

**“What the MBA Student and Business  
Executive Needs to Know About  
Environmental Laws and Liabilities”  
or  
A Full Semester of Environmental Law in  
Just One Day**

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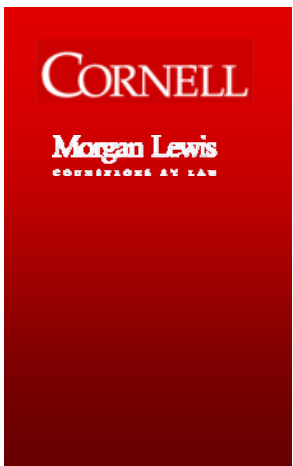
**Morgan Lewis**  
COUNSELORS AT LAW

February 28, 2005

Ken Rubin

# Your Job and the Environment

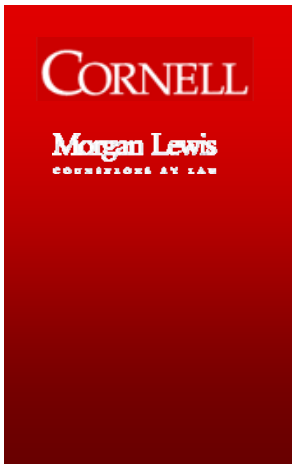
- What you need to know about environmental laws, and your role in implementing them, will vary based upon your position.
- **CEO ( or College President , or Mayor )**
  - You set the tone for XYZ Company ( or Cornell University !), beginning with the policy statement that should be posted at every plant.
- **Division President ( or College Dean )**
  - Can be held criminally liable for the activities of employees who violate an environmental law, even if the officer did not have personal knowledge of the violation. Typically requests legal opinion on the status of environmental compliance.
- **Deal Maker**
  - “Due diligence” includes identifying environmental liabilities and regulatory compliance.



# Your Job and the Environment

- **Plant Manager**

- This person does it all -- engineering, finance, labor relations, and numerous other concerns, including environment. He authorizes signatures for all needed permits to operate, and is personally liable
- ***You - Responsible*** for all of the above
- You are the person everyone above relies upon to answer these questions:
  - What environmental rules apply and what do they require ?
  - Do we have all required permits to operate ?
  - Are we in compliance?
  - What are the potential penalties, and how you can avoid or minimize penalties by conducting voluntary audits and self-reporting violations



# Laws Applicable to Operations

- CLEAN WATER ACT - CWA
- CLEAN AIR ACT - CAA
- RESOURCE CONSERVATION & RECOVERY ACT - RCRA
- TOXIC SUBSTANCES CONTROL ACT - TSCA
- EMERGENCY PLANNING & COMMUNITY RIGHT-TO-KNOW ACT - EPCRA
- SAFE DRINKING WATER ACT - SDWA

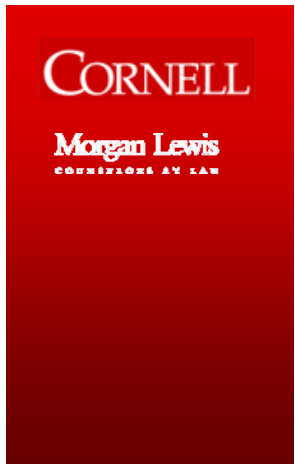


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# Laws Applicable to Past Operations & Expansions

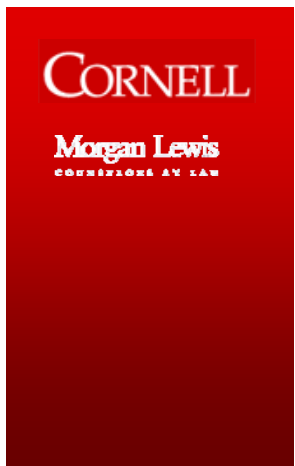
- SUPERFUND: THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT - CERCLA
  - strict liability for past disposal
- ENDANGERED SPECIES ACT - ESA
  - limits/bans construction in designated habitat
- NATIONAL ENVIRONMENTAL POLICY ACT - NEPA
  - Environmental Impact Statements prior to federal permits
- COASTAL ZONE MANAGEMENT ACT - CZMA
  - Plant must be consistent with state's CZMA plan
- STATE & LOCAL ZONING, PERMITS , HEARINGS



# USEPA



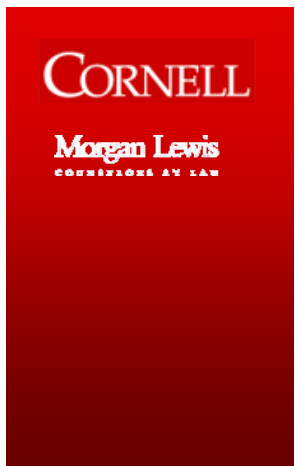
- 1 -Laws enacted by the President/Congress
- 2 = EPA proposes a Rule to implement the statute
- 3- comments are submitted, public hearings, then a final rule published in the Federal Register, and eventually in the annual update to the Code of Federal Regulations (CFR).
- 4 - limited time period for judicial review
- 5 - rules supplemented by Guidance Documents





## Department of Environmental Conservation

- Same pattern as EPA
- In addition, NYDEC promulgates rules to implement EPA requirements.
- Once EPA approves of the state's rules, the state is “delegated “ authority from EPA





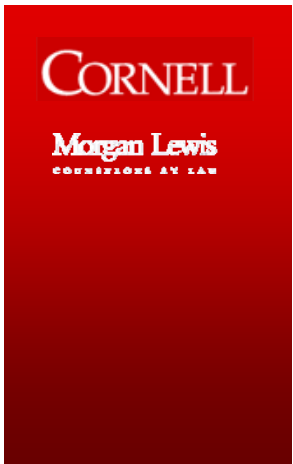
# Tompkins County

## Town of Ithaca

### City of Ithaca

Village of Cayuga Heights  
CORNELL UNIVERSITY

- Follow Federal and State laws and rules
- Zoning



# Regulation Citations

## GUIDE TO SELECTED FEDERAL ENVIRONMENTAL REGULATIONS

### RCRA HAZARDOUS WASTE MANAGEMENT REGULATIONS

Solid Waste Disposal Facility Criteria 40 CFR Parts 257, 258  
 General - Definitions and Delisting  
 Procedures ..... 40 CFR Part 260  
 Identification and Listing of Hazardous Waste - Definition of Solid/Hazardous Waste;  
 Recycling; Small Quantity Generators ... 40 CFR Part 261  
 Generator Standards ..... 40 CFR Part 262  
 Transporter Standards ..... 40 CFR Part 263  
 Standards for Treatment, Storage, and Disposal Facilities ..... 40 CFR Part 264  
 Interim Status Standards for Treatment, Storage, and Disposal Facilities ..... 40 CFR Part 265  
 Recyclable Material Standards; Waste Combustion; Batteries; Military Munitions 40 CFR Part 266  
 Land Disposal Restrictions ..... 40 CFR Part 268  
 Permit Issuance Procedures ..... 40 CFR Part 270  
 State Programs ..... 40 CFR Parts 271-272  
 Underground Storage Tanks ..... 40 CFR Parts 280-282

