

Welcome!

Addressing Environmental Issues in Real Estate Development

Presented by Steve Parascandola and David Berry



Addressing Environmental Issues in Real Estate Development

- Today's PowerPoint presentation and recording will be available on SmithLaw.com/Webinars by Thursday.
- For previous Real Estate Development Law webinar recordings, please visit SmithLaw.com/Webinars.



- The **largest business and litigation law firm** headquartered in the Research Triangle area and one of the largest in North Carolina
- Provide a **full range of legal services** to a diverse and dynamic group of **local, national and international clients**, ranging in size from **large public companies** to **emerging growth businesses**
- Dedicated to furthering clients' interests by providing **intelligent guidance, strategic counsel, solid advice** and **excellent results**



Explanation of Topic



Commonly Applicable Environmental Laws

- Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q
- Comprehensive Environmental Response, Compensation, and Liability Act (Superfund or CERCLA), 42 U.S.C. §§ 9601-9675
- Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136Y

Commonly Applicable Environmental Laws

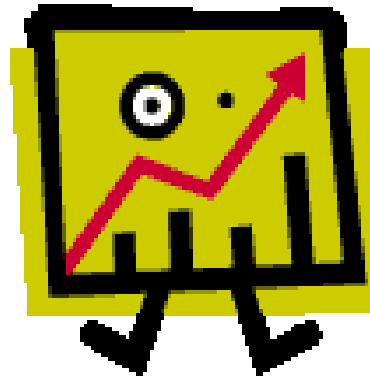
- Freedom of Information ACT (FOIA), 5 U.S.C. §§ 552-552a
- Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 1801-1819
- National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d
- Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678

Commonly Applicable Environmental Laws

- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k
- Superfund Amendments and Reauthorization Act (SARA) Title III, 42 U.S.C. §§ 11001-11050
- Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j-2b
- Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692

CERCLA

- Joint, Several, Strict and Retroactive Liability
- Owner, Operator and Arranger Liability



Liability Takes Many Forms and May Not be Readily Apparent

- Soil and Groundwater
- Fixtures and Improvements – LUSTs, ACMs, PCBs



Liability Takes Many Forms and May Not be Readily Apparent

- Emissions
- Off-Site Contamination
- Third-Party Claims



Liability Takes Many Forms and May Not be Readily Apparent

- Past Disposal Practices – Arranger” Liability
- Wetlands
- Filings and Required Reporting – EPCRA, Groundwater Permits



Typical Background to a “Deal” Requiring Environmental Due Diligence

- Identifying the Target and Negotiating the Letter of Intent



Typical Background to a “Deal” Requiring Environmental Due Diligence

- Typical Allocation of Environmental Liability
 - Seller Retains All “Pre-Closing” Liability
 - Buyer Assumes All Unidentified “Post-Closing” Liability



Typical Background to a “Deal” Requiring Environmental Due Diligence

- Specifying Due Diligence Rights
 - “As Is” Deals
 - Limited Inspection Rights
 - Full Phase I and II Investigations
 - Management/Employee Interviews



Typical Background to a “Deal” Requiring Environmental Due Diligence

- Stock vs. Asset Transactions
 - Successor Liability Issues
 - Traditional Corporate Law Principles
 - CERCLA and Other Environmental Laws
 - EPA and State Enforcement Issues
- Permits, Reporting Requirements, Notifications and Filings

Typical Background to a “Deal” Requiring Environmental Due Diligence

- Financing Issues
 - Lender Liability Issues
 - Foreclosure Issues
 - “Operator” Issues
 - Valuation of Collateral



Engagement of Due Diligence Team – The Role of Attorneys and Environmental Consultants

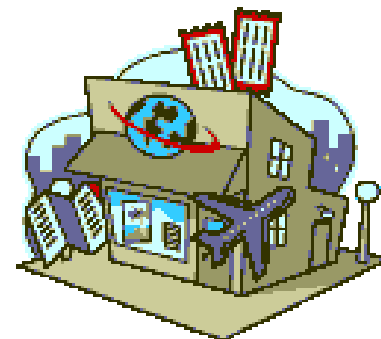
- Consultants – Assessment of Property and Compliance with Laws
- Attorneys – Consideration of Consultants' Assessment and Risk Management
- Although Some Overlap, Very Distinct Roles
- Importance of Maintaining Attorney-Client Privilege
- Preparation of Time and Responsibility Chart

