Buying & Selling Dirty Property

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TABLE OF CONTENTS

BUYING AND SELLING DIRTY PROPERTY

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INTRODUCTION

Those who deal with waste often witness that the discovery of contamination on real estate is the kiss of death for a land acquisition or development project.

The label "hazardous waste" can spook buyers, sellers, banks, investors, landlords, tenants, and brokers. Government agencies which acquire property by purchase, eminent domain, condemnation, tax title, gift, or otherwise, get cold feet when waste is found before the purchase and sale. Developers disappear from the landscape when they see signs of hazardous waste. Business expansions are cancelled for the fear of disturbing past contamination.

This fear of liability is natural, considering that innocent landowners can be liable for acquiring contaminated land even if they were not aware of the contamination at the time of acquisition. Sellers can remain liable even if they sell their land "as is" to buyers who agree to "assume the risk." Facility operators can remain liable long after sale, even if they have contracts for what they think is "complete and total indemnification." Waste generators and transporters can remain liable for their waste forever, wherever it might be deposited, even if they acted properly and obeyed the laws. Owners and operators of hazardous waste treatment, storage and disposal facilities (TSDFs) can remain liable regardless of whether they used the best technology at the time and were not negligent in TSDF management.

Real estate contamination incites fear because it can trigger what is called "strict, joint, and several liability" under federal and state Superfund laws and impose it retroactively and prospectively.

We believe, though, that most hazardous waste problems are manageable, if only someone will take charge to manage them. The parties to a transaction can understand their legal liabilities and the applicable procedures for cleanup. They can get reliable estimates of cleanup costs and schedules. They can allocate their financial responsibilities and cleanup duties using carefully crafted real estate documents. They can readily find ways to "hold the deal together." They can preserve the evidence they need to submit insurance claims and go after the real responsible parties for reimbursement.

This approach can work for the simplest transactions or projects to the most complex, to put contaminated properties back into productive use. While many contaminated lands, commonly known as brownfields, are located in prime urban and commercial locations, they have remained abandoned or ignored for several reasons. One is that developers elect to build on comparatively pristine land elsewhere, commonly called greenfields, often in suburban or exurban areas. Similarly, lenders have been reluctant to finance projects that may involve the risk of environmental liability.

There are parties willing to redevelop brownfields and finance that redevelopment, but they are not willing to face exposure to liability for exorbitant cleanup costs as potentially responsible parties (PRPs) under the federal; and state Superfund laws just by dint of becoming site owners or operators.

The slightest mention of contamination should not create unreasonable fear. Handled properly, the presence of contamination need not render property unusable or unsellable. It is very possible to buy and sell dirty property, complete development projects, or continue business operations.

1. UNDERSTAND SUPERFUND LIABILITY. Liability under federal and state hazardous waste cleanup statutes is a special type known as strict liability. Accordingly, all generators, transporters, and disposal arrangers of hazardous waste, past and present, and all owners and operators of land or facilities, from which there has been a release or threat of release, are theoretically liable for the resulting cleanup costs, without regard to fault. Federal liability arises under the *Comprehensive Environmental Response, Compensation, and Liability Act,* 42 U.S.C. §§ 9601-9675, commonly known as "Superfund" or "CERCLA." Concurrent state liability will usually arise under the state Superfund equivalent, which in Massachusetts is the *Massachusetts Oil and Hazardous Material Release Prevention and Response Act*, Massachusetts General Laws ch. 21E, §§ 1-18, known as "Chapter 21E."

As a result of the joint, strict, and several liability, EPA and state agencies with Superfund laws do not need to prove wrongdoing, such as negligence, in order to compel cleanup or recover government response costs.

An "Owner" or "Operator", under Superfund, is defined under 42 U.S.C. § 9601 (20)(A) as any person owning, operating, or charting by demise, a vessel as well as an onshore or offshore facility. The statute excludes individuals who do not actively participate in the management of a facility but maintain a security interest in the vessel or the facility. 42 U.S.C. § 9601 (20)(A). The courts have found common carriers liable as owner/operators but have declined to hold shippers liable for releases of hazardous substances in their custody, when the circumstances surrounding the release are beyond their control. Courts have interpreted owner/operator liability broadly but require active participation in waste management practices before liability attaches.

Individuals who arrange for the disposal of hazardous wastes they have created are liable as so-called "generators" under CERCLA 42 U.S.C. § 9607 (a)(3). Courts liberally construe generators to include facility owners that take affirmative steps for hazardous waste disposal. Individuals arranging for hazardous waste disposal must have the actual authority to control the handing and disposal of the hazardous waste for liability to arise. Additionally, transporter liability will arise where a transporter plays a significant role in the site selection.

EPA (and the typical hazardous waste agency) does not need to establish who was responsible for exactly how much waste and may select from among what are called the Potentially Responsible Parties (PRPs) to compel a "private party cleanup" or to secure reimbursement of government cleanup expenditures. 42 U.S.C. § 9604 (a)(1).