### SUPERFUND

National Contingency Plan ..... 40 CFR Part 300  
 Hazard Ranking System ..... 40 CFR Part 300, App. A  
 National Priorities List ..... 40 CFR Part 300, App. B  
 Spill Reporting ..... 40 CFR Parts 302, 355  
 Citizen Rewards ..... 40 CFR Part 303  
 Arbitration Procedures for Small Superfund Cost Recovery Claims ..... 40 CFR Part 304  
 Reimbursement to Local Governments ... 40 CFR Part 310  
 Natural Resource Damage Assessments (Department of Interior) ..... 43 CFR Part 11  
 Natural Resource Damage Assessments (National Oceanic and Atmospheric Administration) 15 CFR Part 990

### EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT

Trade Secrecy Claims and Disclosure to Health Professionals ..... 40 CFR Part 350

Emergency Planning and Notification Procedures - Spill Reporting ..... 40 CFR Parts 302, 355  
 Hazardous Chemical Reporting (MSDS; Tiers One and Two) ..... 40 CFR Part 370  
 Toxic Chemical Release Reporting (Form R) ..... 40 CFR Part 372

### CLEAN AIR ACT

National Ambient Air Quality Standards (NAAQS) ..... 40 CFR Part 50  
 State Implementation Plan Requirements (SIP; PSD) ..... 40 CFR Parts 51-52  
 Ambient Air Monitoring Reference and Equivalent Methods ..... 40 CFR Part 53  
 Citizen Suit Notification ..... 40 CFR Part 54  
 Regional Consistency ..... 40 CFR Part 56  
 Ambient Air Quality Surveillance ..... 40 CFR Part 58  
 Performance Standards for New Stationary Sources ..... 40 CFR Part 60  
 National Emission Standards for Hazardous Air Pollutants (NESHAPs) ..... 40 CFR Part 61  
 NESHAPs for Source Categories ..... 40 CFR Part 63  
 Noncompliance Penalties ..... 40 CFR Parts 66-67  
 Accidental Release-Risk Management Programs ..... 40 CFR Part 68  
 Clean Air Act Exemptions ..... 40 CFR Part 69  
 State Operating Permit Program ..... 40 CFR Part 70  
 Acid Rain Program ..... 40 CFR Parts 72-78  
 Fuels and Fuel Additives ..... 40 CFR Parts 79-80  
 Air Quality Planning Areas ..... 40 CFR Part 81  
 Stratospheric Ozone Protection ..... 40 CFR Part 82  
 Motor Vehicle and Aircraft Controls ... 40 CFR Parts 85-88

### PESTICIDES

Pesticide Registration and Classification Procedures ..... 40 CFR Part 152  
 Registration Policies and Interpretations . 40 CFR Part 153  
 Special Review Procedures ..... 40 CFR Part 154  
 Registration Standards ..... 40 CFR Part 155  
 Labeling Requirements ..... 40 CFR Part 156  
 Packaging Requirements ..... 40 CFR Part 157  
 Registration Data Requirements ..... 40 CFR Part 158  
 Good Laboratory Practice Standards .... 40 CFR Part 160  
 State Registration of Pesticide Products .. 40 CFR Part 162

# Regulation Citations (cont.)

## GUIDE TO SELECTED FEDERAL ENVIRONMENTAL REGULATIONS

Certification of Usefulness	40 CFR Part 163
Hearings	40 CFR Part 164
Emergency Use Exemptions	40 CFR Part 166
Registration and Reporting of Pesticide-Producing Establishments	40 CFR Part 167
Enforcement Policies and Interpretations	40 CFR Part 168
Production and Distribution	
Books and Records	40 CFR Part 169
[Agricultural] Worker Protection Standards	40 CFR Part 170
Certification of Pesticide Applicators	40 CFR Part 171
Experimental Use Permits	40 CFR Part 172
Procedures for the Rescission of State Enforcement Responsibility	40 CFR Part 173
Food Additive Regulations	40 CFR Part 177
Objections and Requests for Hearing	40 CFR Part 178
Agricultural Commodity Tolerances and Exemptions	40 CFR Part 180
Food Tolerances	40 CFR Part 185
Animal Feed Tolerances	40 CFR Part 186

### TOXIC SUBSTANCES CONTROL ACT

General	40 CFR Parts 700-702
Reporting and Recordkeeping	40 CFR Part 704
Chemical Imports and Exports	40 CFR Part 707
Inventory Reporting (TSCA § 8(b))	40 CFR Part 710
Preliminary Assessment Information Report—(TSCA § 8(a))	40 CFR Part 712
Health and Safety Data Reporting (TSCA § 8(d))	40 CFR Part 716
Allegations of Significant Adverse Reactions (TSCA § 8(c))	40 CFR Part 717
Premanufacture Notification (TSCA § 5)	40 CFR Part 720
Significant New Uses of Chemical Substances	40 CFR Part 721
Premanufacture Notification Exemptions	40 CFR Part 723
Microorganisms Reporting and Review	40 CFR Part 725
Lead-Based Paint Poison Prevention	40 CFR Part 745
Metalworking Fluids	40 CFR Part 747
Water Treatment Chemicals	40 CFR Part 749
Section 6 Rulemaking Procedures	40 CFR Part 750
PCB Use	40 CFR Part 761
Asbestos	40 CFR Part 763
Dibenzo-Para-Dioxins/Dibenzofurans	40 CFR Part 766
Testing Consent Agreements and Test Rules	40 CFR Part 790
Data Reimbursement	40 CFR Part 791
Good Laboratory Standards	40 CFR Part 792
Testing Guidelines, Chemical Fate, Environmental Effects, Health Effects	40 CFR Parts 795-798
Identification of Substances for Testing	40 CFR Part 799

### ATOMIC ENERGY AND RADIOACTIVE MATERIALS

NRC Licensing Proceedings and Issuance of Orders	10 CFR Part 2
Notices, Instructions, and Reports to Workers: Inspection and Investigations	10 CFR Part 19
Standards for Protection Against Radiation	10 CFR Part 20
Reporting of Defects and Noncompliance	10 CFR Part 21
Licenses for Radiography and Safety Requirements for Radiographic Operations	10 CFR Part 34
Medical Use of Byproduct Material	10 CFR Part 35
Licenses and Radiation Safety Requirements for Irradiators	10 CFR Part 36
Domestic Licensing of Source Material	10 CFR Part 40
Domestic Licensing of Production and Utilization Facilities	10 CFR Part 50
Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions	10 CFR Part 51
Licensing Requirements for Land Disposal	10 CFR Part 61
Procedures for Emergency Access to Disposal Facilities	10 CFR Part 62
Packaging and Transportation of Radioactive Material	10 CFR Part 71
Exports and Imports	10 CFR Part 110
Exemptions, Agreement States, and Offshore Waters	10 CFR Part 150
Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services	10 CFR Part 170
Annual Fees for Reactor Operating and Other Licenses	10 CFR Part 171
National Emission Standards for Hazardous Air Pollutants (NESHAPs)	40 CFR Part 61

### OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

General	29 CFR Parts 1902-1928
Occupational Health and Safety Standards	29 CFR Part 1910
Hazard Communication	29 CFR § 1910.1200

# Regulation Citations (cont.)

## GUIDE TO SELECTED FEDERAL ENVIRONMENTAL REGULATIONS

### CLEAN WATER ACT

Discharge of Oil and SPCC Plans . . .	40 CFR Parts 109-112
State Certification of Activities Requiring a Federal License or Permit . . .	40 CFR Part 121
NPDES Permit Program . . . . .	40 CFR Part 122
State Permit Program (SPDES) Requirements . . . . .	40 CFR Part 123
Permit Decisionmaking Procedures . . . . .	40 CFR Part 124
NPDES Criteria and Standards . . . . .	40 CFR Part 125
Water Quality Planning and Management . . . . .	40 CFR Part 130
Water Quality Standards . . . . .	40 CFR Part 131
Secondary Treatment Regulation . . . . .	40 CFR Part 133
Citizen Suits . . . . .	40 CFR Part 135
Test Procedure Guidelines for Pollutant Analysis . . . . .	40 CFR Part 136
Lists of Conventional and Toxic Pollutants; pH Limits . . . . .	40 CFR Part 401
Pretreatment Regulations . . . . .	40 CFR Part 403
Effluent Limitation Guidelines and Performance Standards; Pretreatment Standards . . . . .	40 CFR Parts 405-471

### WETLAND REGULATIONS EPA

Section 401(b) Guidelines . . . . .	40 CFR Part 230
Section 404(c) Veto Procedures . . . . .	40 CFR Part 231
Section 404 Program Definitions; Exempt Activities . . . . .	40 CFR Part 232
State 404 Programs . . . . .	40 CFR Part 233

### SAFE DRINKING WATER ACT

Drinking Water Standards (MCL and MCLG) and Regulations . . . . .	40 CFR Parts 141-142
National Secondary Drinking Water Regulations . . . . .	40 CFR Part 143
Underground Injection Control Programs . . . . .	40 CFR Parts 144-148

### OCEAN DUMPING

Ocean Dumping . . . . .	40 CFR Parts 220-229
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### ARMY CORPS OF ENGINEERS

General Policies . . . . .	33 CFR Part 320
Dam Permits . . . . .	33 CFR Part 321
Permits for Work Affecting Navigable Waters . . . . .	33 CFR Part 322
Permits for Discharges of Dredged or Fill Material . . . . .	33 CFR Part 323
Permits for Ocean Dumping of Dredged Material . . . . .	33 CFR Part 324
Permit Processing . . . . .	33 CFR Part 325
Enforcement, Supervision, and Inspection . . . . .	33 CFR Part 326
Public Hearings . . . . .	33 CFR Part 327
Definition of Navigable Waters of the United States . . . . .	33 CFR Part 329
Nationwide Permits . . . . .	33 CFR Part 330

### ENVIRONMENTAL IMPACT STATEMENTS, COASTAL ZONE MANAGEMENT ACT, AND ENDANGERED SPECIES ACT

Environmental Impact Statements; Council on Environmental Quality Regulations . . . . .	40 CFR Parts 1500-1508
Ocean & Coastal Resource Management NOAA Regulations . . . . .	15 CFR Part 930
Joint Agency Endangered Species Regulations . . . . .	50 CFR Parts 17, 401-453

### FREEDOM OF INFORMATION ACT

EPA Procedures . . . . .	40 CFR Part 2
NRC Procedures . . . . .	10 CFR Part 9



# Regulation Citations (cont.)

## ENVIRONMENTAL LAW ACRONYMS

### ACRONYMS FOR SELECTED ENVIRONMENTAL STATUTES

AEA	Atomic Energy Act of 1954 (42 U.S.C. §§ 2011-2297g-4); Energy Reorganization Act of 1974 (42 U.S.C. §§ 5801-5891)
AHERA	Asbestos Hazard Emergency Response Act of 1986 (see TSCA)
APA	Acid Precipitation Act of 1980 (42 U.S.C. §§ 8901-8912)
APA	Administrative Procedure Act (5 U.S.C. §§ 551-559, 701-703)
CAA	Clean Air Act (42 U.S.C. §§ 7401-7626)
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601-9675)
CWA	Clean Water Act (see FWPCA)
CZMA	Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451-1464)
EPCRA	Emergency Planning and Community Right-to-Know Act (42 U.S.C. §§ 11001-11050)
ESA	Endangered Species Act (15 U.S.C. §§ 1531-1544)
FFDCA	Federal Food, Drug & Cosmetic Act (21 U.S.C. §§ 301-395)
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §§ 136-136y)
FOIA	Freedom of Information Act (see APA)
FQPA	Food Quality Protection Act (7 U.S.C. §§ 136-136y; 21 U.S.C. §§ 301-395)
FWPCA	Federal Water Pollution Control Act (33 U.S.C. §§ 1251-1387)
HMTA	Hazardous Materials Transportation Act (49 U.S.C. §§ 1801-1813)
HSWA	Hazardous and Solid Waste Amendments of 1984 (see RCRA)
LLRWPA	Low-Level Radioactive Waste Policy Act (42 U.S.C. §§ 2021b to 2021j)
MPRSA	Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. §§ 1431-1445; 33 U.S.C. §§ 1401-1445)
NEPA	National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4347)

NWPA	Nuclear Waste Policy Act of 1982 (42 U.S.C. §§ 10101-10270)
OSHA	Occupational Safety and Health Act of 1970 (29 U.S.C. §§ 651-678)
OPA	Oil Pollution Act of 1990 (33 U.S.C. §§ 2701-2761)
PHSA	Public Health Service Act (see SDWA)
RCRA	Resource Conservation and Recovery Act (42 U.S.C. §§ 6901-6992)
SARA	Superfund Amendments and Reauthorization Act of 1986 (see CERCLA and EPCRA)
SDWA	Safe Drinking Water Act (42 U.S.C. §§ 300f-300j-26)
SMCRA	Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. §§ 1201-1328)
SWDA	Solid Waste Disposal Act (see RCRA)
TSCA	Toxic Substances Control Act (15 U.S.C. §§ 2601-2671)
UMTRCA	Uranium Mill Tailings Radiation Control Act of 1978 (42 USC §§ 7901-7942)
WQA	Water Quality Act of 1987 (see FWPCA)

### ACRONYMS UNDER SELECTED ENVIRONMENTAL LAWS

<b>AEA</b>	
ALARA	As Low as Reasonably Achievable
ASLB	Atomic Safety and Licensing Board
EDO	Executive Director for Operations
OE	Office of Enforcement
OI	Office of Investigations
NMSS	Office of Nuclear Material Safety and Safeguards
NRR	Office of Nuclear Reactor Regulation
OCR	Office of Civilian Radioactive Waste Management
SECY	Secretary of the Commission Paper
SRM	Staff Requirements Memorandum

### CAA

BACT	Best Available Control Technology
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# Regulation Citations (cont.)