Initial Environmental Due Diligence: The Phase I Process

- The Bona Fide Prospective Purchaser (BFPP), Contiguous Property Owner (CPO) and Innocent Landowner (ILO) Defenses
 - “Transaction Screen” vs. Full Phase I Assessment
 - “Friendly” Deals
 - Contractual Indemnities
 - Monetary Considerations/Low Risk Transaction

Initial Environmental Due Diligence: The Phase I Process

- Assessing Apparent Condition of Property to be Acquired
 - Examples of Obvious Environmental Risks
 - CERCLIS, RCRIS and Other Listings
 - On and Off-Site Wells
 - Staining
 - Old Structures
 - ASTs



Initial Environmental Due Diligence: The Phase I Process

- “Hidden” Costs of Compliance
 - “Orphan” USTs
 - Monitoring/Remediation System Upgrades
 - ACMs
- Confirming Compliance with Applicable Reporting Requirements

Initial Environmental Due Diligence: The Phase I Process

- Confirming All Required Permits and Approvals
- Assessing Historical Use and Surrounding Property
- Identifying Pending or Threatened Third Party Claims

Initial Environmental Due Diligence: The Phase I Process

- Lease Issues
 - Restoration Provisions
 - Compliance with All Laws Provisions
 - Indemnifications Provisions
 - Change of Control Issues

Negotiating Environmental Representations and Warranties

- Compliance with All Environmental Laws
 - “Acquired Assets” in Full Compliance
 - Seller in Full Compliance
 - Full Compliance During Period of Ownership
 - No Knowledge of Violations or Claims
 - “Best of Seller’s Knowledge” Provisions

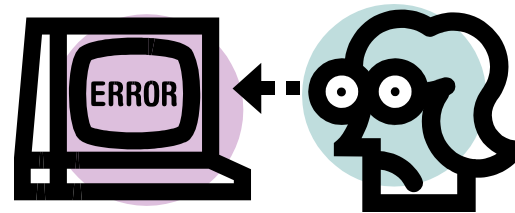


Negotiating Environmental Representations and Warranties

- Waiver of Claims and Indemnification of Seller
- Limitations on Contractual Indemnities
 - Time Limits
 - Statutes of Limitation
 - CERCLA and Other Legal Limitations
- Requiring Compliance and Permit Transfers by Closing
- Identifying Post-Closing Liabilities
- Preparation of Environmental Schedules to the M&A Agreement

Reviewing Corporate Records and Conducting Management Interviews

- Confirming Historical Environmental Compliance
- Uncovering Past Violations



Expanded Environmental Due Diligence – The Phase II Process and Release Reporting Issues

- Negotiating Costs of Phase II Assessments
- Scope of Phase II Assessment Work
 - Limited “Grab Sampling”
 - Laboratory Parameters
- Responsibility for Release Reporting
- Timing of Release Reporting
- Liability Issues
 - Seller’s Failure to Report Discovered Releases

Insurance, Brownfield Program, Dry Cleaner Solvent and UST Trust Fund Issues

- Confirming Coverage and Continuation of Coverage
- Ensuring Assignability of Trust Fund Rights
 - Confirming State-Specific Requirements

Post-Closing Issues

- Access Agreements and Ongoing Remediation Requirements
- Methods of Enduring Post-Closing Compliance
 - Escrow Agreements
 - Letters of Credit
 - Individual Guarantees
 - Rent Offers
 - Property Transfer Liability Insurance

**Thank you for attending today's
Real Estate Development Law webinar!**

Don't forget...

- Today's PowerPoint presentation and recording will be available on SmithLaw.com/Webinars by Thursday
- For previous Real Estate Development Law webinar recordings, please visit SmithLaw.com/Webinars