beyond its focus on industrial activities and imposed potential liability for activities which are commonplace in the operation of a modern school. Further, state and local governments increased their level of environmental supervision, often creating new state and local agencies designed to address solely environmental issues. Expanding public environmental concerns gave rise to new theories of tort liability, the so-called "toxic torts," which created additional liability exposure for school districts.

In addition, the unique aspect of schools — the presence of students — heightened the need for school districts to understand their environmental responsibilities. Because children are more susceptible to damage from environmental problems,[12] conditions that adults tolerate for their own work environment are sometimes considered intolerable for students. Thus, some legislation, most noticeably involving asbestos, targeted only schools. Other legislation, such as that concerning lead and radon, contain special provisions to address school issues involving these substances.

Becoming familiar with environmental laws and the problems that they regulate makes sense for the school administrator and the school lawyer for a number of reasons. First, no school system would want to knowingly expose its students and employees to the health risks often associated with environmental problems. In addition, the public relations "nightmares" that can result from the responses of panicked parents and employees to perceived health risks can only distract schools from efforts to fulfill their educational mission. Finally, legal liability, both in the form of potential recoveries by affected students and employees and the heavy fines and penalties leveled on environmental offenders, gives ample incentive for schools to learn about and comply with environmental laws.

The following chapters outline the environmental problems that are most likely to arise in the school setting. This means, of course, that some of the environmental laws or regulations that might apply to schools are not addressed in this monograph. The discussions of the laws that are included provide fundamental information rather than comprehensive analysis and advice. For more in-depth analysis of environmental laws, school attorneys and administrators may want to refer to other sources[13] and consult environmental law specialists.

10. Congress enacted the original Clean Air Act in 1970 and amended it in 1977. This act, which was greatly overhauled in 1990, appears at 42 U.S.C. §§ 7401-7626.

11. EPA first identified asbestos as a health concern in public schools in 1978. H.R. Rep. No. 763, 99th Cong. 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 5004.

12. For example, Congress found that children breathe 5 times faster than adults and thus suffer more exposure to asbestos through inhalation. *Id.*

13. Two good general references are: Government Institutes, Inc., *Environmental Law Handbook* (11th Ed. 1991) and ABA Section of Natural Resources, Energy and Environmental Law, *The Environmental Law Manual* (1992). *See also* Herber, K. "Federal Environmental Laws which Extend to Local School Districts," *School Law in Review 1989*, 7-1 (NSBA 1989).

Chapter 2

Superfund: The Ghost of Trash Past

THE PROBLEM

The American lifestyle creates an abundance of trash. The schools, reflecting that lifestyle, are no different. For most people once the trash is thrown away and picked up by the local scavenger service, the problem seems to disappear.

This "out-of-sight, out-of-mind" mentality ignores the real world. As a practical matter, most trash from schools or other sources is buried in a landfill. For years, these landfills operated with only minimal regulation and with little thought beyond "scenic" concerns to the potential effects of the landfill on the surrounding area.

Most of the trash generated by schools and sent to landfills is of a benign nature, but some of the trash is not so harmless. Cleaning supplies, discarded laboratory chemicals, trash from shop areas and some construction materials, to name a few items, possess toxic characteristics. When buried in the ground and subjected to the forces of nature, these toxic properties can leach (escape) out of the landfill into the surrounding water table. From there, the toxic agents can enter the public drinking water supply, either by being carried away in streams or rivers or, more often, by seeping into private and public wells.

Efforts to clean up and control a landfill, therefore, are not aimed primarily at eliminating an eyesore or protecting the soil around the landfill, although these may be desirable by-products of the work. Instead, landfill regulation and cleanup are really an effort to prevent ground water contamination.

THE LEGAL FRAMEWORK

In 1980 Congress passed the Comprehensive Environmental, Response, Compensation, and Liability Act, commonly known as "CERCLA" or "Superfund."[14] To protect groundwater from the contamination that results from the leaching or release of toxic substances from hazardous waste disposal sites, the act provides a mechanism to fund the cleanup of these sites. In 1986 Congress substantially revised CERCLA by enacting the Superfund Amendments and Reauthorization Act, generally referred to as "SARA."[15]

Acting pursuant to CERCLA, the EPA has identified over 1,200 sites that most urgently require attention and has placed them on a National Priority List.[16] States often have "mini-superfund" status and establish similar lists of sites for remediation.[17] These laws also generally adopt similar schemes of liability for the costs of remediating bad disposal sites. In addition, CERCLA also recognizes a private right of action in favor of entities who pay the costs of responding to a release from a site even if that site is not on any Superfund list.

To pay for the cleanup, CERCLA imposes potential liability on four categories of parties involved in the site: (1) the present owner and/or operator of the site; (2) the owner and/or operator of the site at the time of the hazardous waste disposal; (3) the transporters of hazardous waste to the site; and (4) the parties (generators) who arranged for the

14. 42 U.S.C. § 9601 *et seq.*

15. Pub. L. No. 99-499 (Oct. 17, 1986). Although some literature suggests otherwise, SARA is not a separate law from CERCLA.

16. Hall, Jr., R.M. & J.A. Reinstorf, *Superfund Response Cost Allocations: The Law, The Science and The Practice,* The Business Lawyer, Vol. 49, No. 4 at 1941 (Aug. 1994).

17. *E.g.,* Ind. Code § 13-7-8.7-1.

waste to be disposed of at the site, either directly with the owner or with the transporter.[18] The standard of liability is strict liability, meaning that each party is responsible even though its actions at all times complied with all legal requirements and were without fault or negligence.[19] Equitable defenses that might be used to prevent liability, such as clean hands or laches, are precluded by CERCLA.[20] Only the very limited defenses listed in the statute are available to oppose liability.[21] In addition, the liability is essentially retroactive and extends to activities that took place many years ago and that were completely lawful at that time.[22]

Finally, CERCLA imposes liability on a joint and several basis. This means that any one responsible party can be held liable for all the costs of cleaning up the site.[23] Persons can escape full liability only by proving that the harm is divisible and there is a reasonable basis for apportioning only a part of the harm to them.[24] Otherwise, the only way to avoid paying for the entire cleanup is to pursue other generators, transporters, owners or operators.[25]

Cleaning up a hazardous waste site can be a very expensive proposition. In addition to direct costs, landowners adjacent to the site may suffer compensable damages. For example, damages at one site were $207.5 million, including the purchase of an entire neighborhood.[26]

In summary, CERCLA and similar state laws provide a powerful and far-reaching tool for imposing liability on schools who generate a hazardous waste and send it to a disposal site. This liability can attach for disposal that occurred many years ago and without regard to fault.

PRACTICAL POINTERS

Absent unusual circumstances, a school will not be a transporter of hazardous substances nor will the school be an owner or operator of a hazardous substance disposal site at the time of the disposal. Instead, the school's liability under CERCLA will arise because either (1) the school generated a hazardous waste that was deposited at the site; or (2) the school, probably unknowingly, became an owner of a hazardous waste site. (The next chapter of this monograph will discuss ways for the school to minimize these risks.)