## ENVIRONMENTAL LAW ACRONYMS

CAAA	Clean Air Act Amendments	NPL	National Priorities List
CO	Carbon Monoxide	NRC	National Response Center
ERC	Emission Reduction Credits	OERR	Office of Emergency and Remedial Response
ESP	Electrostatic Precipitation	OU	Operable Unit
FBC	Fluidized Bed Combustion	OSC	On-Scene Coordinator
FGD	Flue Gas Desulfurization	PDD	Preauthorization Decision Document
GEP	Good Engineering Practice	PHE	Public Health Evaluation
HC	Hydrocarbons	PRP	Potentially Responsible Party
LAER	Lowest Achievable Emission Rate	QA/QC	Quality Assurance/Quality Control
MACT	Maximum Achievable Control Technology	RA	Remedial Action
NAAQS	National Ambient Air Quality Standards	RCRIS	RCRA Information System
NESHAP	National Emissions Standards for Hazardous Air Pollutants	RD	Remedial Design
NOx	Nitrogen Oxide	RI	Remedial Investigation
NSPS	New Source Performance Standards	ROD	Record of Decision
PSD	Prevention of Significant Deterioration	RPM	Remedial Project Manager
RACT	Reasonably Available Control Technology	RQ	Reportable Quantity
RAM	Real-Time Air-Quality Simulation Model	SACM	Superfund Accelerated Cleanup Model
RMP	Risk Management Plan	SCAP	Superfund Comprehensive Accomplishments Plan
RVP	Reid Vapor Pressure	SERC	State Emergency Response Commission
SIP	State Implementation Plan	SETS	Superfund Enforcement Tracking System
SO2	Sulfur Dioxide	SOW	Statement of Work
TSP	Total Suspended Particulates	TAG	Technical Assistance Grant
VMT	Vehicle Miles Traveled	UAO	Unilateral Administrative Order
VOC	Volatile Organic Compound	UST	Underground Storage Tank

## CERCLA, SARA, EPCRA

ADR	Alternative Dispute Resolution
ARARs	Applicable or Relevant and Appropriate Requirements
CERCLIS	Comprehensive Environmental Response, Compensation, and Liability Information System
EA	Endangerment Assessment
EHS	Extremely Hazardous Substance
ESD	Explanation of Significant Difference
FS	Feasibility Study
HRS	Hazard Ranking System
LEPC	Local Emergency Planning Committee
MSDS	Material Safety Data Sheet
MSW	Municipal Solid Waste
NBAR	Nonbinding Preliminary Allocation of Responsibility
NCP	National Contingency Plan

## CWA, FWPCA, OPA, SDWA

BAT	Best Available Technology
BCT	Best Conventional Technology
BOD	Biochemical Oxygen Demand
BPCTCA	Best Practical Control Technology Currently Available
BPT	Best Practicable Technology
CAPA	Critical Aquifer Protection Area
COD	Chemical Oxygen Demand
CWT	Centralized Waste Treatment
DO	Dissolved Oxygen
DMR	Discharge Monitoring Report
ITR	Innovative Technology Requirement
MCL	Maximum Contaminant Level
MCLG	Maximum Contaminant Level Goal
MEP	Maximum Extent Practicable
NPDES	National Pollutant Discharge Elimination System
NPDWS	National Primary Drinking Water Standards

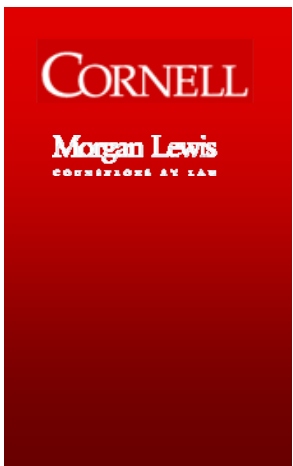
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# Quiz, Returnable Wednesday

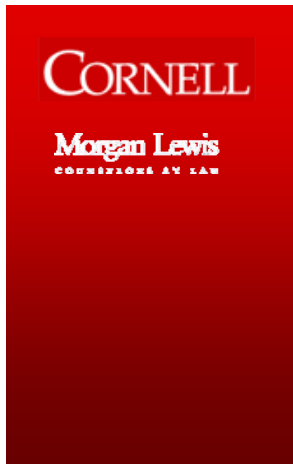
- **What Permits and Statutory Reviews and other Authorizations are Required to Obtain Approval to Build a New Federally Funded Cornell power plant on campus with pipelines taking/discharging water from/into Lake Cayuga ?**
  - What environmental rules apply and what do they require ?
  - Identify Laws and rules by name, formal citation unnecessary
  - How much time do you anticipate will be needed ?  
What's the fast track timeframe?
  - What are the potential penalties if you omit a required approval?



# CLEAN WATER ACT (1970, 1972, and 1977) :

33 U.S.C. sections 1251-1387.

- Be sure you have Discharge Permits or Authorization
  - National Pollutant Discharge Elimination System (“NPDES”) permits - issued by EPA or States, pursuant to EPA category - limits many substances and parameters
    - Technology based
    - State water quality based standards
  - Reporting obligations.
  - Pretreatment limits for indirect discharges to city treatment plants, city issues authorization to use sewer
  - Electroplating Rules: 40 CFR 413
  - Metal Finishing Rules: 40 CFR 433
  - Plastics Molding Rules: 40 CFR 463
  - Metal Molding & Casting Rules: 40 CFR 464
  - Electrical and Electronic Components: 40 CFR 469



# Spill Reporting and Spill Prevention

- must report “immediately” to the National Response Center
- 800 424 8802
- SPCC Plans - 40 CFR 112
  - Spill Prevention Control & Countermeasure Plans
- identify tanks, pipes, that could spill into a waterway
- design & implement plans to prevent spills,
- be prepared to promptly respond to spills
  - report
  - call for cleanup contractors
  - cleanup equipment on site, ready for emergency use



# CLEAN AIR ACT (1970 1977, and 1990)

42 USC 7401-7661

— Permits needed, limitations derived from:

Generally:

- National Ambient Air Quality Standards (“NAAQS”):
  - sulfur oxides, particulate matter, carbon monoxide,
  - ozone, nitrogen oxide, lead
- State Implementation Plans (“SIPs”),
- Air Quality Control Regions (“AQCRs”)
- Specifically:
  - Toxic Air Pollutants: Maximum Achievable Control Technology (“MACT”)
  - New Source Performance Standards (“NSPS”)
- Special substances: CFCs – protect ozone layer

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# New Source Review

- Permit applications due PRIOR TO CONSTRUCTION
- Preconstruction modeling
- New Source Performance Standards (“NSPS”)
- Prevention of Significant Deterioration review (“PSD”).
- Prohibitions on new emissions in nonattainment areas
- Plan ahead for delays, hearings, appeals

- - PRESIDENT BUSH - CLEAN SKIES ACT of 2005 - introduced, not enacted
  - limits on sulfur dioxide, nitrogen oxides and, for the first time, mercury
  - NOT regulate carbon dioxide
  - NOT seek to regulate green house gases to reduce global warming
  - Senate Environment Chairman Inhof: “ called global warming “ the greatest hoax ever perpetrated on the American people
  - sets emission limits “caps” and allows facilities to “trade” the right to emit tons of pollutants. A plant that emits less than its cap, has rights to sell, a company that exceeds its cap can buy emission credits instead of installing equipment
  - - that makes sense from a nationwide economic standpoint, but if you live close to a plant that has purchased credits instead of reducing emissions, you might have a different opinion

