

## TWO RECENT DEVELOPMENTS POTENTIALLY AFFECTING REAL ESTATE TRANSACTIONS

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The following article briefly discusses two recent developments which have potential impacts on real estate transactions. The first is the relatively recent change in the federal Comprehensive Emergency Response, Compensation and Liability Act (CERCLA) concerning “all appropriate inquiry” and its effect on defenses to cleanup liability. The second development is the recent growing concern over indoor air quality from natural and man-made pollutants.

### **I. PURCHASER’S POTENTIAL CLEANUP LIABILITY RISKS AND DEFENSES**

#### **A. Liability Imposed by CERCLA**

Under CERCLA, the current owner and/or operator of property is liable for the costs involved in cleaning up contaminated property. 42 U.S.C. § 9607(a). In addition, a purchaser of contaminated real property would be liable under CERCLA for costs to clean up that property unless the purchaser can qualify for the “bona fide prospective purchaser” or “innocent purchaser” defenses. *Id.*; 42 U.S.C. §§ 9601(35), 9601(40), 9607(b)(3) & 9607(r). Liability under CERCLA is joint, strict and several. This means that a liable party, including subsequent purchasers for value, could technically be held responsible for all of the clean up costs regardless of the scope of its contribution to those problems.

#### ***1. Applicability of the Bona Fide Purchaser Defense***

Section 107(r) provides an exemption from owner or operator liability for a new category of real property purchasers called “bona fide purchasers.” 42 U.S.C. § 9607(r). Even though the exemption is contained in the brownfields section of the legislation, the new exemption is not limited to “brownfields sites” as that term is defined in the Act. Rather, the new exemption applies to all hazardous substance sites. To be eligible for the exemption, the purchaser must not impede the performance of the response action. 42 U.S.C. § 9607(r)(1). A “bona fide purchaser” is defined as a person that acquires ownership of the facility after enactment of the exemption on January 11, 2002, and who establishes the following by a preponderance of the evidence:

- all of the disposal at the property occurred before he acquired it;
- the person must have conducted all appropriate inquiry at the time he acquired the property;
- the person must provide all required notices with respect to the discovery or release of hazardous substances;

- the person must exercise “appropriate care” by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human or environmental exposure to any hazardous substances;
- the person must provide access and cooperation to those authorized to undertake response actions;
- the person must not be affiliated with a liable party;
- the person must comply with land use restrictions and must not impede any institutional controls placed on the property; and
- the person must comply with information requests and subpoenas.

42 U.S.C. § 9601(40). Notably, there is no requirement that the purchaser not have known of the contamination at the time that the property was purchased. *Id.*

EPA initially adopted ASTM E 1527-97 as the “all appropriate inquiry” standard that applies to property purchased after May 31, 1997 until EPA promulgated regulations defining the standard. 42 U.S.C. § 9601 (35)(B)(iv)(II). The ASTM standard cited in the statute has been updated and replaced with ASTM's revised standards E 1527-05 and EPA promulgated regulatory standards and practices for meeting the “all appropriate inquiry” obligations in November, 2005. Hence, in the case of property purchased on or after May 31, 1997, the requirements for conducting "all appropriate inquiry," including the conduct of such activities to qualify as a bona fide prospective purchaser defense under CERCLA, can be satisfied through the use of the applicable ASTM Standard (depending on when the Phase I was conducted) or by meeting the regulatory requirements set forth at 40 C.F.R. Part 312. 40 C.F.R. § 312.11. Essentially, this means that, to qualify for the bona fide purchaser defense, the purchaser must now conduct a Phase I Environmental Assessment meeting the ASTM E 1527-05 standard or the similar Part 312 regulatory requirements.

In addition, a bona fide purchaser must exercise “appropriate care” by taking reasonable steps to stop any continuing release, prevent any threatened future release, and preventing or limiting human or environmental exposure to any hazardous substances. 42 U.S.C. § 9601(40). It is not exactly clear what is meant by the term “appropriate care.” The term is not defined. The contiguous property exemption section contains a similar “appropriate care” requirement and expressly provides that one attempting to qualify for the exemption will not be required to undertake groundwater investigations or install groundwater remediation systems. 42 U.S.C. § 9607(q)(1)(D).<sup>1</sup> One could argue that the same applies for bona fide purchasers. One could also argue that the “appropriate care” standard is actually more rigorous for bona fide purchasers than it is for contiguous property owners. In addition, the new amendments to the (related) innocent purchaser defense may confuse the matter somewhat. Under the new amendments, to qualify for