A simple illustration demonstrates the far-reaching impact of the statutory scheme:

Able School District and Bad Toxic Company generate hazardous waste, albeit at substantially different levels. They hire Clyde Trucking and Doak Transport, respectively, to haul the waste to a landfill that was owned by Jones at the time of the disposal and is now owned by Gregory, who knew about the disposal. If there is a release or threatened release of toxic substances from the landfill, and if costs are incurred to respond to the release, then Able, Bad, Clyde, Doak, Jones and Gregory are all separately responsible for paying all those costs even if none of them violated any law in generating, transporting or accepting the waste for disposal.

A school district will usually learn of its potential liability under CERCLA when it receives from the EPA or some private party a letter advising the school district that it is a potentially responsible party ("PRP") in con-

18. 42 U.S.C. § 9607(a).

19. *E.g., United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2nd Cir. 1993); *Farmland Industries, Inc. v. Morrison-Quirk Grains Corp.*, 987 F.2d 1335 (8th Cir. 1993).

20. *See United States v. Smuggler-Durant Min. Corp.*, 823 F. Supp. 873 (D. Colo. 1993).

21. *Id.*

22. *E.g., O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *United States v. Kramer*, 757 F. Supp. 397 (D.N.J. 1991).

23. *United States v. Arrowhead Refining Co.*, 829 F. Supp. 1078 (D. Minn. 1992).

24. *Alcan Aluminum Corp.*, 990 F.2d 711; *Purolator Products Corp. v. Allied Signal, Inc.*, 772 F. Supp. 124 (W.D.N.Y. 1991).

25. *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

26. Washington Post, June 21, 1992, at A8. The payments also included providing college educations for 700 children who lived in the neighborhood. The school district had already closed its building in the neighborhood.

nection with a certain hazardous waste site. Generally, the school will have been identified as a PRP from the records maintained at the hazardous waste site, from records produced by those who transported waste to the site or from evidence at the site itself, such as containers marked with the school's name. Note again, the school is a PRP regardless of whether its disposal of the hazardous waste complied with all laws and standards of reasonable care at the time of the disposal. Liability under CERCLA is imposed without regard to fault.

How does the school district respond to this letter? The following steps should be taken immediately:

- **Contact insurance carriers.** The school's present liability insurance carrier and the carrier at the time of the disposal should be contacted.[27] Be prepared to learn that the insurance carrier, particularly in more recent policies, included a specific exclusion for coverage of any losses suffered by the school district as a PRP. Older policies may also contain a "pollution exclusion," but the effectiveness of those exclusions is the subject of substantial litigation.[28] In any event, the school should exhaust all possibilities of insurance coverage. Insurance coverage for claims arising under CERCLA remains a fertile field for imaginative litigation.[29]

- **Contact PRP committee.** The school district or its attorney should determine whether a PRP committee has been formed and should make itself known to that committee in order to obtain current information concerning the site. Often EPA will first sue those parties that it identifies as the major sources of the hazardous waste in the landfill (or the major source of money to correct the problem) or contact those parties to offer them the opportunity to clean up the site before EPA takes corrective action. It will then leave it to that group to pursue the other PRPs at the site. Usually, the attorneys and consultants representing the major PRPs will form a PRP committee and that group will have the most current information regarding the site.

- **Determine basis for PRP designation.** Determine the exact basis for the school district being designated as a PRP. Be sure that the substance generated by the school district is a hazardous substance as defined under CERCLA.[30] EPA maintains a list of all such hazardous substances in the federal regulations.[31] Unless the school's waste contained one of those hazardous substances, the school cannot be held liable for the cleanup. But, as a practical matter, it will fall to the school to prove the absence of hazards in the waste.

- **Determine formation of "de minimis" committee.** Assuming that the school is a small contributor to the landfill, determine whether a "de minimis" or a "de micromis" committee has been established. The PRP committee is almost always composed of, or controlled by, the major polluters at the site. This group then tries to minimize its exposure by imposing disproportionate costs on the minimal contributors to the site. Formation of a "de minimis" committee, made up of the small contributors to the site, will give all of the small parties more bargaining power. If no such committee has been formed for the site, the school may even want to initiate its formation.

27. Cases hold that the PRP notice letter constitutes a "suit" that can trigger an insurance company's duty to defend. *Village of Morrisville Water & Light Dep't v. U.S. Fidelity & Guar. Co.*, 775 F. Supp. 718 (D. Vt. 1991); *Coakley v. Maine Bonding and Cas. Co.*, 618 A.2d 777 (N.H. 1992).

28. *See, e.g., Aetna Casualty and Surety Co. v. Gulf Resources & Chemical Corp.*, 709 F. Supp. 958 (D. Idaho 1989).

29. *See* Zuckerman, T.I. and M.C. Raskoff, *Environmental Insurance Litigation* (Shepard's/McGraw Hill, Inc. 1994).

30. 42 U.S.C. § 9601(14).

31. This list is maintained at 40 C.F.R. Part 302.

- **Encourage speedy settlement for small contributors.** Consistent with the specific language of CERCLA, attempt to encourage speedy settlement of the "de minimis" or "de micromis" contributors.[32] EPA has specific guidelines dealing with "de minimis" settlements. Almost without exception, these settlements will be made on a volume allocation basis, meaning that the school's contribution will be based on the proportion its volume of waste bears to the total volume of waste at the site. Although EPA does not usually enter into settlements that give complete releases or do not contain reopeners, "de minimis" settlements can form an exception to this rule.[33]

- **Seriously consider reasonable settlement offers.** Give serious consideration to accepting a reasonable "de minimis" settlement offer to cap liability and avoid further transaction and litigation costs. A recent court decision upheld an effective 100% penalty on settling "de minimis" parties who did not accept an administrative settlement but wanted to take the deal after litigation.[34]

In summary, school districts now face liability for disposal actions that took place many years ago and without any fault by the districts. Nothing can be done now to protect against such liability. Instead, the school district must be aware of the liability and be prepared to respond to its potential when it arises. Following the above steps gives the school district that ability.

32. SARA added specific statutory language regarding settlements to CERCLA. 42 U.S.C. § 9622. This includes specific language encouraging quick settlements with "de minimis" parties. 42 U.S.C. § 9622(g). For "de micromis" settlement guidelines, see BNA, Toxics Law Reporter, Aug. 18, 1993.

33. 42 U.S.C. § 9622(g)(2).

34. *United States v. Cannon Engineering Corp.*, 720 F. Supp. 1027 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990).

Chapter 3

Minimizing Future Superfund Liability

THE PROBLEM

As noted in the prior chapter, trash containing toxic waste and disposed of years ago can create liability for the school district under CERCLA. In addition, if a school has already purchased land without investigating its environmental condition, (a not infrequent occurrence), it could be held liable as an owner if that land is the site of a release or threatened release of a toxic substance. What's done is done, and these potential sources of liability cannot be totally eliminated. But the school is probably still generating hazardous waste and will usually be buying additional land. What steps can be taken to minimize liability that could arise from these actions?

THE LEGAL FRAMEWORK

Hazardous Waste

In 1976, Congress adopted the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.*, in an effort to develop "cradle-to-grave" management of hazardous waste. In 1984, Congress amended RCRA through the Hazardous and Solid Waste Amendments of 1984, 98 Stat. 3220, *et seq.*.

RCRA contains a detailed definition of "hazardous waste," and EPA has published a list of solid wastes deemed hazardous. In a typical school situation, certain cleaning fluids, construction materials, asbestos, medical waste, shop class waste and discarded chemical laboratory materials could very well fit this definition and appear on the list.