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# RISK MANAGEMENT PLANS

Prompted by Bhopal pesticide explosion - Now Useful as Anti-Terrorism Plan

- About 170 EXTREMELY HAZARDOUS SUBSTANCES and threshold quantities for the Risk Management Program for Chemical Accidental Release Prevention listed at 40 CFR 68.130.
  - See List of Lists
- Worst case analysis of toxic vapor plumes for listed substances
- Possibly required for other substances under the General Duty Clause of CAA section 112r.
- Identify Potential Hazards: explosive-type release points
- Design & implement plans to minimize possibility of release
- Minimize consequences of release - Be prepared to immediately respond to release





## LIST OF LISTS

### Consolidated List of Chemicals Subject to the Emergency Planning and Community Right-To-Know Act (EPCRA) and Section 112(r) of the Clean Air Act

- EPCRA Section 302 Extremely Hazardous Substances
- CERCLA Hazardous Substances
- EPCRA Section 313 Toxic Chemicals
- CAA 112(r) Regulated Chemicals For Accidental Release Prevention

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United States  
Environmental Protection  
Agency

Office of Solid Waste  
and Emergency Response  
Office of Enforcement  
and Compliance Assurance

EPA 550-B00-002  
May 2000  
[www.epa.gov/ceppo/](http://www.epa.gov/ceppo/)



# GUIDANCE FOR IMPLEMENTATION OF THE GENERAL DUTY CLAUSE CLEAN AIR ACT SECTION 112(r)(1)



# Toxic Substances Control Act of 1976 (“TSCA”) 15 U.S.C. sections 2601 et seq.

- Inventory of existing chemicals initially published in 1979
  - cannot import or manufacture new chemicals prior to:
    - Premanufacture / import notification (“PMN”)
    - “articles” & FDA regulated devices exempt
    - EPA can ban sale of and recall products containing new chemicals that are not on the inventory
- PCB restrictions
- Import certifications
- Substantial risk reporting and record keeping
- Unlike Europe, no pre-testing required to place new chemical on Inventory



# Safe Drinking Water Act

(1974, 1996) 42 U.S.C. sections 300f et seq.

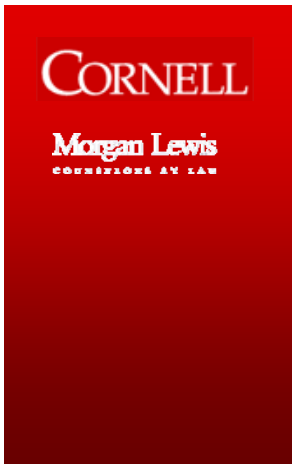
- Applies to (1) water utilities , (2) industrial plants which supply their own drinking water (do not purchase water from utility), and even to small remote trailer parks, restaurants, service stations which serve 25 or more people.
- Establishes Maximum Contaminant Levels (MCLs) in drinking water.
- Imposes mandatory treatment techniques
- Bans certain types of underground injection of wastes
- Terrorism laws -Vulnerability Assessments/Plans

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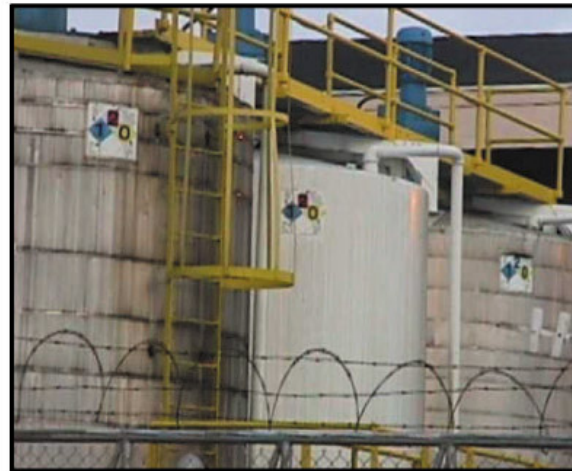
# RESOURCE CONSERVATION & RECOVERY ACT (“RCRA”) (1976, 1984) 42 U.S.C. sections 321 et seq.

- What is a hazardous waste? A solid waste that’s hazardous.
  - Characteristics:
    - corrosivity
    - ignitability
    - reactivity
    - toxicity as measured by a special leaching protocol
  - Lists
- Controls:
  - Permits required for treatment, storage, and disposal
  - 90 day storage exempt
  - Land disposal ban for untreated wastes
  - Report and repair leaking tanks
  - Corrective Action

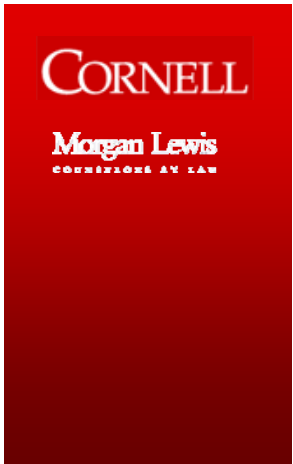




# Protocol for Conducting Environmental Compliance Audits of Treatment, Storage and Disposal Facilities under the Resource Conservation and Recovery Act



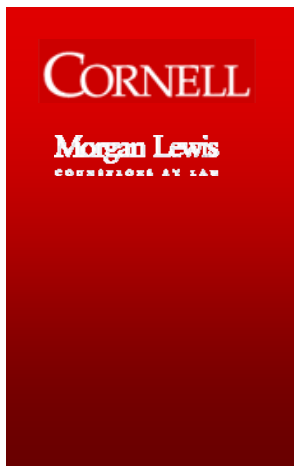
EPA Office of Compliance



# Emergency Planning and Community Right-to-Know Act (1986)

42 U.S.C. 11011 et seq

- Facility plans
  - Facility Emergency Response coordinator/manager
  - Spill and vapor release reporting
  - Annual inventory reporting ( Tier I or II reports)
  - Annual toxic chemical emissions reporting = FORM R
    - Mercury 10 pounds
    - Lead 100 pounds
    - Other - Does the facility manufacture or process ANY single toxic chemical in excess of 25,000 pounds or otherwise use a toxic chemical in excess of 10,000 pounds for the applicable calendar year?
  - Material Safety Data Sheet (“MSDS”)



United States  
Environmental Protection  
Agency

Office of Solid Waste  
and Emergency Response  
(5104)

EPA 550-B99-008  
August 1999  
[www.epa.gov/ceppo/](http://www.epa.gov/ceppo/)




# Guidance for Auditing Risk Management Plans/Programs under Clean Air Act Section 112(r)



Chemical Emergency Preparedness and Prevention Office

Printed on recycled paper

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 **EMERGENCY PLANNING AND  
COMMUNITY RIGHT-TO-KNOW  
ACT - SECTION 313:**

**Guidance for Reporting Releases and Other  
Waste Management Quantities of Toxic  
Chemicals: Lead and Lead Compounds**

Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) requires certain facilities manufacturing, processing, or otherwise using listed toxic chemicals to report the annual quantity of such chemicals entering each environmental medium. Such facilities must also report pollution prevention and recycling data for such chemicals, pursuant to section 6607 of the Pollution Prevention Act, 42 U.S.C. 13106.

