



REAL PROPERTY TRANSFERS AND LIABILITY

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Real estate owners, investors, tenants and lenders have environmental liability on numerous fronts that they must be concerned with and educated about. Legal action may come from local, state, federal and private interests. These actions are not limited to the current property owner at the time of the action, but rather can include other property owners in the chain of title, tenants and lending institutions.

I. FEDERAL ENVIRONMENTAL LIABILITY

Federal environmental liability regarding real estate transactions generally falls under two federal statutes. These statutes are the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA aka Superfund) of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, and the Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Act) of 1996; and the Resource Conservation and Recovery Act (RCRA) of 1976, as amended by Hazardous and Solid Waste Amendments (HSWA) of 1984. CERCLA is the federal environmental statute of greatest concern to real estate owners, investors, tenants and lenders.

CERCLA

CERCLA'S POTENTIALLY RESPONSIBLE PARTIES (PRPs)

CERCLA establishes four categories of potentially responsible parties (PRPs) for federal environmental liability:

- The current owner(s) and operator(s) of a facility where a hazardous substance release has occurred or the threat of one exists.
- The owner(s) or operator(s) of a facility when hazardous substances were disposed of at the facility.
- Persons or entities (generators) that handled the treatment and disposal of hazardous substances at a facility.
- Persons or entities that transported hazardous substances to a selected facility.

Persons falling into any one of these categories could be directed by the EPA to clean up contaminated sites or the EPA could perform clean up and recover costs from the PRP.

CERCLA defines an “owner or operator” as the person owning or operating a facility, or in the case of abandonment, a person who owns, operates or controls activities at a facility prior to the abandonment. Lending institutions become vulnerable when they foreclose on contaminated property. Lender’s must understand the intricacies of CERCLA to avoid being defined as the owner or operator of a property when foreclosure occurs. Lender’s need to also be very cautious about actions taken to “control” a debtors business. These actions could be construed as operational activities and subject the lender to that definition. Experienced legal counsel in this area of law is crucial to lenders.

DISCLOSURE OF KNOWN OR THREATENED RELEASES

As previously discussed, CERCLA establishes four categories of PRP’s, but missing from that

list is “interim landowners”. In SARA’s innocent landowner provision Section 101(35)(C) it states that “if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge such defendant shall be treated as liable under section 9607(b)(1) of this title...”. It is unclear whether this was intended to create a fifth PRP (interim landowner), but it may necessitate further clarification from Congress or the courts.

Several states have passed disclosure requirements relative to property transactions

DEFENSES TO CERCLA LIABILITY

Innocent Landowner Defense- CERCLA provides the buyer or owner with an “Innocent Landowner Defense” if certain conditions are met prior to the purchase of a property. SARA required “all appropriate inquiry” to be performed on a property prior to purchase that includes a review of previous property ownership and uses of the property. “All appropriate inquiry” was further defined under the Brownfields Act. The EPA is currently promulgating standards that define “all appropriate inquiry”. The Brownfields act states that such standards must include:

- the results of an inquiry by an environmental professional
- interviews with past and present owners, operators and occupants of a facility
- review of historical documents
- searches of recorded environmental cleanup liens
- review of government records
- site reconnaissance

- specialized knowledge on the part of the defendant
- the relationship of the purchase price to the value of the property if uncontaminated
- common knowledge or easily attainable information about the property
- the obviousness of the presence or likely presence of contamination

Until the EPA promulgates standards or regulations regarding “all appropriate inquiry” the ASTM Standard E-1527 will constitute “all appropriate inquiry”.

Contiguous Properties- The Brownfields Act provides some protection for owners of property that has been contaminated by a source on a contiguous property. The Brownfields Act states that a contiguous property owner will not be defined as owner or operator of a facility under CERCLA if the following conditions are met:

The owner or operator must not have caused or contributed to the hazardous substance release. The owner or operator must not be affiliated with anyone that is potentially liable for response costs or be potentially liable themselves.

The owner or operator must have undertaken action to stop or prevent releases.

The owner or operator must cooperate with and provide access to those persons performing response actions.

The owner or operator must have performed “all appropriate inquiry” prior to the property purchase and not have knowledge that the property is or could be contaminated by a hazardous substance release.

An owner or operator that does not meet the conditions for exemption under CERCLA’s contiguous properties law may qualify under the “Bona Fide Prospective Purchasers” exemption.



“Bona Fide Prospective Purchasers”- An owner or operator of a contaminated property may qualify as a “Bona Fide Prospective Purchaser” if certain conditions are met under the Brownfields Act.

