

Environmental Issues For Real Estate Lawyers

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Why should you (and your clients) care?

- **Avoid potential liability to government agencies and private parties for environmental conditions**
- Assure land is suitable for intended use (existing or planned)
- If you represent a lender, assure valuation of secured collateral
- Potentially Affected Parties: Buyers, Sellers, Lenders, Landlords, Tenants

Key Statutes

Florida

- Pollution and Discharge Prevention and Renewal: Ch. 376
 - Pollution Discharge Prevention and Control Act. §§ 376.011-376.165; 376.19-376.21
 - Brownfields Redevelopment Act: §§ 376.77 – 376.85
- “Little CERCLA:” § 403.727

Federal

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): 42 USC 9601 et seq.
- Resource Conservation and Recovery Act (RCRA): 42 USC 6901-6992k

Potentially Liable Parties

Under Federal Law

- CERCLA – 42 USC 9607(a)
 - Owners and operators
 - Owner/operator at time of disposal
 - Persons who arrange for transport for disposal/treatment (aka “generators”)
 - Persons who accept hazardous substances for transport/disposal
- RCRA
 - Facilities that generate, transport, treat, store, or dispose of hazardous waste (regulated under RCRA subsection C)

Potentially Liable Parties

Under State Law

- “Little CERCLA”
 - 403.727: waste generator, transporter, facility owner or operator, any person who by contract/agreement/otherwise arranges for transport or disposal of hazardous substances
- Pollution Discharge Prevention and Control Act
 - 376.012: “any responsible party who permits or suffers a prohibited discharge or other polluting condition.”
 - “Responsible party” defined: 376.031(20)
- Brownfields Redevelopment Act
 - 376.83 – persons who knowingly or willfully violate the act.

DUE DILIGENCE:

All Appropriate Inquiry

42 USC § 9601(35)
(B)

- Phase I Environmental Site Assessments, (Phase I ESA)
 - Records Review
 - Site Reconnaissance
 - Interviews
 - Evaluation and Reports
- ASTM Standard E1527-05
 - 40 CFR 312.11
 - New standard expected by year's end
- Recognized Environmental Conditions (REC)
 - The presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, ground water, or surface water of the property. The term includes hazardous substances or petroleum products even under conditions in compliance with laws. (Excludes de minimis conditions)

DUE DILIGENCE:

All Appropriate Inquiry

- Typically, the ASTM standard is used for commercial real estate transactions.
 - Depending on the value, might make sense for a residential purchase
- Must be conducted by an environmental professional.
- Common View of Phase I:
 - Conducted in order to be able to claim “innocent land owners defense.”
- Al’s View of Phase I:
 - Environmental due diligence should be conducted so Buyer knows what he/she is getting, and will not be saddled with environmental liability.

Phase II Sampling

- Not explicitly required under the AAI Rule (40 CFR 312), but may be required to satisfy a Buyer's post acquisition "continuing obligations" under certain CERCLA exemptions, including for the Innocent Landowner, Contiguous Property Owner, and Bona Fide Prospective Purchaser exemptions.
- More practically, it may be used to determine if contamination exists on or near property to be acquired.
- May trigger the obligation to report or clean up.
- Can help establish a baseline condition.

Innocent Purchaser Defense

- 42 USCA §§ 9601(35)(A), 9607(b)(3)
- Protects innocent purchasers who did not know of, and who had no reason to know of, contamination on the property.
- Requirements:
 - Acquisition after release
 - Buyer did not know and had no reason to know of contamination
- Due Diligence/All Appropriate Inquiry (see above)

Other CERCLA Defenses

- Bona Fide Prospective Purchasers:
 - 42 USCA §§ 9601(40), 9607(4)
 - Disposal of hazardous substances occurred before purchase
 - Person made all appropriate inquiry and determined contamination was present
 - Person exercised appropriate care with respect to hazardous substances
 - Person is not otherwise potentially liable through familial, contractual, corporate, or financial relationships
 - Must have acquired property after January 11, 2002
 - Must prove certain factors by a preponderance of the evidence, including:
- Contiguous Landowners
- Acts of God: an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight. 42 USC § 9601(1)
- Acts of War

Federal Liability for Lenders: Dos and Don'ts

- 42 USC 9601(20) excludes from the term owner or operator “a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.”
- Do:
 - Pre-Loan Due Diligence
 - Assess Risk before securing collateral
 - After foreclosure, divest ownership of property at “earliest practicable, commercially reasonable time.” 42 USC 9601(20) (E)
 - Keep records (e.g. of efforts to sell)
 - Put “environmental compliance” clauses in loan agreement
- Don't:
 - Participate in Management. 42 USC 9601(20)(E), (F)
 - *U.S. v. Fleet Factors Corp.*, 821 F. Supp 707 (S.D. Ga. 1993)

State Lender Liability

- Adds defense for “acts of government” § 403.727(5)(b)
- “Act of God” which “means only an unforeseeable act exclusively occasioned by the violence of nature without the interference of any human agency.” § 403.727(5)(c)
- No secured creditor exemption
- There is protection for petroleum contamination (§ 376.308 (3)) and sites involved in the brownfields process (§ 376.82 (4)).