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<sup>1</sup> In the committee report accompanying the bill, the Senate Committee on the Environment and Public Works explained that a contiguous property owner will not be required to conduct full scale response actions, but rather would be required to take steps such as apprising government agencies of the situation, erecting signs or fences, or maintaining existing barriers to prevent exposure. See S. Rep. No. 107-2, 107th Cong., 1st Sess. 10-13 (Mar. 12, 2001)(accompanying S. 350).

the innocent purchaser defense, the purchaser must now comply with the “appropriate care” standard, as well as the old “due care” standard. 42 U.S.C. § 9601(35). One could argue that the “appropriate care” standard must require something more than the “due care” standard, or Congress would not have felt the need to add the requirement to the innocent purchaser defense. However, such an argument ignores the legislative history.

One potential issue for a purchaser planning to rely upon the bona fide purchaser exemption is that the United States may have a windfall lien on the property for any unrecovered response costs if a response action is carried out on the property and that response action increases the fair market value of the property above the market value prior to initiation of the response action. 42 U.S.C. § 9607(r)(2). The amount of such a lien shall not exceed the amount of the increase in the fair market value of the property attributable to the response action and the lien continues until satisfaction of the lien or recovery of the response costs, notwithstanding any statute of limitations. 42 U.S.C. §§ 9607(r)(3) and (4). In lieu of imposing a windfall lien on the property, the bona fide purchaser may grant a lien on another piece of property, or offer another form of assurance of payment acceptable to EPA. 42 U.S.C. 9607(r)(2). Finally, while the bona fide purchaser defense is an affirmative defense to CERCLA liability, it may not provide a defense to state-imposed cleanup liability under CERCLA analogs or other cleanup authority.

## ***2. Applicability of the Innocent Purchaser Defense***

The innocent purchaser defense provides that a purchaser of contaminated property may escape liability if he undertook the same “all appropriate inquiry” as required under the bona fide purchaser defense prior to purchasing the property. 42 U.S.C. § 9601 (35)(A). Importantly, the defense is only available to a purchaser who did not know or have reason to know of the contamination. *Id.* Finally, an innocent landowner must “take reasonable steps” to stop any continuing release, prevent future releases, and/or prevent or limit exposure to any released hazardous substance. *Id.*

### **B. Recovery Actions for Response Costs**

CERCLA Section 107 generally allows EPA, states or individual parties to seek recovery from responsible parties for costs incurred in cleanup of a contaminated property. 42 U.S.C. § 9607. There are four classes of responsible parties: the current owner or operator; former owners and operators at the time hazardous substances were disposed of at the facility; persons who arranged for disposal or treatment at a facility; and, persons who accepted hazardous substances for transport to a facility. The four groups are on the hook for response costs and, in the past, could be held liable for cleanup costs incurred by individuals.

However, recently, the U.S. Supreme Court has accepted a case that may determine whether parties who voluntarily clean up contaminated sites have any rights to recover their costs under CERCLA. In the past, the Supreme Court held that parties who incur response costs from *voluntary* cleanup projects are not eligible for contribution

under CERCLA section 113. *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004). In *Aviall*, Aviall Services voluntarily conducted ground and groundwater remediation activities at its site and sought contribution from Cooper Industries for Cooper's portion of the remediation costs. The Supreme Court held that, under CERCLA section 113, a responsible party "may" seek contribution from other responsible parties *only* if the federal government has compelled the responsible party conducting the remediation to clean up the site. The Court did not rule on whether such an action could be brought under CERCLA section 107.

Since the *Aviall* ruling, several other companies have sought to recover response costs under CERCLA section 107 for cleanup work conducted voluntarily. The Eighth Circuit, Second Circuit and Seventh Circuit Courts have held that section 107 allows parties who undertake voluntary Superfund cleanups to recover response costs from responsible parties. However, there is a split in the Courts, as the Third Circuit has taken the position that there is no right to recovery under section 107.