- The owner must have purchased the property after January 2002.
- The owner must not impede the response and restoration.
- All disposal of hazardous substances must occur prior to purchase.
- The owner must perform “all appropriate inquiry” into the previous ownership and uses of the property.
- The owner must exercise appropriate care regarding any hazardous substances found at the facility prior to purchase.
- The owner must cooperate with and provide access to those persons performing response actions.
- The owner must not impede institutional controls at the facility.
- The owner must not be affiliated with anyone that is potentially liable for response costs or be potentially liable themselves.

“Bona Fide Prospective Purchasers” may be exempt from CERCLA liability, but they cannot reap a windfall from increased property value as a result of federal cleanup. If increased property value is recognized by the owner due to federal cleanup, then the federal government can place a lien on the affected property. The EPA may provide formal agreements not to sue in certain circumstances, however the EPA’s position is that prospective purchaser agreements are no longer necessary.

Secured Creditor Exemption Rule- Lenders may qualify as exempt from federal action for response and restoration under CERCLA’s

Secured Creditor Exemption Rule if certain conditions are met. The rule also provides a framework for lending institutions to police their loans and work with borrowers relative to contaminated collateral without being held liable for response and restoration costs.

The lender cannot manage the borrower’s environmental compliance issues or be involved in day-to-day decision making. If the lender forecloses on the property it must divest itself of the property “at the earliest practicable commercially reasonable time”. There are numerous other caveats to maintaining this exemption upon foreclosure.

The rule does not provide an exemption to secured creditors for all liability under CERCLA. The rule applies only to CERCLA liability as an owner or operator. It does not apply to a secured creditor's activity as a “generator”. The rule also does not exempt secured creditors from liability under other federal or state environmental laws. In addition it does not provide protection from private or third party litigation.

RCRA

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) LIABILITY

RCRA was enacted in 1976 to provide regulations for the management of hazardous waste from its’ generation to disposal. RCRA regulation that concerns real estate owners, investors, tenants and lenders relates to hazardous waste and underground storage tanks. RCRA can impose civil and criminal penalties and require corrective action be undertaken by responsible parties. Owners, operators and lenders can find themselves liable for penalties and/or cleanup costs under RCRA actions.



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RCRA liability has been assigned to current and former property owners where hazardous waste has been dumped. Previous landowners have been held liable for improperly storing chemical wastes and not rectifying hazardous conditions. Current property owners have been held liable for not properly investigating hazardous conditions prior to the property purchase. RCRA may hold property owners liable for not meeting notification, operation and corrective action standards established federal rules.

II. STATE AND LOCAL LIABILITY

Real estate owners, investors, tenants and lenders could face legal action relative to local and state regulations. Property owners including lenders with foreclosure properties could face regulatory action for lack of compliance and assessment and cleanup of contaminated property. Owners, operators and lending institutions should conduct “all appropriate inquiry” prior to property transactions to limit liability in this area. Owners, operators and lenders involved in real estate transactions involving contaminated property should identify responsible parties, understand state cleanup programs (if applicable to the property) and evaluate risks including federal, local and state regulatory action and third party liability.

III. THIRD PARTY LIABILITY

Federal statutes do not provide protection from potential lawsuits involving third parties. Real estate owners, investors, tenants and lenders could face third party lawsuits relative to contamination migrating from the owner, operator or lenders property to surrounding properties. State petroleum cleanup program sites with low scores may sit idle for numerous years while contamination continues to migrate. Owners, operators and lending institutions

should conduct “all appropriate inquiry” prior to property transactions and evaluate the potential for offsite migration and third party liability.

III. WHAT CAN YOU DO TO LIMIT YOUR LIABILITY?

Persons involved in real estate transactions should make every effort to understand the intricacies of federal, state and local environmental law. Environmental attorneys can assist in reviewing your policies and procedures as they relate to real estate transactions. “All appropriate inquiry” should be performed by an insured environmental professional. Florida Environmental Regulation Specialists, Inc. (FER) has experienced professionals that can assist you through the entire process.

RESOURCES

1. Laurence S. Kirsch and Geraldine E. Edens. An Overview of Environmental Liability Chapter 1 Federal Environmental Liability
2. Barry Breen. Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Agencies
3. Bruce C. Smith, Esquire. The EPA’s New Lender Liability Rule: Quelling The Fear Spawned by Fleet Factors
4. John D. Cromie and Adam W. Walsh. Secured Creditor Exemption Upheld