Salazar, Van Osselaer, Van Houten and Mendoza in Waste Today Magazine: Handling Waste Means Managing Environmental Risk

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PRACTICES Environmental, Environmental Due Diligence, Environmental, Social and Governance, PFAS and Emerging Contaminants

Haynes Boone attorneys Victor K. Salazar, Andrew Van Osselaer, Greg Van Houten and Mary Mendoza authored an article for Waste Today Magazine explaining how waste operators can navigate even the most complex environmental risk with confidence, using comprehensive approaches and layered risk management strategies.

Read an excerpt below.

Waste management companies face increasing challenges. Heavily regulated and scrutinized, they face numerous environmental risks that could lead to government enforcement actions, fines or even criminal penalties—not to mention third-party liability. Fortunately, just as risks have grown, so have risk management tools, including novel legal strategies and advanced insurance products.

Industry veterans are no strangers to the many risks companies face: transportation accidents, site releases, legacy contamination from prior land uses and nuisance claims, to name a few. Nor are they strangers to their consequences: regulatory enforcement actions, cleanup obligations and litigation. But recently, new risks have appeared, including so-called emerging contaminants, such as per- and polyfluoroalkyl substances (PFAS). And unlike many legacy contaminants, PFAS pervade waste streams, being found in consumer products, coatings, packaging, textiles, wastewater residuals, landfill leachate and even protective gear. For waste management companies, the ubiquity of PFAS has injected new risks into nearly all operations.

While these risks are daunting, they are not insurmountable. Commensurate with this rise in risk has been an expansion of risk management options that not only address these risks but also present potential opportunities for companies willing to avail themselves of these options.

Sources of Risk

Environmental liability in the waste management industry rarely stems from a single dramatic event. Instead, it arises through routine operations, infrastructure aging or historical conditions that were never fully evaluated and addressed.

Legacy contamination is a core concern at decades old facilities. These issues surface during transactions, refinancing, expansion or redevelopment, creating uncertainty that drives purchase price adjustments and burdensome indemnities and can even kill deals entirely.

Transportation and storage of waste also are sources of liability: hauling accidents, mishandling of waste, tank leaks and other containment failures all being potential risks.

Contamination migration presents risk beyond facility boundaries. Migrations can affect neighboring landowners, aquifers or surface waters. These scenarios often lead to disputes over responsibility

that are costly and difficult to resolve.

When it comes to government oversight, agencies have broad authority to require investigations, corrective action, long-term monitoring and cleanup—even when contamination was not caused by the operator or where the operator complied with permits at the time of the release. Regulators are increasingly requiring evaluation of PFAS in leachate, groundwater and wastewater residuals.

Contractual indemnities are another source of risk. Operators often assume such risks in their contracts with others, sometimes even unknowingly. For example, a broad indemnity could sweep in environmental liabilities despite not explicitly referencing them.

Finally, private litigation often could unfold on a large scale when dealing with issues like drinking water contamination. These claims often involve allegations of property damage, but they could even involve claims of bodily injury. As we have seen with PFAS, waste management companies are being pulled into mass tort litigation based on their alleged role in contaminating groundwater.

Managing Risk: Knowledge is Power, Or Is It?

Too little knowledge invites surprise liabilities. Unmanaged knowledge, however, invites other forms of surprise—for example, the inadvertent and unknowing triggering disclosure duties. Companies are well-advised to develop fact-finding procedures that strike the correct balance, ideally with the assistance of a combination of legal and technical advisors to preserve privilege.

For owned facilities, environmental assessment is the first step. However, discovering previously unknown contamination can trigger reporting and costly remediation and compliance obligations. One way to address this conundrum is to avail oneself of the state's audit privilege act (which exists in most states). These acts allow operators to conduct environmental audits that, if done correctly, provide insulation from state penalties.

Property purchasers inadvertently could assume environmental liabilities. Assessing site conditions, therefore, is essential. Properly scoped Phase I environmental site assessments (ESA) are essential to obtaining knowledge and innocent purchaser protection under the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA. While typical Phase I ESAs do not check for PFAS, other assessments do. As for more invasive forms of investigation, factors often lead buyers to adopt a more balanced approach—this includes seller resistance to testing on one hand and the assurances gained by performing "all appropriate inquiries" under CERLCA.

To read the full article from *Waste Today Magazine*, click here.