### **C. Liability Imposed by State Programs**

Any purchaser should also be aware that it may be held liable for cleanup costs under a State program. For example, under the Arizona Water Quality Assurance Revolving Fund (WQARF), responsible parties are strictly and severally, but not jointly, liable for expenditures for remedial actions. A.R.S. § 49-285(a). A responsible party is defined, in relevant part, as a person who owns or operates a facility: when the hazardous substance was placed or came to be located in or on the facility; when the hazardous substance was located in or on the facility but before the release; or during the time of the release or threatened release. A.R.S. § 49-283(A)(1). The WQARF statute further provides that a person is not a responsible party unless he:

knew or should have known that a hazardous substance was located in or on the facility at the time right, title or interest in the property was first acquired by the person and engaged in conduct by which he associated himself with the release... For purposes of this paragraph, "associated himself with the release" means having actual knowledge of the release and taking action or failing to take action that the person is authorized to take and that increases the volume or toxicity of the hazardous substance that has been released.

A.R.S. § 49-283(B)(3). Hence, a purchaser who "knew or should have known a hazardous substance was located in or on the facility" is a potentially responsible party if he acts (or fails to act) and the amount or toxicity of the release increases.

Briefly, there is a mechanism for reducing a purchaser's liability under the WQARF program. An entity purchasing contaminated land may enter into a Prospective Purchaser Agreement, in which ADEQ covenants not to sue or take any other civil or administrative action against the purchaser for any and all liability under WQARF and CERCLA. See A.R.S. § 49-285.01. In order to obtain such an agreement, the purchaser

must meet a list of conditions set forth in the statutes. In order to obtain such an agreement, the following conditions must be met:

- the facility is within a site identified on the registry maintained by the department pursuant to section 49-287.01 or the department has been provided sufficient information to reasonably identify the extent of the contamination at the facility;
- the person is not currently liable for an existing or threatened release of a hazardous substance at the facility; and
- the proposed redevelopment or reuse of the facility will not contribute to or exacerbate existing known contamination or unreasonably interfere with remedial measures necessary at the facility or cause the contamination to present a substantial health risk to the public.
- the agreement will provide a substantial public benefit that may include any of the following:
  - an agreement by the prospective purchaser to provide substantial funding or other resources to perform or facilitate remedial measures at the facility pursuant to this chapter;
  - an agreement by the prospective purchaser to perform substantial remedial measures at the facility pursuant to this chapter;
  - productive reuse of a vacant or abandoned industrial or commercial facility;
  - development of a facility by a governmental entity or nonprofit organization to address an important public purpose; or
  - creation of conservation or recreation areas.
- the department consults with local planning and zoning authorities with jurisdiction over the facility and considers reasonably anticipated future land uses at the facility and surrounding properties.

A.R.S. § 49-285.01(A). In some cases, Arizona has required prospective purchaser agreement applicants to allow the state an environmental easement for access throughout the property and required the applicant to provide notice of the agreement and easement to future purchasers of the property.

#### **D. Liability Imposed by RCRA**

A purchaser may be exposed to additional requirements for cleanup of regulated materials if it is involved in “active management” of hazardous waste. In general, this occurs when an area contaminated by hazardous constituents is managed in such a manner as to trigger RCRA requirements. For example, if a purchaser excavates or disturbs an area of soil which contains a waste which was disposed of prior to promulgation of the RCRA statute and which now would be a hazardous waste, the purchaser may then be subject to hazardous waste management requirements for that soil.

## **II. INDOOR AIR QUALITY**

Indoor air quality is affected by many different factors which affect the type, level and nature of possible health impacts. The factors include pollutant sources, design, maintenance and operation of ventilation systems, moisture and humidity. Of these various factors, this article will briefly discuss three possible pollutant sources: mold, radon and vapor intrusion.

#### **A. Mold**

Moisture, humidity and substrate contribute to the growth of mold and similar biological pollutants. High relative humidity levels, failure to dry water-damaged materials within 24 hours and failure to properly maintain equipment with water reservoirs or drain pans can all contribute to mold growth. Certain types of mold, in turn, may cause or contribute to adverse health affects, especially if exposed individuals are sensitive to the mold.

Currently, there are no indoor air regulations or standards for airborne concentrations of mold or mold spores set by the Environmental Protection Agency. However, there are industry and state standards. For example, Texas has revised its building codes with the intent of addressing issues arising from construction related mold causes. The New York City Department of Health has developed guidelines for the assessment and remediation of mold in indoor environments. In addition, industries have issued guidelines concerning mold remediation, such as the Institute of Inspection, Cleaning and Restoration Certification (IICRC) S520 standard.