Because a school will generally be a relatively small generator of hazardous waste (less than 100 kg of such waste per month),[35] RCRA will classify it as a conditionally exempt small quantity generator or "CESQG." As a CESQG, the school must: (1) determine if the solid waste it generates is hazardous;[36] (2) obtain a generator EPA number if it wants to ship the waste off-site;[37] (3) use a manifest if the waste is shipped off-site;[38] (4) package, label and mark the waste in accordance with DOT requirements;[39] and (5) maintain records and generate reports as required by regulation.[40]

Real Estate Acquisition

Because CERCLA includes a current owner of real estate among its potentially responsible parties, some schools could face CERCLA liability arising from their ownership of real estate on which hazardous waste has been deposited. SARA amended CERCLA to provide a defense for such liability, commonly known as the "innocent landowner" defense, if the owner can establish that, before purchasing the real estate, it took all reasonable efforts consistent with good commercial practice to minimize its liability and still did not know or have reason to know that the disposal took place on the property.[41]

35. Schools generating more than 100 kg of hazardous waste in a calendar month would not qualify as a CESQG and would be subject to substantial regulations that go beyond the scope of this work.

36. 40 C.F.R. § 262.11.

37. 40 C.F.R. § 262.12.

38. 40 C.F.R. § 262.20-23.

39. 40 C.F.R. § 262.30-34.

40. 40 C.F.R. § 262.40-44.

41. This "defense" comes in the form of defining "contractual relationship" under 42 U.S.C. § 9607 and is contained in 42 U.S.C. § 9601(35).

PRACTICE POINTERS

Hazardous Waste Disposal

Although no perfect solution exists to avoid future liability for the waste a school is producing today, certain common sense approaches will help. For example, be sure the school identifies any hazardous waste that it is producing. In addition, the school must engage reputable transporters to ensure that the waste is going to landfills authorized and equipped to receive it. Contracts, particularly those involving asbestos removal, construction or other activities involving toxic substances, should include covenants regarding proper disposal of waste and indemnity for violation of those covenants. Finally, the school should take advantage of government-sponsored toxic waste disposal events to rid itself of hazardous materials.

The importance of working with qualified transporters and landfills cannot be over-emphasized. These parties can often be the source of information and assistance to the school in complying with the law. The hazardous waste divisions of state EPAs are also good sources of information and can often "recommend" transporters and landfills for the school's use.

Real Estate

The "innocent landowner" defense described above only relieves the school district from liability for cleaning up the real estate. The school still could be stuck owning contaminated real estate with no market value or practical use. Consequently, the school district should take steps to ensure that any land it acquires has no hazardous waste problems, both to establish the "innocent landowner" defense and to protect the school district's investment in the real estate.

The school district can accomplish these twin goals by obtaining an environmental audit of the real estate prior to its acquisition. These audits, commonly called "Phase I environmental audits," can be obtained from the numerous environmental consulting and engineering firms which have began operation in recent years.

At the minimum, this audit will include a records search of the real estate to determine its prior uses over the last 75 or 100 years. In addition, the audit will review governmental records to be sure that the site has not been listed on any state or federal "suspect" or "priority" list and that the property is not located in an area containing any other real estate on such list. This latter point is very important because a school could encounter problems arising from its location near a hazardous waste site. Finally, the audit will include at least a visual inspection of the site to determine whether evidence of soil contamination exists and may also include limited soil borings and soil contamination tests.

If any of these efforts reveal potential problems, then the environmental audit can proceed to more intense testing, such as groundwater contamination tests. If any contamination is discovered, the school should first consider "walking away" from the acquisition. The potential liability for remediating hazardous waste issues, particularly if groundwater has been contaminated, is so great that the school cannot afford the risk.

If the school decides to proceed with purchasing the real estate (which may be a wise move because even the hint of contamination can vastly reduce the purchase price), then the contamination should be removed prior to closing. In addition, the school should seek indemnification from the current owner for any liability the school encounters or discovers at a later time. A sample form for such indemnity appears as Exhibit A to this chapter at pages 9-10.

Environmental audits should also take place before the school undertakes construction on property the school has previously acquired without such audits and regardless of the "pristine" nature of the real estate. A purchaser may find that its rural land was the site of a former landfill or had been contaminated by prior activity at the site, such as the burial of agricultural chemicals. Audits before construction can avoid wasted investment of additional sums on contaminated sites. The massive potential liability for cleanup requires extreme caution before proceeding with real estate purchases or construction.

EXHIBIT A

SAMPLE INDEMNITY PROVISION

Seller's Environmental Indemnity of Buyer and Allocation of Responsibility.

(a) Indemnity.

(i) Seller shall indemnify, defend and save harmless Buyer, its officers, shareholders and employees, from and against any actions, suits, proceedings, investigations, assessments, audits, fines, judgments, liabilities, losses, claims, demands, damages, obligations, costs, charges, reasonable counsel fees and other expenses of every nature and character, arising from Environmental Damage as defined in Section _____ of this Agreement (the "Buyer's Environmental Indemnity Loss").

(ii) The indemnities described above specifically include but are not limited to the direct obligation of the Seller to promptly perform any remedial or other activities required or ordered by any administrative agency or government official, or are otherwise necessary to avoid injury or liability to any person or property, to prevent the spread of pollution, or to permit continued safe operation of Buyer's business on the Real Estate (hereinafter the "Remedial Work").

(iii) Without waiving its indemnity, upon failure of the Seller to promptly perform the Remedial Work, the Buyer may, at its option, commence and/or complete such work itself, and require the Seller to pay all costs thereby incurred.

(b) ***Agency or Third Party Action.*** Without limiting its obligations under any other provision of this Agreement, Seller shall be solely and completely, and jointly and severally, responsible for responding to and complying with any administrative notice, order, request or demand, or any third party claim or demand relating to potential or actual contamination on the Real Estate, except where the contamination was caused solely by Buyer. The responsibility conferred under this paragraph includes but is not limited to responding to such orders on behalf of Buyer and defending against any assertion of Buyer's financial responsibility or individual duty to perform under such orders. Seller shall assume, pursuant to subparagraph (a) of this Section any liabilities or responsibilities which are assessed against Buyer in any action described under this subparagraph (b) or any other Environmental Damage; provided that the Seller shall not be responsible for any loss, damage or expense solely attributable to acts by Buyer subsequent to the Closing.

(c) ***Survival.*** Notwithstanding any limitations on other indemnity provisions in this Agreement, this Section is expressly intended by the parties to survive the Closing without limitations on duration or amount.

Definitions - Environmental Matters.

As used in this Agreement:

(i) "Hazardous Substance" means any hazardous, toxic or regulated substance, material or waste, including, but not limited to, those substances, materials, and wastes listed in the United States Department of Transportation Hazardous Materials Table (49 CFR 172.101) or by the Environmental Protection Agency as hazardous substances (40 CFR Part 302) and amendments thereto, or such substances, materials and wastes which are or become regulated under any applicable local, state or federal law including, without limitation, any material, waste or substance which is: (i) petroleum; (ii) asbestos; (iii) polychlorinated biphenyls; (iv) designated as a "hazardous substance" pursuant to Section 311 of the Clean Water Act, 33 U.S.C. § 1251, *et seq.* (33 U.S.C. § 1321) or listed pursuant to Section 307 of the Clean Water Act (33 U.S.C. § 1317); (v) defined as a "hazardous waste" pursuant to Section 1004 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* (42 U.S.C. § 6903); (vi) defined as a "hazardous substance" pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.* (42 U.S.C. § 9601); (vii) defined as a "hazardous waste" under Indiana Code 13-7-1-12, or a "hazardous substance" under Indiana Code 13-7-8.7-1(c); or (viii) designated by any federal, state or local governmental authority as hazardous or toxic, which such governmental authorities regulate, or otherwise control for the protection of health, safety or the environment.