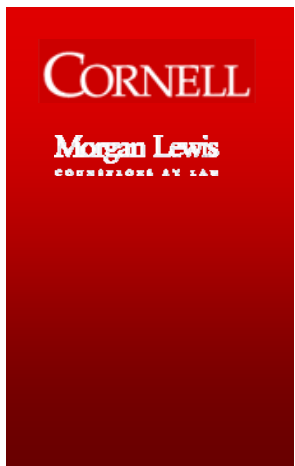
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# New Plants and Expansion

- National Environmental Policy Act of 1969 (“NEPA”) 42 U.S.C. 4321-4347
  - Environmental Impact Statements
  - Public Review - procedural only
- Coastal Zone Management Act (1973)
  - Bars new development that is not consistent with a state’s approved coastal zone management plan
  - Consistency certification
- Endangered Species Act (1973)
  - 7 U.S.C. 136;16 U.S.C. 460 et seq.
  - Determine if listed species present
  - Prohibits adverse impact on endangered species



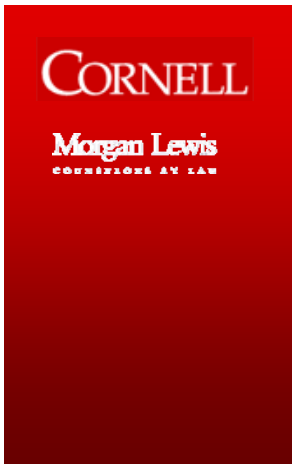
# New Plants and Expansion

- Clean Water Act - Section 404 permits from Corps of Engineers for wetlands development
  - Prohibitions on non-water dependent structures in wetlands
  - 3 Steps:
    - Avoid wetlands - must be water dependent
    - Minimize impact - mitigation
    - Compensation: no net loss
- Plan ahead - long lead time
- NIMBY syndrome
  - The STABLEX example
  - All Federal permits



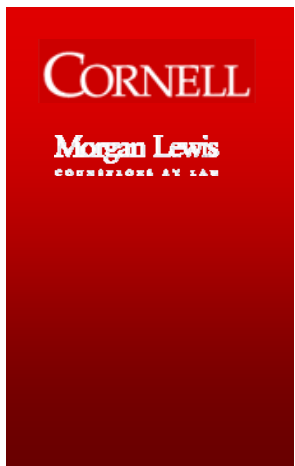
# Extraordinary and Unpredictable Operational Costs, Liabilities

- Superfund - Comprehensive Environmental Response, Compensation and Liability Act of 1980 (amended 1986 by S.A.R.A.) 42 U.S.C.9601 et seq.
  - Multi-million dollar strict liability for legal disposal decades earlier
  - owner/operator, generator, transporter
  - Spill Reporting
- Insurance
  - pollution exclusion clause?
  - What is sudden and accidental?
  - Judicial forum?



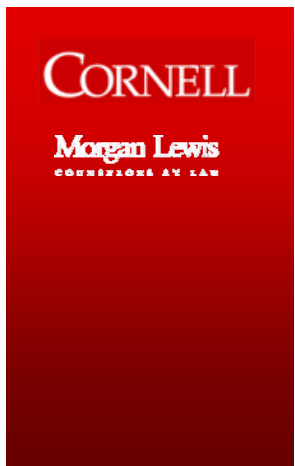
# Special Considerations

- Acquisitions and Divestitures / Closures
  - Successor Liability
  - "Piercing the Corporate Veil"
    - Is the remote parent liable for subsidiary
  - Establish indemnities and escrows to pay for hidden liabilities, or specifically contract away liability.
  - State Transfer Laws
    - Pre-transfer obligations such as New Jersey Industrial Site Recovery Act



# Brownfields - Redevelopment of Contaminated Properties

- Lender Liability Limited:
  - Asset Conservation , Lender Liability and Deposit Insurance Protection Act of 1996
  - A lender can foreclose without becoming a CERCLA PRP
- A New Owner Can Avoid Liability for Predecessor
  - 2002 Small Business & Brownfields Small Business Liability Relief and Brownfields Revitalization Act



# Environmental Liabilities/Penalties

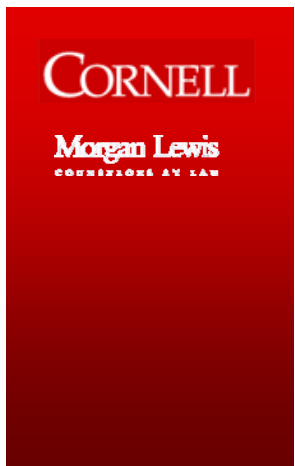
- Civil
  - Surprise inspections
  - Whistleblowers
  - strict liability regardless of knowledge
  - Administrative: like a ticket
  - Judicial
    - typically \$27,500 per day
    - some reach more than \$ ten million
    - injunctions: plant shutdown
- Criminal Penalties (i.e., jail)
  - for knowing deliberate violations
  - false reporting
  - personal injuries
  - major damage
  - long history of problems
  - injunctions
  - barred from government contracts
  - “responsible corporate officer” liable too even if without direct involvement
  - an upstate NY example<sup>35</sup>

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# Environmental Liabilities/Penalties

- Toxic Torts, Punitive Damages, and Citizen Suits
  - Common Law Theories of Negligence, Strict Liability, Nuisance, Etc.
  - ASBESTOS - The Haliburton example (claims against Dresser Industries)
  - Toxic Tort/Class Action Reforms Introduced in Congress
  - Statutory Actions
    - Citizen Suits Under the Clean Water Act, Clean Air Act, EPCRA, and RCRA.
    - Private Party Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation and Liability Act



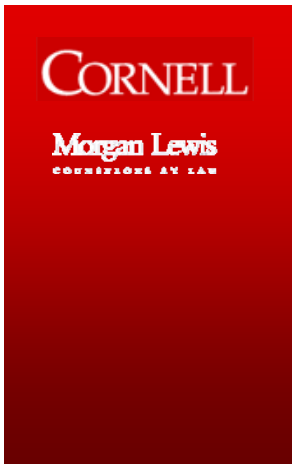
# Other Planning Considerations: State, Local and Community Laws & Rules

- State comparable to federal, may be more restrictive
- County zoning restrictions - hearings, exceptions
- Town
- City & Village
- Regional water boards, air quality districts
- Community restrictive covenants, rules
- Deed Restrictions



# Typical Compliance Audit Concerns:

- **CAA** - permits
  - Risk Management Plan (abbreviated version) 40 CFR 68
- **CWA** - pretreatment limits
- **EPCRA** - Form R submissions for all covered substances
- **TSCA** - are all substances on the Inventory or exempt