#### **B. Radon**

Radon is caused by the radioactive breakdown of naturally occurring traces of uranium in soil, rock and water. Because exposure to high levels of radon has been linked to lung cancer, EPA and the surgeon general recommend that *all* houses be tested for radon. Like mold, EPA has not established criteria regulating the amount of radon which can be found in indoor air. However, EPA recommends that action to reduce levels be taken if levels greater than 4 pCi/L in a home. In addition, the federal Housing Commissioner in 2004 issued Notice H 2004-08 requiring that a release agreement be included in all sales contracts for HUD-acquired single family homes. While government guidance focuses on the presence and effects of radon in the residential setting, it is possible that, at some point, radon in commercial spaces may be targeted for evaluation.

The exposure pathway for radon is generally through a building's basement or foundation (i.e., cracks and/or gaps in the concrete or stone). However, this exposure pathway can be interrupted through the use of various engineering controls such as sub-slab depressurization systems, low-permeability barriers, or other means.

#### **C. Vapor Intrusion**

In the last several years, soil gas vapor intrusion has become an increasing concern for EPA and state environmental agencies. The issue first came to light at Superfund sites in the northeast U.S. that were contaminated by volatile organic compounds (VOCs) as the result of industrial and commercial activities. Essentially, soil gas vapor intrusion is the migration of VOCs from a subsurface source, such as the ground or groundwater, into the indoor air of overlying buildings.

EPA has not promulgated regulatory standards applicable to vapor intrusion. However, EPA has developed the OSWER Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (EPA, 2002), which provides guidance concerning techniques for determining whether vapor intrusion at a site poses a health risk. EPA has also established draft Soil Gas Screening Levels (SGSLs). The SGSLs are not standards, but provide a benchmark at which levels could adversely impact health.

While there are no directly applicable regulatory standards applicable to vapor intrusion, there are other standards which potentially can impact real estate which may overlie sources of vapor intrusion. For example, several EPA Regions and several states have implemented preliminary remediation goals (PRGs) under Superfund and the Resource Conservation and Recovery Act (RCRA) for VOCs that may migrate into a building. The PRGs are cleanup standards for remediation at contaminated sites. Because of the relative novelty of vapor intrusion issues, these standards do not currently impose too great a burden on the potentially regulated public. However, several states are reviewing their cleanup levels to determine whether the potential for vapor intrusion is adequately addressed and, in some cases, have lowered the cleanup level, especially those where the remediated land will be used for residential purposes, in an effort to address soil gas-related issues.

With respect to non-residential settings, EPA and the Occupational Safety and Health Administration (OSHA) have agreed that OSHA will have primary responsibility in addressing occupational exposures. OSHA's current regulatory program regarding vapor exposure levels typical in a work place provides the workers with at least some protection. However, there may be instances where employees and employers are not aware of subsurface contamination that could be contributing to the indoor air environment in a building. This is especially true where chemicals containing the subsurface contaminants are no longer used at the facility. In such a case, EPA recommends that regional or state agencies notify the facility of the potential for vapor intrusion. EPA also takes the position that a change in the future use of the building might suggest a need to re-evaluate the indoor air pathway. In addition, non-residential, non-occupational settings may present exposure scenarios to the general public. In cases where vapor intrusion may be present, EPA also recommends that appropriate screening levels be applied to the sites.

While contamination of a site may have the potential to result in vapor intrusion, there are steps which can be taken to mitigate the likelihood of exposure. Like radon, the exposure pathway for soil gas vapor can be established through cracks in basements and

foundations. However, soil gas can also be drawn into the building from groundwater use if the groundwater is contaminated and the building uses well water. The same engineering controls as used to mitigate the radon exposure pathway can also be used to interrupt the vapor intrusion pathway.

### **III. SUMMARY**

Generally, responsible parties, which can include current owners and operators of facilities, may be liable for remediation costs at contaminated sites. However, two defenses exist to protect purchasers, as owners and operators, from liability for purchased contaminated property; the “bona fide purchaser” defense and the innocent purchaser defense. In both cases, recent changes to the “all appropriate inquiry” standard must be met in order to qualify for the defense.

With respect to indoor air quality, recent concerns on the national level, especially regarding vapor intrusion of VOCs, has lead to policy guidance at the federal level and changes to regulatory cleanup levels in some states. As a result, standards may be implemented which restrict the use of a property or require mitigation and it may become more difficult to change the future uses of those property with vapor intrusion issues potentially arising from subsurface contamination.