Remember that federal Superfund liability attaches to any real estate contaminated with Superfund-type hazardous substances, regardless whether the site is listed on the National Priority List (NPL).[1] That is why Superfund liability reaches almost anyone having anything to do with real estate. Remember that Massachusetts Superfund liability attaches to oil as well as hazardous materials on property. Massachusetts General Laws ch. 21E, §§ 1-18.

Several states have created their own Superfund laws. These state statutes, which Congress has invited to go beyond the federal Superfund, commonly regulate more types of waste, such as petroleum products (as in Massachusetts); impose stricter liability (allowing fewer defenses); foster additional litigation (allowing private suits for damage to real estate); affect real estate title (allowing the state, such as Massachusetts, Connecticut, and New Hampshire, to record a superior lien, known as a "superlien", to secure reimbursement of cleanup costs); allow liens against the business revenues of liable persons (New Hampshire); or require site assessments prior to transactions involving industrial property (as in New Jersey and Connecticut).

2. ACCEPT CONTAMINATION AS ROUTINE. Realize that almost every piece of municipal, industrial, or commercial real estate has some contamination. Look for it. Expect to find it. Want to find it. Ordinary commercial buildings, well-kept factories, warehouses, farmland, and even unimproved land and "open space" can be contaminated.

EPA under Superfund has certified National Priority List (NPL) sites and has other under investigation. Additionally, CERCLIS, the computerized inventory of potential sites, contains thousands of sites in the database. Since Superfund's inception in 1980, 30,429 sites have been logged. There likely will be tens of thousands more sites discovered in the next few decades. Essentially, we are discovering, and cleaning up, the chemical legacy of 200 years of the Industrial Revolution.

Thus, dealing with dirty property will become routine. Rather than run from dirty property or assume that a piece of land is useless, you should gather the kind of information needed to make rational business decisions. The value and usefulness of a piece of property is directly proportional to where is the waste, what kind is it, where has it gone, how fast has it traveled, how difficult is its removal, whether treatment of it is possible, and how clean the property will have to be to satisfy government requirements.

3. DO CAREFUL SITE ASSESSMENTS. Because the presence of hazardous waste may not be readily apparent, it is critical to evaluate property thoroughly before closing a real estate transaction or casting a project in concrete. Recognize, though, that you get what you pay for in a site assessment. Choose contractors wisely.

Anybody with a business card will claim to be able to do site assessments for you. Prior experience of the site assessment professional is key. Consider the resumes of persons who will participate in the assessment, as well as the reputations of any laboratory performing analytical services carefully. The qualified site assessor can help potential purchasers to avoid liability.

Avoid contractors who low-ball their proposals. Examine a site assessor's previous work to see if the bidder simply does quick studies which recommend further work. Avoid those who send you contracts dripping with indemnification clauses and limits on financial liability for ordinary negligence. Additionally, avoid those who send teams of junior people right out of school with no supervision by senior engineers or environmental scientists.

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[1] Information on NPL sites can be obtained from: WWW.EPA.GOV/superfund/oerr/siteinfo/index.htm

4. EXPECT TO FIND CONTAMINATION. The purpose of the site assessment is to obtain useful information for business decisions. It is naive to buy a cheap assessment in the hopes that it will be "clean". It is silly of many buyers, lenders, and property managers to accept any site assessment provided that it is presented with a title and in a glossy cover.

To meet the appropriate level of inquiry and establish consistent standards for environmental diligence in commercial real estate, the American Society of Testing and Materials (ASTM) has established standards for industry practices. The ASTM standards established a pre-screening Phase I assessment process, and a complete protocol for a Phase I assessment as well as guidance for Phase II studies. ASTM Standards on Environmental Site Assessments for Commercial Real Estate. ASTM standards and guidance are universally recognized among the commercial and lending communities.

A Phase I site assessment is a preliminary survey that consists of a site visit, an examination of the site's history, and a state and federal file review for regulatory history. A site assessment of this preliminary sort is fine for a rough-cut, to identify the presence of potential hazardous wastes, but it is not a determination with much certainty.

If questions concerning possibilities of contamination still exist following the initial assessment, then further investigation, often termed a Phase II site assessment, which involves subsurface explorations as well chemical screening and analysis, should be performed. Additionally, site assessments should consider groundwater contamination, since it is the most important variable, affecting the extent of liability and the cost of remediation. Off-site contamination maximizes liability and cost.

A properly done site assessment should include a physical survey, specifically: topography, geologic setting, surface and groundwater flows, building and utility layouts, and the condition of all above and below-ground buildings and other structures, along with tanks and piping. The assessment also should include the permit and enforcement history of the property, and a determination of prior waste disposal, as well as industrial, commercial, or agricultural uses. Additionally, potential purchasers may wish to engage their site assessor to expand the scope of their initial assessment to include asbestos, lead paint, and radon.

