

ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE and LAND USE

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Environmental Considerations in Real Estate Transactions

- Understanding potential environmental liabilities under federal and state law
- How much due diligence is enough?
- Resolving and/or allocating risk
- Protecting against unknown risks
- Assignments and contribution claims
- Restrictive Covenants

Environmental Issues For Buyers

- Conducting due diligence
- Evaluating known contamination
- Assessing potential unknown contamination
- Potential liability for groundwater and other off-site contamination
- Release and indemnification from seller
- Assignments and contribution claims

Environmental Issues for Sellers

- Disclosure of known risks and contamination
- Liability for unknown contamination and offsite risks
- Providing representations and warranties
- Release and Covenant Not to Sue
- Indemnification
- Assignments and Contribution Claims

Liability Under Federal Law

1. 1980 CERCLA, e.g., "Superfund" – Comprehensive Environmental Response, Compensation and Liability Act, 42 USC 9403, as amended by the 1986 Superfund Amendments.
2. 2002 Small Business Liability Relief and Brownfields Revitalization Act, 42 USC 9403.
3. Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6901.
4. Clean Water Act of 1977, 33 U.S.C. § 1251 (including wetlands).
5. Insecticide Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*
6. Toxic Substances Control Act, 15 U.S.C. § 2601
7. Safe Drinking Water Act, 42 U.S.C. § 300 *et seq.*
8. Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. § 11011,

Liability Under State Law

1. MTCA – Washington Model Toxics Control Act, RCW 70.105D.
2. Washington Hazardous Waste Management Act, RCW 70.105.
3. Washington Solid Waste Management Act, RCW 70.95.
4. Washington Clean Air Act, RCW 70.94.
5. Washington Water Pollution Control Act, RCW 90.48.
6. Common law theories of trespass, nuisance and negligence

Superfund Liability

- CERCLA enforcement action at sites where there is an imminent and substantial endangerment to human health or the environment
- Notice of liability issued to all "Potentially Responsible Parties," e.g., PRPs
- Private property impacts associated with area-wide site listings

MTCA LIABILITY FOR CONTAMINATED PROPERTY

1. Release or Presence of Hazardous Substances
2. Reporting, Notice and Site Listing
3. Independent or Voluntary Cleanup
4. Enforcement Order
5. Private Right of Action

Liability Attaches to the Property and Follows the Owners and Operators

1. Property contaminated by the presence or a release of a hazardous waste, including petroleum product (i.e., gasoline)
2. Owner or operator at time of release
3. Current owner or operator (unless "innocent purchaser" or contamination by "passive migration")

Liability of Former Owners

- MTCA imposes liability on former owners of contaminated property if such persons disposed or released hazardous substances into the environment during their ownership. RCW 70.105D.040(1)(b).
- Strict liability - no intent necessary.
- Requires proof of "disposal" or "release"

The Importance of Due Diligence Investigations

- Provides valuable information about the potential liabilities associated with a site that can be used in purchase and sale negotiations.
- Prerequisite for certain defenses to CERCLA liability, e.g., the "Innocent Landowner" defense
- Mandatory for site assessments to qualify for EPA Brownfields funding or grants
- Mandatory for Site Characterization as part of a CERCLA site remediation

All Appropriate Inquiry RULE GOVERNS PHASE I INVESTIGATIONS

- EPA issued the final “AAI” rule on November 1, 2005, 70 Fed. Reg. 66070 (40 CFR 312.20).
- Effective November 1, 2006.
- Promulgated 3 years after 2002 Brownfields Amendments to CERCLA (e.g., the Small Business Liability Relief and Brownfields Revitalization Act).
- 2002 Brownfield Amendments:
 - Provided new funding and grants for Brownfields development
 - Clarified and limited CERCLA liability for certain landowners
 - Enacted new AAI Procedures and Standards

AAI Rule Standards

- 2002 Brownfields law specifies ten criteria that must be met.
- Involves detailed investigation, records review and interviews of current and past owners, operators and employees
- Results must be documented in a report (six month shelf life)

AAI Rule Investigation Criteria

1. Interviews with past and present site owners and occupants (interviews with neighboring property owners is mandatory at abandoned or vacant properties)
2. Reviews of historical sources of information (title, permits, photos)
3. Search for environmental liens
4. Reviews of governmental records
5. Visual inspections of facility and adjoining properties