(ii) "Environmental Damage" shall mean any or all liabilities, obligations, claims, damages, penalties, actions, causes of action (criminal, civil or administrative), investigation, abatement, containment, remediation, response, removal or cleanup costs and other costs and expenses (including, without limitation, consultants' fees and attorneys' fees) imposed upon or incurred by or asserted against the Seller or Buyer by reason of, or in connection with the following conditions arising from events or causes occurring or existing prior to the Closing:

(A) the presence, disposal (including off-site disposal), escape, leakage, discharge, emission, release or threatened release of any Hazardous Substance on, from, or affecting the Real Estate;

(B) any personal injury (including the death of any person) or property damage (real or personal) arising out of or related to any Hazardous Substance;

(C) any lawsuit or administrative action brought or threatened, settlement reached, or government order issued, relating to or arising out of, any Hazardous Substance;

(D) any actual or alleged violation of laws, orders, rules, guidelines, ordinances, regulations, requirements, demands of any government authority (federal, state or local) arising out of, or related to any Hazardous Substance; or

(E) any condition that interferes with a business relationship, affects the use or enjoyment of any property, or poses a hazard to health, safety or the environment which is based upon, or is in any way related to, any Hazardous Substance.

Chapter 4

Underground Storage Tanks: The Danger Below

THE PROBLEM

School districts often maintain underground storage tanks ("USTs") to hold, for example, gasoline at a bus garage. Although petroleum is not defined as a hazardous substance under CERCLA, Subtitle 1 of the Resource Conservation and Recovery Act ("RCRA") required the EPA to develop a comprehensive regulatory program for USTs, including those containing petroleum, which is a regulated substance under this law.[42] In accordance with this direction, the EPA has adopted regulations which govern USTs.

As with the regulations of hazardous waste sites under CERCLA, controls over USTs are imposed to protect the purity of groundwater. Petroleum contamination of a drinking water supply poses health risks for the users. Leaks from USTs can migrate into private and public water supplies.

THE LEGAL FRAMEWORK

The EPA regulations include rules for the design, construction and installation of new tanks; standards for maintaining leak detection systems and related record-keeping; rules requiring the report of releases from regulated tanks; corrective actions for such releases; and standards for closing existing tanks.[43] Because of the vast numbers of USTs in existence, the EPA has essentially delegated UST regulation to state programs or agencies, usually the state's EPA and/or fire marshall. **Caution: Often the state rules for USTs will differ from the EPA rules. Consequently, the school district must contact its state agency to be sure that it has followed the correct procedures in dealing with UST issues.** The following description of the rules is based solely upon the EPA's regulations.

The law contains several exclusions of USTs from regulation.[44] Probably the most applicable to school districts are: (1) tanks storing heating oil for use on the premises where stored; (2) septic tanks; and (3) waste water treatment tanks that are part of a treatment facility regulated under the Clean Water Act. Again, however, states may have different exclusions; in particular, **states may regulate heating oil tanks.**

A school district should have notified its state agency of existing USTs by May 8, 1986.[45] New tanks installed since then have to meet certain construction and design standards, including leak detection, and must be installed in accordance with the regulations. These new tanks must also include spill and overfill prevention equipment. The appropriate state agency should be notified of the installation of new tanks.

These standards for acquiring and installing new tanks will affect every owner of a UST because, by December 22, 1998, all USTs must either meet the new tank performance standards, be equipped with specific upgrades or be closed down. Accordingly, all school districts that have USTs must be familiar with these requirements.

In addition to regulating construction and installation of tanks, the regulations also impose certain operation, maintenance and record-keeping requirements. The purpose of these requirements is to prevent spills or leaks, if possible, or to detect the existence of such spills or leaks as soon as possible. The

42. 42 U.S.C. § 6991(2).

43. 40 C.F.R. § 280 *et seq.*

44. 42 U.S.C. § 6991(1).

45. 42 U.S.C. § 6991a.(a)(1).

regulations provided a phase-in for compliance with the release detection requirements. The phase-in schedule required all tanks, whenever installed, to meet such requirements by the end of 1993.

If a "release" does occur (*e.g.*, the tank leaks), and that release exceeds 25 gallons of petroleum or causes a sheen on nearby surface water, the release must be reported within 24 hours. (Check state law regarding notification of general environmental spills as they may contain stricter reporting requirements.) In addition, upon confirmation of a release, the UST owner must perform immediate corrective action to be sure that no further releases occur and to eliminate fire and explosion hazards. Once these immediate measures are completed, then the owner must abate the contamination caused by the release which can include the removal of any contaminated soil and the cleaning of any contaminated groundwater. Again, the states may have different rules for the reporting of leaks and the appropriate corrective action. State law and state agencies, usually the state EPA and/or fire marshall, must be consulted.

Any closure of a UST must be accomplished in accordance with the regulations and again usually requires notice to the state. This closure will usually mean removal of the UST from the ground or, at the very least, filling the tank with inert material. In addition, at the time of closure, the owner should determine whether leaks have occurred that have contaminated surrounding soil or groundwater and clean up any such contamination.

Finally, the regulations impose certain financial responsibility requirements which are designed to ensure that funds exist for the cleanup of UST releases if the owner is not financially responsible. Many schools (and school lawyers) are unaware of these financial assurance requirements. They apply to all governmental districts, including schools, unless the debts of the school also constitute debts of the state under state law.[46] The regulations provide a number of ways to satisfy this financial assurance requirement. These include use of the school's bond rating and a "self-insurance" mechanism based on the school's financial information. But use of these mechanisms require strict compliance with the regulations including, in some cases, using the exact wording in the regulations to satisfy the EPA.

Failure to comply with UST regulations subjects the school district to enforcement actions that can include civil penalties up to $10,000 per tank for each day of violation. In addition, many states have established an excess liability fund to cover uninsured cleanup costs in case of an UST leak. But failure to comply with the regulations usually disqualifies the UST owner from participation in this fund.

PRACTICE POINTERS

When the UST regulations were first adopted, they received substantial publicity, and many UST owners did a good job of initial compliance with the laws. As time passes, and those school people familiar with the rules retire or move on to new positions, new personnel may become involved without knowledge of these rules. Consequently, compliance decreases and the potential for liability increases. Periodic and systematic review of all documentation regarding USTs should be an essential part of each school district's practices.

Close attention should be paid to two specific areas: (1) closure of tanks and (2) financial assurances. As for tank closing, too often the school does not take closure costs into account in budgeting for closing of a facility. These costs can be substantial given the possibility that the tank has leaked and cleanup will be required.

The financial assurance regulations are relatively new and have not received much attention, but they have substantial repercussions for a school district that fails to comply with the rules. Any school with a UST should review the regulations closely to be sure they have filed the appropriate documents.

46. 42 U.S.C. § 6991e.(d)(2).

