

Environmental Issues in Project Development

By
Richard M. Glick
Davis Wright Tremaine LLP

March 15, 2011

Multnomah Bar Association
Portland, Oregon

Anchorage
Bellevue
Los Angeles

New York
Portland
San Francisco

Seattle
Shanghai
Washington, D.C.



Introduction—Goals

- Identification of and limiting environmental liability risk in real estate transactions
- Overview of key environmental permits
 - Stormwater
 - Wetlands removal-fill
 - Water Rights

Nature of the Risk



Nature of the Risk

- CERCLA §107 (42 USC §9607) imposes strict joint and several liability on "owners and operators"
 - *Burlington Northern and Sante Fe Railway Co. v. United States*, 129 S Ct 1870 (2009)—apportionment possible
- Security interest alone not enough to trigger liability
- Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Brownfields Amendments, HR 2869)

Nature of the Risk

- Oregon has parallel laws creating strict, joint and several liability.
- ORS 465.255(1)(b) imposes strict liability for remedial action costs incurred by the state or any other person on Owners or Operators who knew or reasonably should have known of a “release” when the person first became the Owner or Operator
- ORS 465.255(5)(a) allows state superfund liability to be allocated among private parties contractually, but cannot contract away liability to the government
- Petroleum is covered, and strict liability not quite so strict.
- Probabilistic risk assessments

Nature of the Risk

- Federal and state liens for unrecovered cleanup costs
 - ORS 466.205(7)—applies to any property in state
- RCRA (42 USC §6901) regulates handling and disposition of hazardous waste
 - Applies mostly to ongoing sources of contamination, cleanup if imminent public risk
 - CERCLA applies mostly to historic contamination

Nature of the Risk--Defenses



Nature of the Risk--Defenses

- "Innocent landowners" may avoid liability (42 USC §9601(35)(A))
 - Did "all appropriate inquiry," contamination caused by a third party, the owner has no actual or inquiry notice of contamination, and there is no contractual relationship
- "Bona fide purchasers" (§222, Brownfields Amendments, 42 USC §9601(40))
 - Bought after contamination occurred and AAI
 - May have knowledge, but no affiliation and handles hazardous substances appropriately
 - Government lien to extent of property value appreciation

Nature of the Risk--Defenses

- “Contiguous property owner” may avoid liability (Brownfields Amendments §221, 42 USC §9607(9))
 - Codifies “aquifer rule” against liability based on ownership if contaminants migrated from off site and AAI before acquisition
 - Must not have contributed to contamination
 - Possible to qualify as bona fide purchaser even if knew of migration

Due Diligence

- Environmental Site Assessments



Due Diligence

- Conduct environmental site assessments
 - For *any* commercial real estate transaction *prior* to closing.
 - Phase I review entails walk through of site for signs of contamination, agency and owner records review, interviews
 - Phase II involves soil and groundwater sampling and analysis.
 - If find history of regulatory enforcement, consent order or other written disposition should be reviewed.

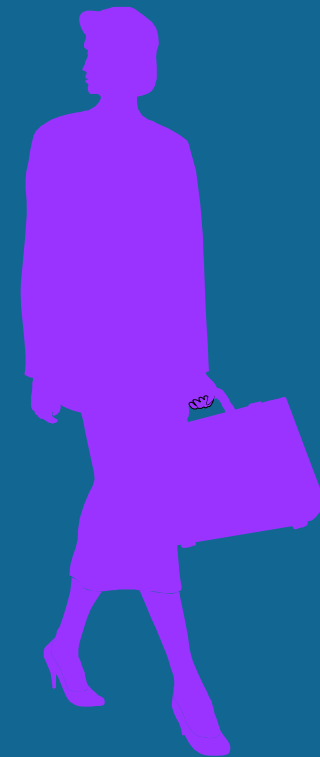
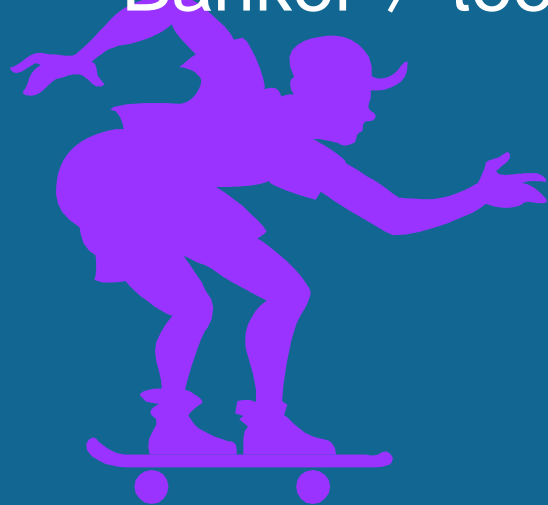
Due Diligence