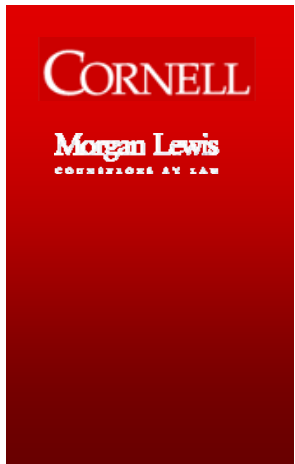
# Typical Concerns:

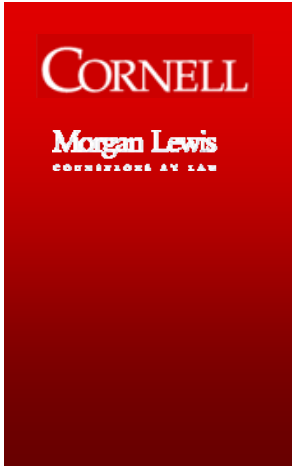
- **RCRA rules** 40 CFR 261-280
  - identifying what waste is hazardous
  - cathode ray tubes, if discarded, are HW
  - training plan 40 CFR 262.34(a)(4) and 265.16
  - labeling, marking, inspecting containers:
    - Satellite Accumulation 40 CFR 262.34(c)
    - Universal Waste 40 CFR 273
    - Emergency preparedness and contingency plan 40 CFR 262.34(a), 265
  - 90 day limit, otherwise need permit & become subject to extremely onerous requirements

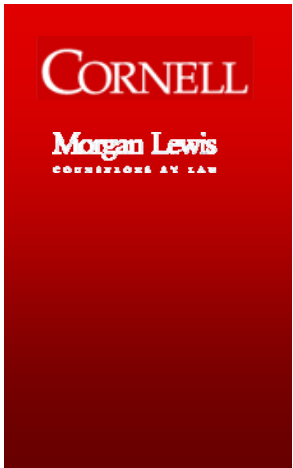


# Compliance Management Tools

- Internal Environmental Compliance Audits
  - ISO 14,000 is NOT a compliance audit
  - ISO 14,000 is not required by law
- Training
- Compliance audits leading to prompt voluntary self-reporting to EPA/ state environmental government agencies ( and correction of deficiencies ) can result in no penalty
- U.S. Department of Justice Guidelines suggest no criminal penalties sought for many types of self-disclosed environmental violations







# Federal Register

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Tuesday,  
April 11, 2000

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Part VII

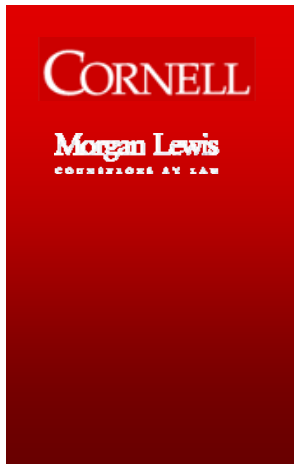
## Environmental Protection Agency

Incentives for Self-Policing: Discovery,  
Disclosure, Correction and Prevention of  
Violations; Notice

## **AUDIT POLICY ELIGIBILITY CHECKLIST**

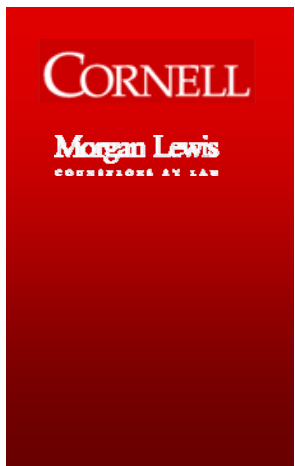
*revised March / 2002*

This document is provided by the U.S. Environmental Protection Agency (EPA) to voluntarily disclose violations under the EPA's policy entitled, *Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations*, 65 Fed. Reg. 19618 (April 11, 2000) (Audit Policy). Completion of this checklist will greatly expedite EPA's determination if your facility meet all nine (9) conditions of the Audit Policy thereby qualifying your facility for 100% penalty mitigation for gravity based penalties.



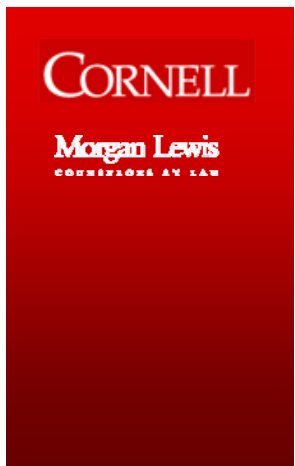
# Securities & Exchange Commission

- Disclose lawsuit
- Disclose anticipated cleanup costs



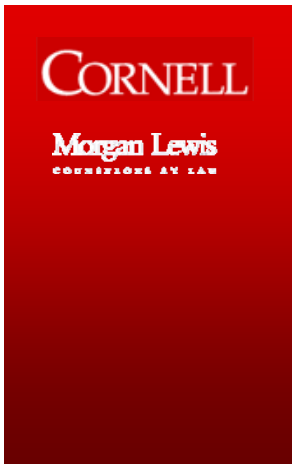
# ENVIRONMENTAL DUE DILIGENCE REVIEW OF TARGET COMPANY'S ENVIRONMENTAL DOCUMENTATION

- General Information (from seller, via FOIA, etc.)
  - Facility plot plans.
  - Environmental spill/accident/incident report files.
  - Internal reports, audits, on the environmental compliance status.
  - Correspondence to and from federal, state, and local environmental agencies.
  - Consent orders/decrees or compliance schedules related to environmental matters.
  - Pleadings in any pending litigation related to environmental matters.
  - Environmental liability insurance policies.



# ENVIRONMENTAL DUE DILIGENCE REVIEW OF TARGET COMPANY'S ENVIRONMENTAL DOCUMENTATION

- Air Emissions/Noise/Odors
  - Federal, state, and local air permits and permit applications for construction, modification, and operation.
  - Air pollution emergency plan. Risk Management Plan.
  - Records of emissions testing for all stacks or process equipment vents, and any other air emissions monitoring records. Records of continuous stack monitoring.
  - Routine monitoring reports to regulatory agencies, and exceedances reports.
  - Copies of any neighborhood complaints.
  - Records of new construction and modifications; maintenance work on air pollution equipment, petroleum storage tank secondary seals, etc.



# ENVIRONMENTAL DUE DILIGENCE REVIEW OF TARGET COMPANY'S ENVIRONMENTAL DOCUMENTATION

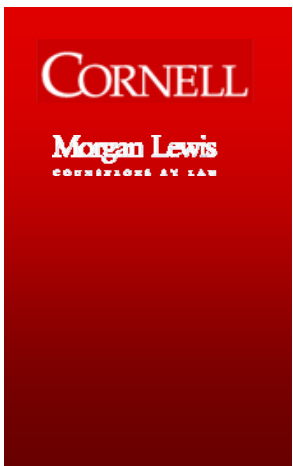
- Waste water Management
  - Federal, state, and local wastewater permits and permit applications.
  - DMRs and Regulatory correspondence, including excursions.
- Spill Prevention, Control, Reporting, and Cleanup
  - Spill reports to government agencies.
  - Spill Prevention and Countermeasures Plan (“SPCC”).
  - Tank structural integrity inspection and leak test records.
- Underground Storage Tanks
  - Inventory control, monitoring, leak detection and tank testing records.
  - Records of reported leaks from underground storage tanks. 47

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# ENVIRONMENTAL DUE DILIGENCE REVIEW OF TARGET COMPANY'S ENVIRONMENTAL DOCUMENTATION

- Solid/Hazardous Waste
  - RCRA notifications for generation, transportation, treatment, storage, and disposal.
  - Federal, state, and local waste management permits and permit applications.
  - Any regulatory correspondence related to those permits or waste management.
  - Records of inactive waste disposal sites.
  - Hazardous material shipping documents and hazardous waste manifests.
  - Facility ground water monitoring plan/annual reports.