Chapter 5

Dangers Within the School: Asbestos, Radon, Lead and Other Toxic Substances

THE PROBLEM

Schools house students and staff for extended periods of the day and for at least half a year. The average student will spend over 1,300 hours a year in a school building, and teachers and other employees will spend even longer periods. Therefore, harmful substances that may be present in the school building can pose health risks to the occupants.

Congress has identified three substances — asbestos, radon and lead — which it believes pose particular problems in school buildings. In response, Congress has adopted laws to attempt to deal with these problems. In addition, the Occupational Safety and Health Administration (OSHA) has recognized the existence of other hazardous substances in the workplace and has regulations in place concerning these products.

Failure to comply with these laws and regulations in some cases exposes the school to substantial fines and other penalties. In all cases, however, a failure to appreciate the potential health problems for students and staff arising from the presence of these substances can result in significant "toxic tort" liability for the school district. Consequently, each school administrator and school lawyer will need to be aware of those laws and regulations pertaining to asbestos, radon, lead and other toxic substances.

ASBESTOS

Asbestos is probably the best known and the most regulated of the toxic substances in schools. As early as 1978, the Environmental Protection Agency had suggested that the presence of asbestos in school buildings raised particular public health problems. The EPA's emphasis on asbestos in schools, as opposed to the existence of asbestos in many other buildings, appears to be based upon the particular sensitivity of students to potential asbestos contamination.

Asbestos was widely-used in floor tile, mastic, insulation and other building products. Intact, asbestos apparently poses no health risk. If asbestos becomes powdery, however, the fibers escape into the atmosphere and can be breathed into the lungs causing damage. Asbestos susceptible to this problem is called "friable."[47]

Although the EPA had recognized a potential health problem arising from asbestos in schools for several years, Congress became dissatisfied with EPA's response to this problem. Consequently, in 1986 Congress adopted the Asbestos Hazard Emergency Response Act[48] ("AHERA"), finding that the EPA's rules were inadequate and purporting to establish federal standards for the inspection of asbestos-containing material in schools and implementation of appropriate response actions with respect to that material.

As a result of AHERA and the EPA regulations thereunder,[49] each school was required to inspect for asbestos and develop an asbestos management plan for each school building under its authority. The plan had to include: (1) a description of all inspection and response actions carried out concerning asbestos before October 22, 1986; (2) results of the inspections carried out to determine whether asbestos-containing material was present in a school building; (3) a description of measures to be taken to respond to any friable asbestos-containing material; and (4) a

47. 15 U.S.C. § 2641 *et seq.*.

48. 15 U.S.C. § 2642(6).

49. 40 C.F.R. § 2641 *et seq.*.

detailed description of any asbestos-containing material which remained in a school building after the response actions were undertaken. The plan also had to provide for periodic reinspection and long-term attention to the asbestos problems.

An additional aspect of AHERA deserves mention. Congress was concerned that those people advising schools on how to deal with asbestos and those contractors removing the asbestos or otherwise treating the material were not subject to any particular licensing or other requirements. Consequently, AHERA set up a state-administered program to provide accreditation to asbestos consultants and contractors. AHERA requires that the inspections and response actions required under the management plan be developed and carried out by accredited contractors and consultants.

Schools removing asbestos or otherwise dealing with friable asbestos-containing material must also be aware of the significant health risks posed for those who do the work. EPA regulations under the Clean Air Act provide specific work procedures and practices that govern asbestos removal.[50] OSHA also has regulations that protect workers exposed to asbestos.[51]

Disposal of the removed asbestos is also subject to regulation as a hazardous waste. Consequently, this disposal is governed by the RCRA rules described in Chapter 3. Improper disposal can be the basis for CERCLA liability.

In short, Congress singled out asbestos as being worthy of detailed and sophisticated attention from every school district in the nation.

AHERA requires schools to follow specific inspection and management plan procedures. Within these procedures, however, the school is granted substantial discretion in choosing alternatives to address asbestos in the building. For example, in *Liddell v. Board of Education of City of St. Louis*, 771 F. Supp. 1496 (E.D. Mo. 1991), the State of Missouri had challenged the costs incurred by the St. Louis schools in their asbestos abatement program. (Missouri was responsible for a portion of these costs under a desegregation order.) In particular, the state challenged the decision of the school to remove vinyl asbestos tile even though that tile was not friable. The court chose not to second-guess the school's decision to remove the tile, stating:

> When faced with a complex (and often confusing) set of asbestos regulations, the Court feels that the most prudent thing for any school to do when the health and safety of children are involved, is to remove the ACM (asbestos-containing material) if school officials believe there is a possibility for release of asbestos fibers. Given the age of the schools and the extent of renovation activities, this Court cannot fault the City Board for opting to remove the VAT [vinyl asbestos tile].

Id. at 1501.

It is important to note that nothing in AHERA mandates the removal of all asbestos from all school buildings. AHERA requires a plan of responsive action only to asbestos that has become "friable." AHERA contemplates that friable asbestos material will not necessarily need to be removed but instead can be encapsulated so that the particles do not reach the atmosphere.

Nevertheless, many school districts, spurred by concerned parents and staff and the fear of liability, have treated AHERA as a requirement that schools remove all asbestos-containing materials from the school premises. In the course of removing the asbestos, however, schools have necessarily caused the removed material to be crumbled and asbestos particles to be released into the air. This fact has caused some experts to question whether the cure was worse than the disease.

Accordingly, before a school district undertakes the removal of asbestos from a building, it should ask whether the removal is the only method to deal with the situation. Frequently, less extreme and less expensive measures are available which will be consistent with AHERA and more realistic for the school budget.

Schools contracting for the management, removal and/or disposal of asbestos should

50. 40 C.F.R. Part 61, Subpart M.

51. 29 C.F.R. § 1910.1001; 29 C.F.R. § 1926.58.

insist on provisions requiring the contractor to follow all applicable rules to protect the contractor's employees and the school. Work should be conducted during the summer or at least after school to minimize exposure to students and staff.

If the school's own workers are expected to deal with asbestos, compliance with the EPA and OSHA rules becomes the school's responsibility. Safety training and observance of safety rules must be required for all employees.

Some experts now question whether the threat of asbestos exposure in schools justifies the massive attention and remediation programs that have been expended. In a 1994 Los Angeles Times series regarding press coverage of health risks,[52] the reporter discussed the public panic over the presence of asbestos in New York City schools. He noted that panic had caused schools to open two weeks late in the fall of 1993 in order to allow inspections for asbestos to be completed.

The reporter compared this panic to the panic which occurred over the use of the pesticide Alar on apples, noting:

> In the 1960s and '70s, miners and other industrial workers who had worked in asbestos-laden environments 20 or 30 years earlier began to show a high incidence of lung cancer and other lung diseases. Congress and the EPA subsequently took steps to limit asbestos exposure.
>
> But many officials failed to take into account the enormous difference between the exposure of someone working with a toxic substance all day and someone who might be exposed to it occasionally and briefly. They also failed to differentiate between the kind of asbestos that could be truly dangerous (Amphiboles) and the white, Chrisotile-based asbestos that is used 95% of the time in the United States and that repeated studies have shown is "not a health risk in a non-occupational environment," as a team of international experts concluded in a study published by Science Magazine in 1990.
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> * * *
>
> The crumbling asbestos may well have offered some risk, but the decision to delay the opening of school was "based more on a need to reassure fearful parents than on any estimate of health risk," [quoting] health experts and school officials . . . .

