

# Update on Environmental Liability in Real Estate Transactions

**Watch-Outs and Best Practices for  
the General Practice Lawyer**

Environment, Energy and Resources Law  
Section

# What You'll Learn This Morning

- **Sources of Environmental Liability**
- **Defenses to Environmental Liability**
- **All Appropriate Inquiry**
- **Kentucky's Brownfield Redevelopment Program**
- **Best Practices for Managing Environmental Risk**

# Sources of Environmental Liability



- CERCLA (“Superfund”)
- 42 U.S.C. § 9601 et seq
  - Kentucky’s counterpart: KRS 224.01-400
- Passed in 1980
  - Result of the Love Canal Disaster
  - SARA passed in 1986
- Stands for Comprehensive Environmental Remediation, *Compensation and Liability Act*

# Who is Liable Under CERCLA?

- **Current owners and operators of “facilities” where a “release” of “hazardous substances” has occurred**
- **Owners and operators at time of a release**
- **Arrangers**
- **Transporters**

# What does Liability Mean?

- Liability is Strict and Joint and Several
- Costs of remedial actions
  - Removal Actions
  - RI/FS
  - Remedy Selection
  - RD/RA
  - O&M/Monitoring
- Natural resource damages
- Lots of Negotiation/Litigation



# Defenses to Liability?

- **Limited Affirmative Defenses**
  - Act of God
  - Act of War
  - Act of Third Party
- **Other Potential Defenses**
  - Innocent Purchaser
  - Lender Exclusion

# Innocent Purchaser

- At the time owner purchased the property, the owner did not know and had no reason to know that hazardous substances were released on the property
- Must have undertaken “all appropriate inquiry” prior to purchase
- 40 CFR Part 312

# All Appropriate Inquiry (“Phase I”)

- **ASTM E 1527-13**
- **Looking for “Recognized Environmental Conditions”**
- **Environmental Professional**
- **Evaluation of the Property**
  - **Interviews**
  - **Historical Documents**
  - **Visual Inspections**
  - **Record Reviews**
  - **Evaluation of Purchase Price**
  - **Degree of “obviousness”**
- **Map**



# Phase II?

- If REC's identified, a Phase II may remove uncertainties
- Sampling and analysis of environmental media at the property
- Useful to:
  - Confirm presence/absence of hazardous substances
  - Estimate costs associated with removing/managing hazardous substances

# Practical Affect of AAI

- **Tool for evaluating potential future risks**
- **Tool for evaluating suitability of the land for planned use/re-use**
- **Informing negotiations of price for the property**
- **Informing negotiations over terms of a PSA**

# Lender Exclusion

- Under CERCLA, foreclosing bank not an owner/operator if it does not “participate in management”
- Participates in management if:
  - Exercises decision-making control over environmental compliance
- In Kentucky, however, the bar is higher...
  - Must engage in “all appropriate inquiry” AND
  - No indicia of hazardous substances
  - KRS 224.01-400(26)

# Kentucky's Brownfield Redevelopment Program (KRS 224.01-415)

- Provides wide liability protections for purchasers of potentially contaminated land
- To qualify:
  - Release occurred prior to acquisition
  - All appropriate inquiry prior to purchase
  - Provided all legally required notices
  - Compliance with all land use restrictions
  - Compliance with any information requests
  - Not legally affiliated with responsible party
  - Not caused/contributed to the release

# Property Management Plan

- In addition to certification, must have a PMP
- PMP serves as a “user’s manual”
- Outlines steps for property owner to operate property without making contamination worse
- Must be prepared by Kentucky certified PE

# Brownfields Process

- Can submit application pre-closing
- KDWM review leads to “Notice of Eligibility” pre-closing
- Upon closing, owner must submit copy of the deed
- KDWM will provide “Notice of Concurrence”
- KDWM has recently begun inspections of properties under Brownfield to confirm compliance with PMP

# How to Manage Environmental Liabilities in Transactions

- **Environmental liabilities may be shifted contractually among private parties**
- **Need to be specific to ensure liabilities are properly allocated**
- **Goals in negotiations will differ depending on party**

# Common Provisions for Contracts

- **Reps & Warranties**
- **Definitions**
- **Covenants**
- **Indemnities**
- **Cleanup Obligations**
- **Post-Closing Liabilities**
- **Limitations on Liabilities**
- **Knowledge**
- **Compliance Status**



# Insurance Options

- **Pollution Legal Liability**
  - Requires investigations
- **Remediation Cost Overrun**
  - Protection for insured who must conduct remediation
- **Secured Creditor**
  - Protects insured's creditor in event of load default and 3<sup>rd</sup> party claims for cleanup costs

Questions?

A decorative graphic consisting of a solid teal horizontal bar that spans the width of the slide. Below this bar, on the right side, there are several horizontal lines of varying lengths and colors, including teal and white, creating a layered, stepped effect.