# ENVIRONMENTAL DUE DILIGENCE REVIEW OF TARGET COMPANY'S ENVIRONMENTAL DOCUMENTATION

- Toxic Substances
  - Records related to storage and disposal of PCB items.
  - Records of any asbestos inventory conducted for the facility.
  - Are all essential chemicals on the TSCA inventory?
- Emergency Planning and Community Right to Know
  - Emergency response plan and notices of spills and accidental releases.
  - Toxic chemical release reports (Form R) and Tier I & II inventory forms.



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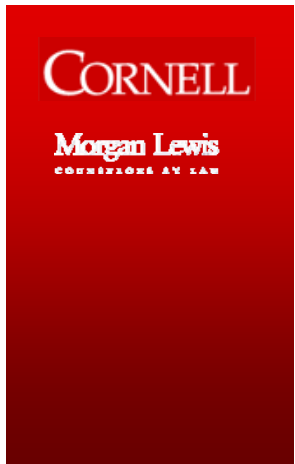


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# SAMPLE CONTRACT TERMS ASSIGNING ENVIRONMENTAL LIABILITIES

- PRO BUYER

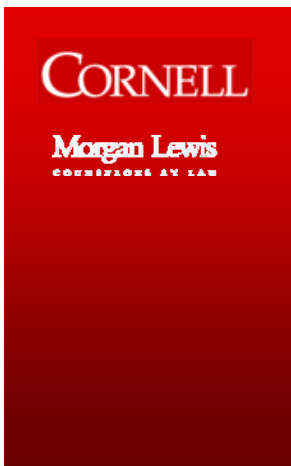
- Seller will be solely financially responsible for remediation arising from the pre-Closing Release of Hazardous Materials at, adjacent to, under, or migrating from the Real Property.
- Seller has obtained all permits, and other authorizations which are required in connection with .... relating to pollution or protection of the environment., and Seller is in full compliance in the conduct of the Business with all terms and conditions of the required permits ( except as set forth in the Disclosure Schedule). Seller agrees to cooperate with Purchaser for the transfer, renewal or issuance of any permits or other authorizations or to satisfy any regulatory requirements involving Seller's business. The Buyer may void the sale and obtain a full refund of the purchase price, plus \$ \_\_\_\_\_, if any permit needed for the continued operation is either unavailable, expired, or invalid.
- Except as set forth in the Disclosure Schedule, Seller is not aware of, nor has Seller nor any of its subsidiaries received notice of, any past, present or future events, conditions, circumstances, which may interfere with continued compliance. Except as set forth in the Disclosure Schedule, there is no civil, criminal or administrative action, suit, demand, claim, hearing, notice or demand letter, notice of violation, investigation, or proceeding pending or threatened against Seller in connection with the conduct of the Business relating in any way to those laws.
- Sellers indemnify Buyer for any liability or obligation ( in excess of \$ \_\_\_\_\_ ) or, at Sellers' election, to effect a Remediation of such Environmental Condition, .....



# SAMPLE CONTRACT TERMS ASSIGNING ENVIRONMENTAL LIABILITIES

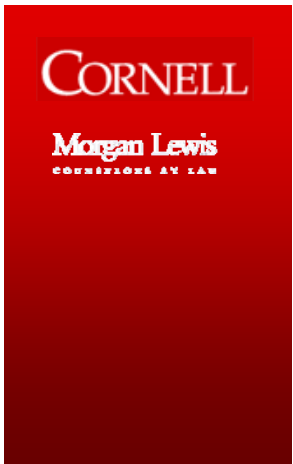
- PRO SELLER

- The Buyer will be solely financially responsible for remediation arising from both pre-closing and post-Closing Release of Hazardous Materials at, adjacent to,, or migrating from the Real Property.
- Purchaser has been given the opportunity to make an environmental inspection of Seller and its facilities prior to the Closing Date and Purchaser hereby acknowledges and confirms that it has agreed to purchase “as is” on the basis of its own inspection.
- Buyer will assume and undertake to perform and pay all of the debts, liabilities and obligations of Seller which are listed on \_\_\_\_\_ hereto (the "Assumed Liabilities"). Buyer shall indemnify and hold harmless Seller against any debt, liability or obligation of Seller expressly assumed by Buyer hereunder.
- CORPORATE SUCCESSOR ENVIRONMENTAL LIABILITY - WHY A BUYER SHOULD CONSIDER AN ASSET PURCHASE RATHER THAN ACQUIRING STOCK
- Unlike acquiring all the stock of a company when all you really need are some select assets, consider carving out the assets alone. By buying the stock , you acquire liabilities of the selling company that may be unrelated to, or at least can be legally separated from, certain specific assets.



# SAMPLE CONTRACT TERMS ASSIGNING ENVIRONMENTAL LIABILITIES

- Asset Purchase
  - The general rule applicable to assets purchases is different than the general rule that applies to stock purchases, mergers, or consolidations. When a corporation sells all or part of its assets to another corporation, either for stock or for cash, the purchasing corporation is not responsible for the debts and liabilities of the seller. This is a logical application of the principle that the seller and buyer corporations are separate “persons.” For example, if Mr. Jones sells his car to Mr. Smith, this does not make Mr. Smith liable for Mr. Jones’ home mortgage or even for an accident that Mr. Jones previously caused with the vehicle. Similarly, when one corporate person buys an asset from another corporate person, the purchaser ordinarily does not “succeed” to the seller’s debts and responsibilities.
  - Given the great incentive for buyers to structure transactions as asset purchases though, in substance, they may be closer to, for example, a merger or consolidation, asset purchase transactions can raise significant legal difficulties about whether the courts will allow the buyer to avoid acquiring the liabilities. The toughest cases include situations where the asset purchaser acquires essentially 100% of the seller’s business and the seller corporation ceases to exist.



# SAMPLE CONTRACT TERMS ASSIGNING ENVIRONMENTAL LIABILITIES

- Special Exceptions: Four Traditional Situations Where an Asset Purchaser “Succeeds” to the Liabilities of the Seller.
  - The courts have developed four traditional exceptions to the general rule that an asset purchaser is not subject to the liabilities of the seller. These are where:
    - the successor expressly or impliedly agrees to assume the liabilities of the predecessor;
    - the transaction may be considered a de facto merger;
    - the successor may be a “mere continuation” of the predecessor; or
    - the transaction is fraudulent.