Corner grocery \neq factory



Due Diligence

- Banker \neq teenage stock holder



Due Diligence

- Phase I Environmental Site Assessments (ESA's)
- EPA's All Appropriate Inquiry rule (AAI), 40 CFR Part 312, and ASTM designation E 1527-05
 - Overview:
 - Purpose/REC's
 - Who can Perform and Qualifications
 - Standards and Practices



Due Diligence

- Phase I Environmental Site Assessments (Phase I ESA's)
 - Purpose and Goals
 - AAI Rule: Purpose is to provide standards and practices for “all appropriate inquiries” for the purposes of CERCLA’s innocent landowner defense, bona fide prospective purchaser liability protection, and contiguous property owner liability protection.
 - ASTM Standard: Permit User to satisfy one of the requirements (all appropriate inquiry) to qualify for the innocent landowner, contiguous property owner, or bona fide prospective purchaser liability limitations.

Due Diligence

- Phase I Environmental Site Assessments (Phase I ESA's)
 - Purpose and Goals.
 - Phase I ESA: Identify “Recognized Environmental Conditions” meaning 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.

Due Diligence

- Phase I Environmental Site Assessments (ESA's)
 - Who can perform and qualifications
 - Conducted by an environmental professional:
 - Sufficient specific education, training and experience to exercise professional judgment to develop opinions and conclusions; and,
 - state or tribal certification or license plus 3 years experience; or
 - A B.S. or higher degree plus 5 years experience; or
 - 10 years experience
 - Resumes included with report



Due Diligence

- Phase I Environmental Site Assessments (ESA's)
 - Standards and Practices: Records Review
 - Searches for liens recorded against the facility
 - Review federal, state, and local government records concerning contamination at or near the facility, including:
 - Waste disposal records;
 - Underground storage tank records; and
 - Hazardous waste handling, generation, treatment, disposal, and spill records.

Due Diligence

- Phase I Environmental Site Assessments (ESA's)
 - Standards and Practices: Records Review
 - Historical sources review to determine previous uses and occupancies of the real property since it was first developed, including:
 - Chain-of-title documents;
 - Aerial photographs;
 - Building department records; and
 - Land-use records.

Due Diligence

- Phase I Environmental Site Assessments (ESA's)
 - Standards and Practices: Site Reconnaissance and Special Knowledge
 - Visual facility inspection (including adjoining properties)
 - Obtain client's specialized knowledge or experience
 - Compare the purchase price to the value of the property if the property was not contaminated
 - Obtain commonly known or reasonably ascertainable property information
 - How obvious the contamination was at the property (would appropriate investigation detect it?)
CERCLA § 101(35)(2)(B)(iii).

Due Diligence

- Phase I Environmental Site Assessments (ESA's)
 - Standards and Practices: Interviews
 - Interview past and present facility owners, operators, and occupants to gather information regarding potential contamination.
 - Interview adjoining owners/occupants if property abandoned.
 - Government officials

Due Diligence

- Phase I Environmental Site Assessments
 - Reviewing the Phase I ESA Report
 - Scope, Data Gaps and Limitations (asbestos, wetlands not covered unless requested)
 - Conclusions, Recommendations and Certification

Due Diligence

- Recognized Environmental Conditions (“REC’s”) . . . or innocence lost!



Due Diligence

- Phase II Environmental Site Assessments
 - Developing an Appropriate Scope of Work
 - Contaminants of concern
 - Media potentially affected
 - Relate work to transaction
 - Iterative process--\$\$\$
 - Phase II only confirms presence of contaminants
 - Next step to characterize the contamination—depth, breadth, whether it is in motion, etc.
 - Interface with regulatory agencies (Voluntary Cleanup Program, prospective purchaser letters)

Due Diligence

- Phase II Environmental Site Assessments
 - Contracting Issues
 - Should the Seller allow a phase II to be performed?
 - Should the Buyer or the Seller arrange for the phase II?
 - What if the phase II confirms a release of hazardous substances?
 - Owner must report: (1) any releases of oil to waters of the state, (2) releases to soils only: 42+ gallons of oil, reportable quantities of hazardous materials