The ASTM standards do not have legal standing, but are an attempt to summarize an industry wide approach for engineers, when performing site assessments. Many states that have a hazardous material release prevention and response law, like the *Massachusetts Oil and Hazardous Material Release Prevention and Response Act,* Massachusetts General Laws ch. 21E, have established content guidelines for Phase I assessments, once a property has been entered into the state Superfund system. To some extent, the state assessment guidelines and the ASTM standards are duplicative, but the ASTM standards are generally considered more basic. Massachusetts 310 C.M.R. § 40.0483, for example, mandates that Phase I preliminary assessments for the purpose of satisfying the state Superfund law, contain: general disposal site information, a disposal site map, a disposal site history, site hydrogeological characteristics, information on the nature of the contamination, an evaluation of the migration pathways and exposure potential, as well as an evaluation on immediate response actions. Commercial lenders and potential purchasers generally require only an assessment that follows the ASTM site assessment guidelines.

5. UTLIZE PROFESSIONAL RISK ASSESSMENTS. Consideration of properties or projects, offers and purchase contracts, negotiations on price and other considerations, expectations for projects or future plans, and all other business decisions should be based not on guesswork, but rather on a professional calculations of contamination nature and extent, response actions and any eventual cleanup, reporting and monitoring obligations, financial costs and obligations undertaken, and the likelihood of related government enforcement and private litigation. That way, the parties can assess potential liabilities, expected expenses, returns on investment, transaction types, and contract clauses to deal with contingencies. Otherwise, the parties are negotiating from ignorance, based on imagined horribles or inflated hopes.

For the simplest transactions, a thorough site assessment and realistic cleanup estimate is needed to make a realistic offer with sensible terms on a do-able schedule, and to prevent the deal falling apart soon after. That is just for starters. More is needed to avoid dashed expectations, blown schedules, escalating costs, unpredictable results, contract disputes, and litigation over property conditions, disclosures, warranties and representations.

Make it a point to collect adequate data to properly and fairly characterize the risk of harm to health, safety, public welfare, and the environment generally, not just a narrow set of Superfund implications. If public health standards do not exist for all substances and all appropriate media at the site, or if no predetermined cleanup levels are set forth in the regulations or in cleanup policies of DEP, evaluate the risks by site-specific risk assessment. This can be accomplished using appropriate reference doses or suitable analogous standards, policies, and guidelines.

There is room for debate in selecting doses or standards in performing risk assessments, which is more like an art than a science. Since the risk assessment drives the determinations of whether any remedial response is necessary, or what future remediation is required or recommended, attorneys and their professional consultants need to seize this opportunity to shape final decisions.

For the development of cleanup alternatives and the final remedial action plan, assuming they are important to the transaction, evaluate each potential remedial action based on such factors as:

- feasibility (cost-benefit analysis, technology-personnel availability);
- residual risk of harm;
- unique site characteristics;
- logistical difficulties;
- reliability of technologies;
- cost of implementation; and
- reasonably foreseeable land uses.

6. STRUCTURE ACQUISITIONS TO REDUCE RISKS. Any decision to purchase or develop contaminated land should consider the nature and scope of the contamination, the anticipated costs or cleanup, any activity and use limitations, and the likelihood of future liability to government or other plaintiffs. Contract clauses, discussed below, are only backstops against financial exposure. Better than mere legal language is to obtain control of the information, the cleanup, and the timing of ownership.

One way to control liability is to delay the closing or acquisition, and thus delay the ownership of the waste, until the cleanup is complete. Another way is to hold back purchase money or put it in escrow until the property is clean enough (according to the buyer's experts). Yet another way is for the buyer to conduct a cleanup (so it is done right) and deduct cleanup costs from the purchase price. Or close on the property with the seller granted access to do the cleanup, at no cost to the buyer. Or create a contract sharing the cleanup duties between the buyer and seller.

Be sure to include explicit division of labor among the parties covering preliminary investigations, legal notices to agencies, remedial action plans, supervision of contractors, and conducting the cleanup.

Parties could separate ownership interests where contamination is involved. Simply put, parties could purchase less than a fee interest in the property, where underground contamination is an issue. Additionally, where underground storage tanks are an issue, parties might wish to exclude an underground storage tank from the parcel that is being purchased.

Potential purchasers ultimately may decide to lease a contaminated parcel, in an attempt to avoid liability. Some courts have held that tenants who did not possess control over the property were not operators. Tenants which are active participants in management decisions, however, or which control the property's management, have been held liable as operations under Superfund.

Under CERCLA, conducting "All Appropriate Inquiries" provides certain liability protections to potential landowners. To establish that the owner did not know and had no reason to know that contamination was located at the site, in the event that liability is asserted in litigation, the defendant must demonstrate that all appropriate inquiries were performed and "the defendant took reasonable steps to stop any continuing release; prevent any threatened future release; and prevent or limit any human, environmental or natural resource exposure to any previously released hazardous substance."