Nevertheless, Congress has decreed that asbestos in schools is worthy of special attention. More importantly, Congress has imposed penalties of up to $5,000 **per day** for each day a school fails to carry out its responsibilities.[53]

RADON

Decaying uranium and radium in rocks and soils release radon gas. This colorless and odorless gas can eventually permeate into schools through cracks in basement floors or foundations. Trapped in school buildings without proper ventilation, the radon is then breathed into the lungs of students and teachers, thereby increasing their risk of lung cancer.

The EPA estimates that 5,000-20,000 lung cancer deaths a year are caused by radon. It is generally believed that radon is the largest source of lung cancer risk in the non-smoking population.[54]

In 1988, Congress passed the Indoor Radon Abatement Act as amendments to the Toxic Substance Control Act.[55] That act, among other things, established a national long-term goal to make air within buildings in this country as free of radon as the air outside the buildings.[56] The act further provided

52. Los Angeles Times, Sept. 12 1994.

53. 42 U.S.C. § 2647(a).

54. The foregoing description of radon and its effects was taken from 1988 U.S. Code Cong. and Admin. News 3612 *et seq.*.

55. 42 U.S.C. § 2661 *et seq.*.

56. 42 U.S.C. § 2661.

for the development of construction standards which would mitigate the build-up of radon in newly constructed buildings.[57] Finally, and particularly relevant to schools, the act directed the EPA to study the extent of radon contamination in the nation's schools and to identify areas with a high probability of schools with elevated radon levels.[58] The EPA has responded to this portion of the law and has published lists showing radon "hot spots" in virtually every state.

Remediating high radon levels generally requires providing better ventilation to the building. Radon is a naturally-occurring substance generally present in the atmosphere, but the level of radon in air outside of buildings is so diluted that it poses no health risks. Problems result when the radon becomes trapped in an existing building so that the amount of radon contamination in the air exceeds safe levels. Ventilation removes the radon from these trapped areas and further dilutes it to safe levels.

Two types of school buildings are susceptible to radon problems. First, older buildings, which are more apt to have cracked foundations or floors, can be reservoirs for radon buildup. Second, "tight" buildings constructed to prevent heat loss and save energy costs can allow air to stagnate and contribute to radon buildup. Schools owning and operating these types of buildings, particularly if they are located in identified radon "hot" spots, should engage in periodic radon air testing to ensure that radon levels are below hazardous readings.

Schools contemplating remodeling or new construction should also assure themselves that the construction techniques will not contribute to radon buildup. In those areas where there is a substantial likelihood of radon contamination, the architect's contract should be amended to include specific provisions regarding the ability of the design to inhibit the buildup of radon gas.

In some respects, the problem of radon appears to be an environmental fad. The threat of radon contamination was a popular "scare" story in the late 1980s and early 1990s. Some home buyers demanded radon tests prior to completing the purchase of a home, and radon "self-test" kits appeared in many hardware and home improvement stores. For whatever reason, radon does not appear to register as highly on the popular environmental scale these days. For schools located in areas of high radon levels, however, it still remains a concern and should be included in the school's overall environmental plan.

57. 42 U.S.C. § 2664.

58. 42 U.S.C. § 2667.

LEAD

The presence of lead in schools, either in drinking water or in lead-based paint on the walls, may lead to significant health problems for children. Studies show that children are especially at risk for lead exposure. Even small levels of lead, below those levels once considered safe, have been associated with deficient I.Q. scores, academic achievement, language skills and attention span.[59]

In the course of enacting the Lead Contamination Control Act of 1988,[60] Congress found that a major source of lead contamination was the lead used in drinking water coolers either in lead solder or in lead-lined water tanks. Congress cited surveys from several different states showing that a high percentage of schools had lead levels in drinking water above the EPA standard then in effect of 20 parts per billion. (EPA was then considering lowering this level to 5 parts per billion.) For example, over 40% of Minnesota samples and over 67% of Maryland samples showed lead contamination above the less-restrictive level.[61]

Lead contamination resulting from school drinking water coolers presented particular problems because most of those coolers were built prior to the early 1980s, when all manufacturers, except one, stopped using lead in the coolers. Further, because water may stand in school water coolers for a long period of time before use, such as during weekends and vacations, the likelihood of contamination from lead-lined reservoirs is increased.

59. Reports of these studies appear at 1988 U.S. Code Cong. and Admin. News 3793 *et seq.*.

60. 42 U.S.C. § 300j *et seq.*.

61. *See* note 59, *supra.*

The Lead Contamination Control Act required EPA to distribute to the states a list of drinking water coolers that are not lead free. States were then to establish a program to assist schools in testing for and solving lead contamination problems. These programs were to ensure that, by 1990, all water coolers with potential for lead contamination were to be replaced, removed or rendered inoperable in the schools.

As a result of this action, lead in school drinking water should no longer present a substantial problem. Yet, even after the effective dates of this legislation, at least one school was attempting to sell bonds to complete repairs in a building where one-half of the water fountains had been turned off and teachers were drinking bottled water due to toxic lead levels in the plumbing. Lack of funds or inattention to the statutory parameters could mean that other schools continue to be out of compliance with the statute's intent. Students and teachers damaged by non-compliance can probably point to the statute as establishing a minimum standard of care. Accordingly, schools that do not comply with the law expose themselves to significant risks.

Lead can be found not only in a school's drinking water, but also on the walls, particularly in older school buildings that used lead paint. For example, in the fall of 1992, one New York City elementary school was closed for two weeks due to high levels of lead in wall paint and floor dust.[62] One expert at a medical center likened the school to a "toxic waste dump" due to the level of lead at the school. The dust had been created in the course of renovations of the building. During the two weeks the school was closed, workers cleaned up the dust and completed renovations.

Students can be exposed to lead through lead-based paint by breathing the dust resulting from construction or by eating paint chips. This latter method is a particular problem for schools housing younger children.

There are currently no federal guidelines with respect to the removal of lead paint or abatement of problems with lead paint in schools. However, 15 U.S.C. §§ 2681-92 does address efforts to abate hazards related to lead-based paint in housing. Schools concerned about the possibility of lead-based paint on their walls and interested in programs to reduce or eliminate this risk might profit from reviewing the regulations issued under these statutes to assist in their remediation efforts.

OTHER TOXIC SUBSTANCES

In addition to asbestos, radon and lead, a school can have many other materials that contain toxic substances. Many of these products are unavoidable such as shop and laboratory supplies, cleaning products and construction materials. Very often, school employees are those most likely to come into contact with these items.

To protect such employees (and itself), a school must be sure that it has complied with OSHA's hazard communication rules. These rules mandate each employer to have a written hazard communications program that includes a list of hazardous chemicals located in the school. Every chemical manufacturer has to determine if its product constitutes a "hazardous chemical" under OSHA's definition. If it does, then the manufacturer must prepare a material safety data sheet ("MSDS") for that product. The MSDS must include the hazards, precautions in use and other prescribed data on the chemical.

The school as employer must obtain the MSDS and make it available to employees. In addition, the school must label containers to advise workers of a chemical's presence and its hazards. Finally, the school has to provide education and training in handling the chemicals. Students and volunteer workers who come into contact with the products also need to receive proper education and training.