AAI Rule Criteria, con't

6. Specialized knowledge of or experience of the prospective purchaser
7. Relationship of the purchase price to the value of the property, if not contaminated
8. Commonly known or reasonable ascertainable information about the property
9. Degree of obviousness of contamination or likely presence of contamination, and ability to detect contamination by appropriate inquiry
10. Performance and supervision of AAI by “Environmental Professional”

AAI Rule Considerations

- Higher standard for Phase I consultant
- Qualified Environmental Professionals - minimum of the required education and experience; emphasis on experience:
 - Hold a current PE or Geologist's license with 3 years relevant experience
 - Licensed or certified by federal or state government to perform environmental inquiries and have 3 years relevant full-time experience
 - College degree in science or engineering and 5 years full-time experience
 - Equivalent of ten years of relevant full-time experience

AAI Rule Considerations, Con't

- Final report must include an opinion regarding whether a release or threat of release has occurred, along with known data gaps regarding the relevant conditions for a release
- AAI must be conducted within one year prior to date of acquisition of property
- If over a year old, all parts of the investigation must be reviewed and update
- If over 6 months old, the following components must be updated:
 - Interviews with current and former owners and operators
 - Lien search
 - Government records review
 - Visual inspections
 - Declaration by Environmental Professional

AAI Rule Considerations, Con't

- Opens door for purchasers to require access to facility, management and employees.
- Seller's knowledge must be disclosed to the Phase I consultant
- May require new confidentiality agreements between buyers and sellers
- May lead to reporting of historical releases not previously known by management.

AAI AS A DEFENSE TO LIABILITY

If done correctly, can insulate buyer from CERCLA liability, based upon the:

1. Innocent Purchaser defense (if contamination is later discovered)
2. Bona Fide Prospective Purchaser defense (even if contamination is known before purchase)
3. Contiguous Property Owner defense (e.g., the "Plume Policy")

Post Acquisition Requirements for Innocent Landowners and BFPPs

1. Compliance with land use restrictions and institutional controls.
2. Cooperation with ongoing response and remedial actions.
3. Voluntary response to CERCLA Information requests.

STATE DUE DILIGENCE PROCEDURES

- The new AAI standards apply only to CERCLA due diligence procedures
- In states where there is a mini-Superfund statute (e.g., MTCA in Washington), the AAI procedures will become the de facto standard because:
 - It will ensure protection from any CERCLA claims
 - Lenders will require it
 - It will serve to protect a buyer from acquiring otherwise unknown liabilities and potential exposure to state or private party claims

Due Diligence for Business Environmental Risks

- Asbestos
- Mold
- Radon
- Lead-based paint
- Wetlands, Critical Areas, Endangered Species
- Natural and ecological resources
- Cultural, Tribal and historical resources
- Industrial hygiene
- Indoor air quality
- High voltage power lines

Environmental Considerations in Real Estate Negotiations

- Potential that a due diligence investigation will result in the discovery of a potential liability or contamination, especially at redeveloped commercial properties
- Once discovered, the owner/operator must report the contamination to EPA and/or Ecology
- Buyer can walk away from deal or seek to negotiate favorable terms to reduce liability

Environmental Considerations in Real Estate Negotiations

- WAC 173-340-300(2)(a) requires reporting the release of a Hazardous Substance that may pose a threat to human health and the environment to Ecology
- Ecology will then perform a review of the site and data and prepare a formal hazard ranking for the Property
- MTCA Voluntary Cleanup Program provides a consultant driven cleanup as an alternative to an Ecology Order
- Upon completion of investigation and cleanup, Ecology will make a determination whether "No Further Action" or additional work is required
- Ecology recently revised its procedures and policy regarding issuance of No Further Action determinations (handout)

Risk Management and Allocation of Environmental Liabilities

- Avoid the risk:
 - Avoid or cease conducting certain high risk activities (dry cleaner leases)
- Retain the risk:
 - Pay for losses and liabilities as they arise (create reserves, seek insurance coverage for historical releases)
- Reduce the risk:
 - Undertake investigation and cleanup of contamination, contain contamination through engineering controls

Risk Management and Allocation of Environmental Liabilities

Cover the risk:

- Reduce the purchase price equivalent to cost of cleanup or liability
- Establish an escrow
- Environmental insurance (on site or off site coverage)
- Indemnification
- Assignment of claims
- Transfer and shift the risk:
 - Seek PLP to agree to pay for cleanup prior to closing

Scope of Indemnification

- On site contamination v off site contamination
- Known contamination v unknown contamination
- Remediation claims v tort liability
- Indemnity of a party v a third party
- Clean up standards
- Restrictive covenant/deed restriction

Contribution and Cost-Recovery Under CERCLA

- CERCLA Section 113(f) provides a limited right of contribution to recover costs against another PRP
- *Cooper Industries v. Aviall Services*, 543 U.S. 157 (2004) held that 113 contribution claims are only available to parties sued by EPA or a State under 106 or 107 of CERCLA, or after a PRP has resolved its liability to the U.S. or State in an administrative or judicial settlement. [113(f)(1) and (f)(3)(B)]
- Inconsistent court decisions regarding 113(f) definition of administrative settlements and the effect of non-CERCLA state settlements

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CERCLA Section 107(a) Cost Recovery

- Section 107(a)(4) provides any PRP (owner, operator, generator, transporter) shall be liable for:
 - (A) *all costs of removal or remedial action incurred by the U.S. or a State or Indian Tribe not inconsistent with the national contingency plan;*
 - (B) *any other necessary costs of response incurred by any other person consistent with the national contingency plan;*

U.S. v. Atlantic Research Corp. 127 S.Ct. 2331, June 11, 2007

- Justice Thomas for a unanimous court
- Rejected the "Government's" argument that "any other person" in 107(a)(4)(B) referred to any person not identified as a PRP in 107(a)(1)-(4)
- Eighth Circuit had ruled that this section provided a cause of action to anyone except the U.S., State or Indian tribe as listed in 107(a)(4)(A)
- Supreme Court upheld the Eighth Circuit, construing the plain meaning of the language in 107(a)(4)(B) as naturally flowing from 107(a)(4)(A) and thus providing a private right of action for PRPs to recover cleanup costs from other PRPs

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U.S. v. Atlantic Research, con't.

- The Court rejected the Government's argument that 113(f) and 107(a)(4)(B) are incompatible and would allow parties to avoid the 113(f) statute of limitations or equitable distribution of liability
- "[A]ccepting the Government's interpretation would reduce the number of potential plaintiffs to almost zero, rendering 107(a)(4)(B) a dead letter"
- The Court ruled that 107(a) and 113(f) "compliment each other by providing causes of action 'to persons in different procedural circumstances'"
- Similar statutory construction theme as in the Court's recent decision in *Massachusetts v. EPA* 127 S.Ct. 1438, (April 2, 2007), where the Court ruled that carbon dioxide was an "air pollutant" under the plain meaning of the Clean Air Act.

U.S. v. Atlantic Research, con't.

- Distinction between contribution and cost recovery was thoroughly discussed and finally clarified
- Contribution claims are contingent on inequitable distribution of liability among PRPs (and may be pursued after payment of a judgment or settlement to EPA)
- Cost recovery claims permit recovery of costs incurred to cleanup a site

U.S. v. Atlantic Research, con't.

The Supreme Court has provided two clear pathways for recovery of cleanup costs against PRPs:

1. Under Section 113 as a result of a civil or administrative action or settlement by EPA or State
2. Under Section 104, through a wholly-voluntary cleanup that complies with the National Contingency Plan

Benefits of Private Right of Action Between PRPs Following a Voluntary Cleanup Action

- PRP recovers cost of cleanup from the responsible parties
- Public benefit from cleanup; eliminates potential migration and exposure pathways
- Promotes Brownfield redevelopment without government funding
- Preserves greenfields
- Reduces sprawl, traffic jams and GHGs
- Job security for lawyers and environmental engineers and consultants

Contribution Claims under the Model Toxics Control Act

- RCW 70.105D.080 provides a private right of action, including contribution, against any other liable person under RCW 70.105D.040
- Covers petroleum contamination and authorizes recovery of attorney fees

MTCA Private Right of Action

- MTCA imposes liability on former owners of contaminated property if such persons disposed or released hazardous substances into the environment during their ownership. RCW 70.105D.040(1)(b).
- Strict liability - no intent necessary.
- Defense for former owners and operators of contaminated sites (must prove "disposal" during their ownership or operation, excluding any "passive migration" of existing contamination)