For property purchased before May 31, 1997, the American Society for Testing and Materials standards will satisfy the "All Appropriate Inquiry" rule. Otherwise, all appropriate inquiries must be performed before the site is retained and in accordance with generally accepted standards. A complete inquiry considers all of the following:

- the results of an inquiry by an environmental professional;
- interviews with past and present owners, operators, and occupants of the facility;
- reviews of historical sources to determine previous uses and occupancies;
- searches for recorded environmental cleanup liens against the facility that are filed under federal, state, or local law;
- reviews of federal, state, and local government records concerning disposal, storage, handling, generation, treatment, and spills of contamination at or near the facility;
- visual inspections of the facility and of adjoining properties;
- specialized knowledge or experience on the part of the defendant;
- the relationship of the purchase price to the value of the property, if the property was not contaminated;
- commonly known or reasonably ascertainable information about the property; and
- the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

7. CARVE OFF CONTAMINATED AREAS. While structuring the transaction, remember that hazardous waste liability is triggered by ownership or operation of a contaminated site or facility. If you do not want the liability, do not own or operate the dirty site. Instead, think of carving the site into separate parcels (by a legal subdivision if necessary) and simply buy only the clean property. Or lease the clean part of the premises, not the dirty part. Or lease only the surface of the floor and the space above. Or lease only the upper floors. Or buy only an easement or air rights. Prospective purchasers should consider avoiding environmental liabilities by purchasing only clean assets.

Remember also that liability attaches to those who arranged for transportation, treatment, or disposal of hazardous wastes. If one does not want the liability for formerly-generated wastes (wherever they are now), do not buy the company. Buy only the rights to sell the product. Or only loan funds to the operation, taking back only principal and interest. Or create a new corporate subsidiary for the clean part of the operation, and buy only it.

8. DISTANCE A BUYER FROM THE REAL ESTATE. Sophisticated purchasers now explore participation in a deal as limited partners, or through a subsidiary, or owning a limited economic interest in a project. The idea is to exclude interest in the real estate. Be aware that these approaches probably will not isolate the buyer who has actual knowledge and control over activities that contaminate the land. Under court decisions, the key appears to be who made hazardous waste operation, production, or disposal decisions, or who oversaw that area within a business. Be sure to avoid the degree of managerial involvement which constitutes "ownership" or "operation" of a site or facility covered by the federal or state Superfund.

Thus, a limited partnership might limit liability if the limited partners stay out of day-to-day management activities. Partners could acquire property through a joint venture and allocate liability among themselves. Owning a piece of the project, not the real estate, likewise may limit liability for an investor who is not directly involved in waste generation or disposal.

A parent company may not be liable for a subsidiary where the parent company did not form itself specifically as a shelter against Superfund and where the parent is not involved directly in day-to-day operations. Generally, parent corporations will not be held liable for the actions of subsidiary corporations that are financially independent and make unconstrained business decisions. However, parent corporations can be held liable as site operators for parcels that subsidiaries owned and managed, where the parents exert “practical total influence and control” over the subsidiary. Courts will engage in an intensive fact inquiry surrounding the totality of the circumstances, when assessing substantial control for corporate operator liability.

Business organizations cannot protect individuals acting in their corporate capacity, who under the guise of corporate decisions, knowingly present an imminent and substantial endangerment to human health and the environment. Corporate officers and employees who have engaged in highly illegal toxic waste disposal, may be personally liable, even though they have acted on behalf of the corporation.

9. USE CONTRACT CLAUSES CAUTIOUSLY. Quite often too casually, contracts are commonly employed to condition offers to purchase real estate or business assets, afford access to property and documents to conduct due diligence reviews, deal with ongoing or future response actions on a property before and after a transfer, divide costs, responsibilities and liabilities for monitoring, cleanups or litigation, and in many other ways cover environmental contingencies in all kinds of business, residential and governmental transactions.

While not even close to perfect protection, various types of contracts make sense where the buyer needs to conduct a property examination without which the price cannot be negotiated or deal reached, the seller needs to specify the land is being sold “as is,” where the structure of the deal is not enough to give the parties the relative comfort they need, where one party or both desire important warranties and representations, where both parties are to stay involved in actions relative to contamination after the transaction, or where they otherwise need to be crystal clear what they are or are not transferring and agreeing in the transaction.

Essentially, the considerations are similar for transactions large and small, but the complexity of the contracts will differ depending on the circumstances. The contract needs to be tailored to the situation.

For example, the typical seller hopes to sell the property at high value with no further responsibilities, while the typical buyer expects a low price due to contamination, plus seller indemnification for a long period. The reasonable middle ground will be contractual agreement for the buyer to have reasonable time and access to conduct a due diligence, obtain and review relevant documents, inspect the site and conduct testing, obtain extensions if desired, escape the deal (or renegotiate price) if dissatisfied, and maybe limited indemnification. It is usual to obtain a representation that there are no known violations of environmental regulations, no outstanding enforcement or litigation, no notices of claims or liabilities, no outstanding litigation, and no relevant documents known to the seller but withheld.