CONCLUSION

By singling out asbestos, radon and lead for particular attention in the school setting, Congress has created not only some legal hurdles for compliance but also some defi-

62. Newsday, Sept. 16, 1992.

nite liability risks. In addition, OSHA regulations address other hazardous substances that threaten the workplace. Certainly, other factors in a school, such as the overall condition of the building, can pose health risks. But from an environmental standpoint, a school should focus on the control of hazardous substances as a first step in its efforts to provide a healthy school "atmosphere."

Chapter 6

Toxic Torts

In addition to environmental liability arising from federal and state regulatory statutes, the school district must also be concerned with liability for so-called "toxic torts." These torts are generally defined as injuries wrongfully caused by exposure to chemical substances.[63] The theories of liability for toxic torts are the typical state tort law causes of action such as negligence, strict liability for hazardous activities, nuisance, products liability, etc. However, these tort actions have unique proof problems that must be addressed, particularly for causation and damages.[64]

A school district could face a toxic tort case due to illnesses suffered by students or teachers as a result of exposure to chemicals used in the school. For example, a class may encounter an outbreak of illnesses or reactions due to odors coming from remodeling or renovation activities occurring in the school during school time.[65] Or students could be injured due to exposure to lead paint.[66]

A review of the case law reveals the following situations in which schools have been sued for alleged toxic tort injuries and/or violations of federal environmental law:

- *Duross v. Freeman,* 832 S.W.2d 354 (Tex. App. 1992). Student sued school science teacher and school nurse for personal injuries suffered when the student was burned by a caustic chemical compound.
- *University of Miami Medical School v. Singleton,* 582 So.2d 1182 (Fla. App. 1991). Graduate student employed as a lab assistant filed worker's compensation claim for injuries resulting from exposure to toxic fumes during her employment.
- *Dick v. Superior Court of Los Angeles County and Los Angeles Unified School District,* 230 Cal. Rptr. 297 (Cal. App. 1986). Individual brought suit alleging personal injuries as a result of exposure to toxic fumigants at school.
- *Mervak v. City of Niagra Falls,* 420 N.Y.S.2d 687 (Sup. Ct. N.Y. 1979). Suit brought arising from location of school on hazardous waste dump.
- *School District of the City of Allentown v. Marshall,* 657 F.2d 16 (3rd Cir. 1981). Employee alleged discrimination based on anti-retaliation provisions of the Toxic Substances Control Act.
- *Byrne v. Board of Education,* 1989 W.L. 120646 (E.D. Wis. 1989). Elementary school teacher claimed discrimination under section 504 of the Rehabilitation Act, alleging that school premises where she taught contained potentially toxic airborne organisms to which she developed a permanent sensitivity resulting in a disability which the school failed to accommodate.

In preventing and defending toxic tort litigation, the school nurse can play a pivotal role. Often the nurse can detect a pattern of complaints emerging in a particular class or particular area of school. Ideally, the nurse should receive training in recognizing poten-

63. American Bar Association, *The Environmental Law Manual* (1992).

64. *Id.* at 473-75.

65. Los Angeles Times, Aug. 9, 1992.

66 Newsday, Sept. 16, 1992.

tial environmental causes for such outbreaks. Quick reaction to eliminate the cause of the problem, such as restricting construction work to non-school hours, may solve the problem and reduce the likelihood of litigation.

The school has several other steps available to it to minimize its exposure in toxic tort litigation. First and foremost among these steps is assuring compliance with federal, state and local environmental laws and regulations. Although compliance with mandates will not guarantee success in toxic tort litigation, failing to comply with the standards will almost certainly be seen as a failure to exercise a reasonable standard of care. Juries will probably not understand or appreciate a school's non-compliance with environmental laws.

A second step a school can take is to eliminate the possible sources of toxic tort liability. A school could substitute non-toxic alternatives for toxic chemicals presently used in the workplace. For example, use of an integrated pest management program could take the place of repeated spraying with pesticides. Or harsh chemical cleaning solvents could be eliminated and more "environmentally-friendly" products used in their place. Each of these alternatives will require consideration of their costs and benefits, but reduction in use of toxic substances can only work in the school's favor in avoiding toxic tort litigation.

Chapter 7

Prevention of and Response to Environmental Crises

PREVENTION

Thus far this monograph has discussed methods that a school may use to lessen the potential of an environmental crisis in one of its buildings. Proper waste disposal, care in land acquisition, attention to asbestos, radon, lead, and other toxins in the school and compliance with UST regulations are all examples of everyday procedures that will help protect a school not only from legal liability but also from the substantial administrative and public relations issues that an environmental "crisis" can bring.

Review of other environmental law literature suggests some additional preventive measures.

Construction

Construction activities often introduce potentially toxic materials into the school setting, thereby exposing students to such materials. The school should take steps to minimize the risk of exposure and to assign responsibility for any exposure that occurs.

In contracts for new construction, the general contractor or construction manager should be required to advise the school as to the use of any potentially hazardous materials in completing the work so that a determination can be made as to the extent of specific contractual language needed to address adequately that material. More generally, the contracts should require use and disposal of any toxic materials in accordance with the environmental laws that apply to those materials. Supervision and examination of the worksite should be undertaken to ensure that soil or water contamination does not occur at the time of construction.

At the very least, general language requiring compliance with all environmental laws and a covenant not to pollute the site should be included in the contract. The contractor should also assume responsibility for protecting his own workers from exposure. Finally, the contractors' liability insurance should be reviewed to ensure that it protects the school from the liabilities set forth above. "Pollution" exclusions need to be carefully scrutinized.

Renovation and remodeling activities also increase the potential for environmental problems. Again, these activities, like new construction, pose the potential of introducing hazardous substances into the school site. Consequently, the contract should contain provisions similar to the ones described above for new construction.

Renovation and remodeling may present increased risks to the school, because students and employees may be present at the site when the materials are being used. Fumes from construction or dust from lead paint or asbestos removal pose potential problems for the school.

Consequently, renovation and remodeling should be scheduled, if at all possible, during summer vacations or other extended student absences from the building. If renovation or remodeling must occur during the school term, the school should consider scheduling portions of the work for after-school hours. In addition, physical separation of the area under renovation from the area being used by students and teachers should be maintained. This not only prevents contamination from entering the school area, but it also has the added advantage of keeping students away from the work area.

Provisions regarding the time of work, the use of materials and the separation of the work space should be contained in the construction contract. Be sure that the general contractor, construction manager, and architect understand their obligations to protect

the school environment from contamination, agree to provide that protection and insure against the risks.

Maintenance Activities

Maintenance activities also can be the source of environmental problems. The use of toxic cleaning fluids and insecticides are often the major sources of these problems. The school's maintenance staff should consider the costs and benefits of non-toxic or less toxic products. In addition, use of certain products and insecticides should be limited to times of extended school breaks or, at least, to times in which students are not present in the building. Proper ventilation of the school building at such times should be in place.

RESPONSE

Despite the best of efforts and plans, an environmental crisis may still arrive. Once this happens, the school must act quickly to protect the health of its constituents and attempt to alleviate the mass hysteria that often accompanies these problems. Advance preparation can help. This preparation should include the following:

- The school or its attorney should be familiar with the sources of environmental law and liability.
- The school nurse should be trained in identifying symptoms which could be prompted by environmental conditions.
- The school nurse should examine records of student sickness to determine if any patterns emerge indicating problems at particular times or in particular locations.
- The school should identify the governmental agencies that can be contacted for help in the crisis, such as the state and local environmental protection departments and the state and local boards of health.
- The school should also identify potential experts, such as environmental engineers and industrial hygienists, who can assist the school quickly, if necessary.