Other Uses for Site Assessments

- Establishing contractual liability for known contaminated property
 - Establishing baseline environmental data
- Evaluation for Brownfield redevelopment
- Cost of Remediation
- Establish baseline environmental conditions

OTHER ISSUES and RED FLAGS

- Underground Storage Tanks
- Asbestos
- Lead-Based Products
- Radon and Vapor Intrusion
 - Will likely be included in new ASTM Standards
- Arsenic
 - Former Agriculture Uses
 - Former Golf Courses
- Former Industrial Uses
- Dry Cleaners

Contractually Resolving Contamination Issues

- Purchase and Sale Contracts, Loan Commitments/ Mortgages, Leases
- Potential Liability Risks
 - Other Party to Contract
 - Third Parties (Government, Prior Owners, Future Owners/Operators, Neighboring Property Owners, Tenants)

Potential Avenues to Protection

- Assign liability through contractual provisions
- Negotiate an escrow for cleanup costs
- Adjust sales price to reflect cleanup costs
- Environmental insurance

Clauses to Consider

- Indemnification and Release Clauses
 - CERCLA 107(e)(1) (Liability) contains conflicting language regarding indemnification/hold harmless clauses
 - The 11th Circuit follows the majority view: contractual clauses are binding on parties not otherwise liable (like insurance companies) but continue to hold parties liable to the United States
 - May only apply when indemnitor is solvent
- Savings Severability Clause
- Mediation Clauses
- Cost-Sharing Provisions

Disclosures, Warranties, and Representations

- Buyers should seek disclosures in the Representations and Warranties
- Breach of warranty or representation that the property contains no existing environmental conditions can provide a mechanism by which the buyer can rescind the contract.
- No contract clause should interfere with a legal requirement to report.

Insurance Coverage

- Basically all Comprehensive General Liability policies contain an “absolute” pollution exclusion.
- Environmental Insurance
 - Pollution and/or remediation liability insurance
 - Integrated general liability with pollution insurance
 - “cleanup cost cap” / “stop loss” / “cost containment” insurance
 - Contaminated property development insurance
 - Lender environmental protection insurance
 - Indoor air quality and mold insurance
 - Miscellaneous specialized provisions (underground storage tanks, transactional risks, business-specific coverage, e.g. for agriculture).
- Beware: “claim-made” vs. “occurrence-based”
 - “claims-made” covers time period in which claim is made
 - “occurrence-based” covers time period when release occurred

Federal Disclosure and Reporting Requirements

- CERCLA:
 - Reportable Quantity exceeded - 42 USCA 9603(a)
 - The reportable quantities of each hazardous substance can be found at 40 CFR §§ 302.4 - .5
 - Notification within 24 hours required
 - “Lasting Provision” – 42 USCA 9603(c)
 - Required to notify the EPA when it is discovered that a facility has treated, stored, or disposed of hazardous waste.
- RCRA:
 - Emergency coordinator (designated by owner/operator) must report a release, fire, or explosion that could threaten human health or the environment outside the facility.
 - Owner or Operator must report a leak from a hazardous waste tank within 24 hours of discovery

State Disclosure and Reporting Requirements

- Petroleum Storage Systems (Chapter 62-761, F.A.C.)
- Contaminated Site Cleanup (Chapter 62-780, F.A.C.)
 - Also includes identification of an imminent threat; and
 - Initial notice of contamination beyond property boundaries

Wetlands and Water

Federal

- § 404 Clean Water Act
 - Coastal and Inland Wetlands

State

- State Environmental Resource Permits
 - Permit Transfers
- FDEP and WMDs
- Sovereign Submerged Lands

Recommended Resources

- *Environmental Aspects of Real Estate and Commercial Transactions* (American Bar Association, 4th ed. 2011 Witkin, James B., ed.)
- 59 Am. Jur. Trials 231. Contractual Indemnifications and Releases From Environmental Liability.
- Environmental Transactions and Brownfields Committee Newsletter, June 2013, ABA Section of Environment, Energy, and Resources.
- Real Estate Transactions – Structure and Analysis with Forms. Westlaw Database. (Updated April 2013).
- Schwenke, Roger D. *Environmental Issues in a Real Estate Transaction*. RPCT FL-CLE 12-1 (The Florida Bar, 2011).

Any Questions?

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