Another example is to reach agreement that defines a known contamination condition, refer to designated reports and plans, and allocate buyer or seller or shared responsibility for ongoing as well as future response actions (perhaps with a time limit), costs (perhaps with a dollar limit, or shared on a formula).

Common liabilities can be allocated among parties, although CERCLA does not allow parties to actually transfer potential governmental liability imposed by law. Contracts can allocate costs and risks, but can only share or shift the financial burdens. Superfund itself provides that the fundamental legal liability remains and cannot be shifted. For this reason, the basic contractual agreement is for indemnification: one party, usually the seller or a former owner or operator, expressly agrees to reimburse the buyer or present owner or operator for all or part of the expenses arising out of a cleanup.

CERCLA, under § 107(e), recognizes the use of indemnification agreements between parties. The courts have consistently enforced such agreements between parties, but have refused to recognize and enforce indemnification agreements between parties and the government. Private party indemnification agreements do not nullify a party's liability under CERCLA. Rather, these agreements shift the financial burden of potential cleanup costs among private parties.

We think the well-considered contract, in a complex matter involving large amounts of money, ongoing remediation actions, multiple responsible parties, or a long period of time, ought to include provisions for: such things as escrow deposits, purchase money holdbacks, reimbursement formulas, management of the cleanup, covenants not to sue, representations and warranties, liability releases, circulation of progress reports, cooperation on insurance claims, purchase price adjustments, arrangements against third party claims and government cleanup orders, as well as contingencies about future claims in case the government orders a more thorough cleanup later.

A word of caution on escrow agreements: experience teaches an escrow, intended as a solution to hold a deal together that otherwise would fall apart, can simply push the problem down the road to litigation later. Any escrow arrangement should be clear, concise and precise, with very careful consideration of who will serve as escrow agent with no conflict of interest.

The contract language a party should employ in an indemnification agreement in order to successfully incorporate CERCLA liability will vary among jurisdictions. A majority of jurisdictions will interpret broad, general language as distributing CERCLA response costs. A minority of jurisdictions, in contrast, require either a specific reference to CERCLA or environmental liabilities, or specific proven intent of the parties, to allocate CERCLA response costs.

Parties should utilize written representations and warranties, as to the condition of the parcel, within the purchase and sale agreement. The prospective purchaser of contaminated property, for instance, should seek warranties that the seller has exercised due diligence in their representations. Additionally, the purchaser should clearly define the warranties' precise scope. Of course, the prospective purchaser would want comprehensive warranties, while the seller would want to limit the representations and warranties to the best of its knowledge. Naturally, the prospective purchaser should require that all representations and warranties survive the closing, and attempt to obtain a long survival period.

10. MAKE CREATIVE BORROWING ARRANGEMENTS. Often banks and other lenders are reluctant, with good reason, to finance contaminated property, taking dirty land as collateral. Until recently, court cases held banks liable under Superfund if they foreclose on a piece of property, so as to own it even briefly. Additionally, these cases held banks liable if they get too involved in borrower operations, or if they have the authority to control the operations--even if they do not exercise it.

The liability nightmare for the lending community ended on September 30, 1996, with the *"Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996." Title II, Subtitle E, Section 2501-2505 of the 1996 Omnibus Appropriations, H.R. 3610,* which amended CERCLA owner/operator liability, under 42 U.S.C. § 9601(20), to exclude lenders that do not actively participate in an entity's management.

Lenders are protected from owner/operator liability, with respect to environmental compliance or operational functions of the facility, if they do not exercise decision making control and actively participate in the management of a facility prior to foreclosure. These CERCLA lender amendments defined management participation as actual participation in a facility's affairs. The mere ability of a lender to influence management decisions does not give rise to owner/operator liability. Lenders which exercise control over a facility's environmental services or actively participate in management will risk liability. Lenders which foreclose on contaminated property are protected, where the lender attempts to sell the property in a commercially reasonable manner, liquidate the foreclosed property, or wind up the foreclosed business's operations.

It remains significant, of course, that property held as collateral may lose its value once hazardous waste is found. Or the borrower may not be able to repay a loan if forced to pay for a cleanup. Or the lender may lose priority to a superlien filed by a state environmental agency.

There are, therefore, some ways lenders can be comfortable financing dirty property. The careful bank requires a proper site assessment along with written representations about the absence or condition of any known contamination either on the property or on the neighboring property, which could migrate. The thorough bank requires the buyer to give prompt notification of any contamination discovered during the term of the loan. The creative bank also might insist on indemnity from borrowers and guarantors, or may condition the loan on cleanup, or may adjust interest rates to reflect risks, or may take personal guarantees, or mortgages on clean property, to back up the usual collateral.