Transaction Documentation Issues

- No RECs identified
- Buyer wants:
 - Representations and warranties that property is clean
 - Indemnification against later discovery of contaminants
 - Indemnification only as good as financial strength of party giving

Transaction Documentation Issues

- No RECs identified
- Seller wants:
 - Buyer to take "as is" with general release and waiver
 - Limit indemnification to:
 - Contamination occurring prior to closing
 - Defined dollar and time limit
 - Reciprocal indemnification

Transaction Documentation Issues

- No RECs identified
- Lender wants:
 - Open ended indemnification from seller to buyer for term of loan
 - Assurances of seller's wherewithal to back indemnification
 - Ongoing monitoring and audit program

Transaction Documentation Issues

- RECs identified
- Buyer wants:
 - Cleanup prior to closing or as soon after closing as practicable
 - Cleanup under government supervision resulting in "no further action" letter from DEQ,
 - Indemnification
 - Price offset for lost business and inconvenience during cleanup

Transaction Documentation Issues

- RECs identified
 - Seller wants:
 - Whole thing to go away!
 - If property were not being sold, environmental inspection may not have occurred
 - Cost of cleanup could be greater than value of property, or at least erode gain from sale
 - Release with covenant not to sue after cleanup
 - Seller should not promise a "release" from DEQ, since best one gets is "no further action" letter.

Transaction Documentation Issues

- RECs identified
 - Lender wants:
 - Assurances cleanup will be accomplished
 - May want to withhold funds to cover cost of cleanup
 - May want to decline to finance

Pressure Points

- Asbestos
 - Not typically included in Phase I ESA
 - Found in most commercial buildings over 20 years old
 - Hazardous in "friable" form
 - No general requirement to remove from commercial buildings, except where remodeling or demolition
 - OSHA rules may require asbestos surveys in office buildings.

Pressure Points

- PCBs
 - Existing transformers may be topped with PCB oil, but new ones cannot contain PCBs
 - Liability for spills of PCB oil
- Mold
- Radon
- Lead paint

Environmental Due Diligence Checklist



Environmental Due Diligence Checklist



- ✓ Does the transaction involve property that has ever had a commercial or industrial use?
- ✓ Did the Phase 1 identify “recognized environmental conditions”?
- ✓ Does the property include undeveloped land?

Environmental Due Diligence Checklist



- ✓ Are jurisdictional wetlands present?
- ✓ Does the current business have the potential to contaminate the property?
- ✓ Will the purchaser or tenant continue to operate the business?

Environmental Due Diligence Checklist



- ✓ Is contamination confirmed in a Level 2 or baseline study?
- ✓ Will environmental response costs be incurred?

Other Considerations

- Selected development permits
 - Stormwater
 - Wetlands
 - Water Rights
- All require Land Use Compatability Statements (LUCS)
 - Each state agency has own State Agency Coordination (SAC) document—needs review!
 - Some require before considering permit

Stormwater



Stormwater

- DEQ 1200-C Permit
 - General permit for developments affecting more than 1 acre
 - Can apply to less than 1 acre if part of a larger common development
- DEQ 1200-CN Permit
 - Similar to 1200-C, but some local jurisdictions apply automatically to developments under 5 acres

Wetlands



Wetlands

- Development in jurisdictional wetlands may not be permitted, or mitigation requirements may be imposed
 - Land need not squish beneath your feet to be a wetland.
 - 1987 Corps of Engineers Wetlands Delineation Manual defines: "Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

Wetlands

- Oregon Division of State Lands
 - Removal-Fill program (ORS 196.795- 196.990)
 - 50 cubic yards threshold
 - Joint permit with Corps
- Clean Water Act §404 requires permit from Corps of Engineers before dredging “waters of U.S.” – wetlands
 - Nationwide permits

Nationwide Permit Program



Water Rights



Water Rights

- Law of prior appropriation
 - First in time, first in right
 - Appurtenant rights run with the land, pass by operation of law without special deed
 - Rights may be conveyed separately from land, but must go through “transfer” process for change of point of diversion/appropriation, place of use, or nature of use
 - May be lost for five consecutive years non-use

Water Rights

- Water rights audit
 - Verify right intact and ground-truth use
 - Paper right and actual use often not in sync
 - Volume of right, capacity of well, quality of water may not be suitable
 - Use Certified Water Rights Examiner

Contact Information

Rick Glick

Davis Wright Tremaine LLP

rickglick@dwt.com

503.778.5210