Careful documentation of health claims and health concerns is essential. Again, the school nurse is critical to this type of record keeping. But particular care must be taken to avoid the "power of suggestion" problem, *i.e.*, making people feel sick when they are not or "suggesting" the source of the problem is in the school.

If the school is not the source of the environmental contamination, such as when a chemical spill occurs near school property, then the school should coordinate its response with the federal, local and state environmental authorities. Evacuation plans should be in place for each school building. If the school is evacuated or closed, return to the site should occur only after the approval of health officials.

Finally, open communications with parents may help stem the rumors that often bedevil an environmental crisis. Suggestions of "cover up" or silence add little to the credibility of the school and do not foster the cooperation the school needs to deal with the problem.

Chapter 8

An Environmental Check List

Compliance with all applicable environmental laws is a daunting task. The following list of questions and concerns will enable school lawyers and school administrators to start and to maintain the process of compliance with these requirements.

SUPERFUND/RCRA

1) Does the school retain copies of all of its general liability insurance policies? Can it locate those policies?

2) Do the policies exclude pollution claims? Can coverage of these claims be obtained? At what cost?

3) Has the school received from the EPA or any other party letters notifying it of potential responsibility for hazardous waste sites? If so, has the school notified its insurance carrier? Has the school pursued the possibility of a "de minimis" settlement of the matter?

4) Has the school determined whether any of its waste would constitute hazardous waste under RCRA?

5) Is the school satisfied that its waste transporter operates in compliance with environmental laws and delivers the school's hazardous waste to properly regulated landfills?

6) If the school is disposing of hazardous waste, does the school package the waste properly, use manifests for its shipping and retain the records required under RCRA?

7) Do construction contracts address the use and disposal of hazardous materials by building contractors?

8) Does the school have a Phase I environmental assessment of any site it has purchased in the last five years?

9) Before starting construction on ground purchased without an environmental assessment, does the school obtain such an assessment?

UNDERGROUND STORAGE TANKS

1) Does the school have any underground storage tanks that are subject to regulation?

2) If the school has tanks, has it notified state authorities of the tanks' existence?

3) If any new tanks have been installed since 1986, did the construction and installation of those tanks comply with federal and state law?

4) Were the appropriate authorities notified when the tank was placed in service?

5) Has the school complied with the record-keeping and leak detection requirements that apply to the tanks?

6) Has the school complied with the financial assurance regulations?

ASBESTOS

1) Does the school have a proper asbestos management plan for each of its school buildings?

2) Are copies of those management plans maintained in the school and building files as required by the regulations?

3) Do contracts with those providing asbestos management services require the

contractors to follow all environmental laws in handling and disposing of asbestos?

4) If school employees are working near asbestos, have they received proper training and have they been warned as to the presence of asbestos containing materials in the workplace?

5) If the school employs consultants or contractors to assist in its asbestos management functions, is the school satisfied that those consultants and contractors are accredited by the state?

RADON

1) Is the school located in an area identified as one of high radon concentration by the EPA?

2) If the school is located in a "hot" radon area, does the school have a program of systematic radon testing for its school buildings?

3) Is the school located in a state which requires radon testing of schools and has it complied with those state laws?

LEAD

1) Has the school determined if any of its water coolers contain lead-lined reservoirs or lead in the plumbing? If so, has the school removed all of those coolers or rendered those coolers inoperable?

2) Has the school determined whether lead exists in any of the plumbing fixtures or water lines of the school?

3) If the school is uncertain as to the composition of its water coolers or plumbing lines, has the school conducted tests to determine if the school's drinking water contains lead?

4) Has the school determined whether any of the paint used on its walls is a lead-based paint? If so, what steps has the school taken to ensure that students do not ingest the paint?

OTHER TOXIC SUBSTANCES

1) Has the school identified the hazardous substances present at the school and obtained the data material sheets for those substances?

2) Has the school informed its employees of the existence of hazardous substances in the workplace?

3) Does the school conduct the education and training programs necessary to enable employees to handle the hazardous substances safely?

4) Has the school encountered an unusual level of sickness among students or employees that is being attributed to conditions within the building? If so, has the school made any investigation of these occurrences?

PREVENTION OF OR RESPONSE TO AN ENVIRONMENTAL CRISIS

1) Has the school nurse received any training regarding "environmental" illnesses?

2) Is someone in the school administration charged with the responsibility of monitoring compliance with environmental laws?

3) Has the school identified the appropriate local, state and federal environmental authorities that can assist the school in the event of a crisis?

4) Has the school identified environmental engineers and industrial hygienists who can assist the school in an environmental emergency?

5) Has the school determined whether there are sources of potential environmental contamination, such as landfills, chemical plants, etc. located in the vicinity of any of its schools? If so, does the school have a plan to respond if any of these outside sources should cause contamination of the school property?

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Environmental Law: Fundamentals for Schools (March 1995) by David Day. This monograph provides school attorneys and administrators with information on the basic requirements and potential issues under some of the federal environmental laws that affect schools. Such topics as Superfund, RCRA, asbestos, radon, lead, USTs and toxic torts are discussed with practical pointers provided to prevent and respond to environmental crises in school. Intended as a primer, this publication serves as overview of the key environmental issues of which schools must be aware. Approx. 30 pages. ISBN 0-88364-194-1 (List $15, National Affiliates and Council Members $12).

School Law in Review 1995 This digest of papers presented at the 1995 Annual School Law Seminar includes the following topics: school violence and student discipline, Title IX, update on religion in the schools, recent developments in the law of sexual harassment and sexual abuse, collective bargaining, special education technology, "Goals 2000", site-based processes, charter schools, ethics, and evaluation of employees. 100+ pages. ISBN 0-88364-193-3 (List $35, Council members — first copy free. National Affiliates and additional Council copies $28).

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Desk Reference on Significant U.S. Supreme Court Decisions Affecting Public Schools (April 1992) by Gwendolyn H. Gregory, NSBA Deputy General Counsel. This desk reference is designed to serve as a "memory prompt" for attorneys and laymen alike on the name, citation and/or rule of law of a particular U.S. Supreme Court case. It contains virtually all cases in which a public school district was a party and a substantive decision was rendered, however it does not analyze the decision. It includes an extensive descriptive word index, table of cases with full parallel citations and table of constitutional and statutory provisions. 87 pages. ISBN 0-88364-135-6 (List $25, National Affiliates and Council members $20).

School Board Member Liability Under Section 1983 (April 1992) by David B. Rubin, Piscataway, NJ (editor, Naomi E. Gittins, NSBA staff attorney). Like earlier editions published in 1981 and 1985, this monograph serves as a primer for both school board members and school attorneys on board member liability issues. The current version seeks to explain clearly and accurately in layman's terms the basics of civil rights law under Section 1983. It focuses on the types of claims most commonly brought under Section 1983 against school boards and presents factual circumstances and how the courts have applied the law in immunity defenses. 44 pages. ISBN 0-88364-134-8 (List $15, National Affiliates and Council members $12).

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