11. MANAGE WASTE PROBLEMS PROACTIVELY. More contaminated sites will be discovered daily, as buyers, banks, brokers, and property managers become more sophisticated, as chemical testing improves, and as government reporting obligations increase. It will be no surprise that these new sites are the land and buildings involved in typical commercial transactions, construction of new buildings, and municipal projects.

Part of proactive waste management is to anticipate these discoveries. Contamination problems do not "get better" by failing to notice them. Land values do not increase by leaving the contamination there.

We recommend recruiting a qualified engineering or environmental science firm to conduct site assessments on real estate, and environmental audits on ongoing operations. Rather than lurching from crisis-to-crisis, examine your present properties for waste problems. While you are at it, you might as well look for asbestos, PCBs, radon, LUST, lead paint, and ureaformaldehyde foam insulation, UFFI, and other problems. Then you can plan your physical and financial program to address the problems without being under the pressure of deadlines for real estate transactions, government cleanup orders, lenders and investors withholding funds, and litigation by plaintiffs seeking monetary damages.

12. PRESERVE SUPERFUND DEFENSES. Many land managers, especially government agencies, are not aware that the federal Superfund provides some legal defenses or exemptions against strict liability. CERCLA establishes three statutory affirmative defenses for potentially responsible parties: an act of God; an act of war; and third parties' acts or omissions that the defendant does not have a contractual relationship with. It is difficult and often uncommon for parties to use the act of God and war defenses. The third party affirmative defense is often unsuccessfully invoked.

Consider invoking the third-party defense if the contamination is caused exclusively by a person unconnected with you by contract, deed, or otherwise. You cannot invoke this third-party defense, though, for acts of an employee or contractor. They are not qualified as "third parties."

Defendants attempting to invoke the third-party defense must establish that: the hazardous substance's release was caused by the acts or omissions of third parties; the third parties' actions or omissions did not result from a contractual or employment relationship with the defendant; the defendant exercised due care with regard to the hazardous substance; and the defendant took precautions against the foreseeable actions or omissions by the third party. *42 U.S.C. § 9607(b).*

The most important, more useful defense for potential purchasers is the "innocent purchaser defense", which protects the innocent purchaser who does a site assessment at the time of acquisition, meeting good commercial practice at the time, inquiring into the previous ownership and uses of the property, which unfortunately misses the waste. *42 U.S.C. § 9607.*

Congress amended the ambiguous language of CERCLA § 107(b)(3) with the *Superfund Amendments and Reauthorization Act, 42 U.S.C. § 9601 (35)(A)(ii)*, to provide the innocent purchaser defense. Innocent purchasers who can establish that they purchased the property after the hazardous waste disposal, and exercised good faith and due care in attempting to discover any possible contamination before purchasing the parcel, will be protected under this defense. For the innocent purchaser defense to prevail, the innocent landowner cannot have any privity with the third party that subsequently caused the contamination. The party asserting the innocent purchaser defense must establish that it possessed no "reason to know" and conducted "all appropriate inquiry" into the parcel's pervious ownership, uses, and commercial practices. *42 U.S.C. § 9601 (35).* The courts are rigorous in applying a strict interpretation of the statutorily defined elements of the innocent purchaser defense. Prospective purchasers should make an appropriate and detailed pre-purchase environmental investigation to shield themselves from liability under the innocent purchaser's defense.

Of most interest to government agencies and heirs is what we call the involuntary transfer exemption. It is available to anybody taking property by inheritance or bequest, and to agencies which take property or eminent domain. There are several qualifications on this exemption, such as acting with due care.

Another defense for government is for anybody giving care, assistance or advice pursuant to the National Contingency Plan (NCP) or under the direction of a on-scene coordinator under the NCP where there is danger to public health or welfare. Yet another defense for state or local government is for response actions in an emergency, involving a facility not owned by the government.

These are not blanket defenses or exemptions. Quite often you will have to show that you acted properly upon discovery of the contamination, and anticipate the foreseeable acts of other persons. Check the defenses as they are interpreted in the courts and conduct your operations accordingly.

13. INVESTIGATE INSURANCE COVERAGE. Sometimes old Comprehensive General Liability (CGL) policies, even after the passage of time, may provide funds for cleanup and other response actions. This can be surprising because most people assume that all policies are the "claims made" type, providing coverage only for claims made during the policy year for which a premium is paid. The old CGL policies, because they were the "occurrence" type, can provide coverage if you can show the release or threat of release of contamination occurred during one or more of the early policy years. These old CGL policies can have what is known as a "long tail" and you should not neglect them as a source of money. This is especially true for policies before 1973, but policies issued before are pretty good, too.

Don't forget that household or other personal insurance may provide for some coverage and defense of claims.

This is not to say that the insurance company for your business or agency (or for generators, transporters, or site owners or operators) will pay you its money without a hassle. You should provide a notice of claim followed by a sophisticated statement of claim documenting the dates of contamination, the nature of it, the present and expected cleanup costs, the existence of policies, and the legal basis for believing that coverage exists.