Disposal Is Not Just Disposal

- Under MTCA, "disposal" encompasses "putting, placing, transferring, distributing, discharging, discarding, delivering, abandoning, depositing, injecting, dumping, and spilling" hazardous wastes. See *Modern Sewer Corporation v. Nelson Distributing, Inc.*, 125 Wash.App. 564, 109 P.3d 11 (2005)
- Intent to dispose is irrelevant

MTCA Contribution Claim Requirements

- Cleanup action must be the "substantial equivalent" of that by Ecology
- Five elements listed in WAC 173-340-545(2)(c):
 1. Report the action to Ecology
 2. Ecology does not object to the action being conducted
 3. Take reasonable steps to provide advance public notice
 4. Conduct the cleanup substantially in accordance with certain technical standards
 5. Documents that the hazardous substances are lawfully disposed of

Taliesen Corp. v. Razore, 135 Wash.App. 106 (2006)

- Court ruled that Taliesen's failure to satisfy the five elements of WAC 173-340-545(2)(c) was NOT dispositive for determining substantial compliance with an Ecology cleanup.
- Rather, the court set a new standard that looked at the cleanup's "overall effectiveness" rather than compliance with Ecology's regulations.

Taliesen, con't

- Recovery limited to only the additional costs required by the remediation, not the costs necessary to complete development
- Only the incremental or delta of costs between necessary excavation and costs of transportation to handle, transport and dispose of contaminated soils.
- Without actual testing of disposed soil, recovery was slashed 75%

Elements to a Successful Claim

- Having a knowledgeable and experienced consultant and attorney from the outset to guide both the cleanup and claims
- Full site characterization
- Reporting and Disclosure to Ecology
- Coordination and cooperation with neighboring landowners
- Evaluate all feasible and cost effective alternatives

Benefits of Private Right of Action Between PRPs Following a Voluntary Cleanup Action

- PRP recovers cost of doing the right thing
- Public benefit from cleanup; eliminates potential migration and exposure pathways
- Promotes Brownfield redevelopment without government funding
- Preserves greenfields
- Reduces sprawl, traffic jams and GHGs
- Job security for lawyers and environmental engineers and consultants

Speed vs. Process

- Need to thoroughly assess site before conducting the cleanup
- Pitfalls for the unwary include choice of inappropriate or expensive remedy
- Separate actual cleanup costs from development costs (i.e., soil waste disposal vs. soil removal)

Washington Uniform Environmental Covenants Act (SB 5421)

- Signed April 18, 2007
- Effective July 22, 2007
- Adopts the Uniform Environmental Covenants Act with adaptations for Washington law
- Addresses concern in other jurisdictions regarding validity of environmental covenants (deed restrictions) when contaminated land is sold, including the rule against perpetuities and requirements of privity or appurtenance

UECA Requirements

An environmental covenant must:

- Identify the instrument as an environmental covenant executed pursuant to UECA;
- Contain a legal description of the property subject to the covenant;
- Describe with specificity the activity or use limitations imposed on the property;
- Identify every holder;
- Be signed by the agency with jurisdiction (Ecology or EPA), every holder, and every fee simple owner (unless waived by the agency); and
- Identify the name and location of any administrative record for the site or other relevant information specified in Section 5 of the Act
- The agency must consult with local land use planning authorities in the development of the covenant's restrictions
- Requires periodic review by Ecology every 5 years

Effect of Environmental Covenant

- A properly executed environmental covenant runs with the land
- An environmental covenant cannot be invalidated by common law doctrines, such as due to the fact that it is not appurtenant to an interest in real property, it has been assigned to another person, it is not traditionally recognized at common law, it imposes a negative burden or affirmative obligation, the benefit or burden does not touch or concern real property, or there is no privity
- An environmental covenant may prohibit or restrict uses of real property that are authorized by zoning or by law other than this Act

Effect of Environmental Covenant, con't.

- An environmental covenant and any amendment or termination must be recorded in the county in which the property subject to the covenant is located
- An environmental covenant is perpetual unless the covenant provides otherwise or is terminated in accordance with Section 10 or 11 of the Act
- A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by a party to the covenant, Ecology, a person granted the right to enforce the covenant, a person whose interest in the property may be affected by violation of the covenant, and a municipality in which the property is located