We recommend that you do some serious "insurance archeology" if faced with real estate contamination in order to uncover all possible sources of insurance proceeds.

14. PREPARE TO SUE RESPONSIBLE PARTIES. One of the fastest growing areas of litigation in federal and state courts is about reimbursement of remediation expenses from the responsible parties. Valid claims may lie against waste generators, transporters, and past or present site owners and operators. The same legal concepts (strict, joint, and several liability, retroactive and prospective) that make it easy for EPA and state agencies to come after potentially responsible parties under Superfund laws, to carry out cleanups or reimburse the government, may be used by private parties seeking reimbursement for cleaning up the waste of others. A related theory of liability is called "common law contribution" for curing contamination caused by somebody else.

Knowledgeable landowners should be aware of the federal and state laws and limitations, their liabilities and defenses. They should be aware of claims they can pursue for breach of contract, breach of warranty, misrepresentation, indemnification and contribution, and using the private right of action in the federal Superfund (and several state Superfund statutes).

An important approach, to keep the litigation option open, while coping with cleanup obligations and agency compliance, is to conduct affairs so as to retain and organize the data needed to have any hope to pursue claims for reimbursement. Proper cost-accounting and claims presentation should be routine. These arrangements may need the cooperation of others, as in a shared cleanup. This means that contracts for land acquisition and subsequent cleanup should specify how the parties will cooperate in pursuing or defending various types of claims.

CONCLUSION

Hazardous waste management is a fundamental requirement governing commercial and governmental operations. Strict liability for contamination is here to stay, and the courts are willing to enforce the new types of legal obligations. EPA and state agencies have powerful enforcement weapons, such as comprehensive rules for response actions as well as reporting and monitoring, backed by administrative penalties and cleanup orders.

Potential purchasers of dirty property should use the proven legal techniques to hold deals together, structure sharing of the financial burdens, and schedule the cleanups. It makes sense for business, industry, government, and individual landowners to cope with their liabilities by using practical approaches to manage the legal, financial, and environmental risks.

At the same time, be aware there may be sources of funding or reimbursement available by virtue of contract provisions, insurance policies, common law principles, and private rights of action in Superfund statutes.

TABLE OF APPENDICES

APPENDIX 1

CHECKLIST OF CONTRACT PROVISIONS FOR TYPICAL LAND TRANSACTION

1. Right to enter and inspect.
2. Right to information and reports.
3. Right to remediate/obligation to remediate.
4. Obligation to notify of release/threat of release.
5. Option agreement with site assessment contingency.
6. Warranties and representations re: conditions of property.
7. Sale of property "as is".
8. Allocation of liability/responsibility.
9. Basic indemnification/comprehensive indemnification.
10. Obligations to assess and clean up contamination.
11. Escrow agreement for deposit/purchase monies/deed.
12. Special provisions for landlords/tenants.
13. Special provisions for asbestos/PCBs/radon/LUST/lead paint/UFFI.

APPENDIX 2

CHECKLIST OF OPTIONAL CLAUSES FOR COMPLICATED TRANSACTION

1. Obligations and indemnification for cleanup required by other federal, state, or local agencies (or private parties) beyond EPA.
2. Obligations indemnification with respect to cleanup beyond oil or hazardous materials.
3. Obligations indemnification for cleanup beyond applicable government cleanup standards.
4. Obligations and indemnification with respect to diminution in value of the premises (not just cleanup costs).
5. Obligations and indemnification with respect to future government requirements.
6. Obligations and indemnification of the seller by the buyer for newly discovered contamination.
7. Right of the buyer to conduct independent testing and evaluation of contamination.
8. Obligations of the parties to cooperate in studies and cleanup.
9. Resolution of disputes (negotiation/mediation/arbitration).
10. Rights of the parties to terminate agreement.
11. Communication among the parties and cooperation in insurance claims and litigation against the Real Responsible Parties.
12. Assignment of rights to other parties.
13. Restrictions to be incorporated in the deed so that rights and duties run with the land and bind successors in interest.

APPENDIX 3

"BASIC" CONDITIONS FOR OFFER

This offer is conditional on the following terms relative to any releases or threats of releases of oil or hazardous materials at, in, on, under, or near the premises:

1. A site assessment by a qualified environmental engineering, science, or consulting firm selected in the sole discretion of the Buyer, at the sole cost of the Buyer;
2. Access to the premises afforded to Buyer and its designated employees, agents and consultants for conducting said site assessment;
3. Delivery by Seller to Buyer of copies of any and all site assessments or other documents in Seller's possession regarding said oil or hazardous materials in a timely manner prior to completion of said site assessment;
4. Permission by the Seller to perform inspections and testing, whether intrusive or otherwise, on the premises for purposes of said site assessment;
5. Completion of said site assessment to the satisfaction of the Buyer by _____;
6. Said site assessment reporting results which are deemed favorable in the sole discretion of the Buyer; and
7. Agreement by Seller to indemnify and hold harmless the Buyer, and its successors and assigns, and all of Buyer's employees, agents, and consultants, from and against all liabilities, claims, losses, damages, or injuries, by whomever asserted, and in any way suffered, incurred, or paid as a result of any release of oil or hazardous material on or from the premises, or the conduct of said site assessment, whether caused by any action or inaction of the Seller. This indemnity and hold harmless agreement shall survive the lapse of this offer by its expiration, by execution of the Purchase and Sale Agreement, by delivery of the Deed, from Seller to Buyer, or otherwise.

APPENDIX 4

"INTERMEDIATE" CONDITIONS FOR OFFER TO PURCHASE PREMISES WITH KNOWN CONTAMINATION

1. Definitions. The terms "Property" or "Premises" as used in this Offer, are hereby further defined for the purposes of this Addendum to include all structures, fixtures, pipes, underground storage tanks, transformers, soil, groundwater, and surface water at, in, on, under, or near the Premises as otherwise defined in this Offer.

   Oil or Hazardous Material (OHM) refers to any petroleum product, substance, waste, or material determined by any federal, state or local governmental authority to be capable of posing a risk of injury to health, safety, the environment, or property, including, but not limited to, all products, substances, wastes, and materials as defined by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) as amended by the Superfund Amendments and Reauthorization Act (SARA); the Resource Conservation and Recovery Act (RCRA); the Clean Water Act as amended; the Clean Air Act as amended; the Toxic Substance and Control Act (TSCA); the Occupational Safety and Health Act (OSHA); the Emergency Planning and Community Right To Know Act (EPCRA); and similar state laws and regulations thereunder including, but not limited to, [list laws].
2. Presence of OHM. Buyer and Seller acknowledge that a release or threat of release of oil or hazardous materials has occurred at, in, on, under, or near the Premises.
3. State Notification. Seller has submitted to the [state agency] several documents prepared by environmental engineers, scientists, or consultants, dated _____, _____, and _____. These documents formally notify [agency] that there has been evidence of a release or threat of release of oil or hazardous material on the Premises.

4. Response Actions. Seller has conducted Response Actions on the Premises pursuant to [state law], which Response Actions are the subject of documents dated _____, _____, _____, and _____.

5. Investigation by Buyer. Buyer may, at its sole option and expense, undertake a site assessment to determine the nature and extent of any oil or hazardous materials concerning the Premises. Said site assessment shall be completed prior to [date]. Throughout the period of time for this site assessment, Buyer and its designated employees, agents, and consultants shall have a right of access to the Premises during mutually agreed-upon hours to perform said site assessment. Buyer shall request Seller's prior written approval of the time, manner, and extent of any investigative work requiring access to the Premises, and Seller shall not unreasonably withhold said approval. The time for performing said site assessment shall be extended by the amount of time of any extension of this Offer.

6. Scope of Site Assessment. The site assessment by the Buyer shall be performed by environmental engineers, scientists, or consultants selected by the Buyer in its sole discretion, and shall include, but shall not be limited to, all conditions, characteristics, history, and documents concerning the premises, and may include, in the sole discretion of the Buyer, engineering or geological tests, physical inspections, intrusive testing, document reviews, interviews, or other evaluation as deemed necessary by the Buyer to determine the nature and extent of any oil or hazardous materials. Seller may, in its sole discretion, elect to observe and monitor any site assessment activities undertaken by the Buyer, its employees, agents, or consultants and may, at the expense of the Seller, take split or duplicate samples of any soil, water, groundwater, or other materials sampled by the Buyer.

7. Delivery of documents to Buyer. Seller shall provide to Buyer copies of all site assessments, documents, submittals to government agencies, field data, field reports, laboratory analyses, laboratory reports, and all other information in possession of the Buyer as the date of this Offer no later than [date]. Copies of additional documents shall be provided to Seller within two days of coming into possession of the Seller.

8. Delivery of Site Assessment to Seller. Buyer shall provide/ not provide to Seller a copy of its site assessment upon completion in final form. Said site assessment shall be/ shall not be kept confidential by the Buyer.

9. Buyer's Right to Terminate Purchase. In the event that the site assessment conducted by the Buyer reveals the presence of oil or hazardous material in a nature or extent deemed unfavorable, in the sole discretion of the Buyer, or if the Buyer is not satisfied with the site assessment, its results, or the recommendations of its engineers, scientists, or consultants in any respect, in the sole discretion of the Buyer, the Buyer may so notify the Seller no later than [date] and thereupon Buyer shall have the right to terminate this Offer and the Purchase of the Premises by written notice to the Seller effective immediately.

10. Seller's Opportunity for Additional Investigation. Within _____ days of receipt of a copy of the site assessment conducted by the Buyer, or within _____ days of receipt of the Buyer's written notice of termination, whichever comes first, Seller may request, in its sole discretion, that an independent consultant review the site assessment at the sole cost of the Seller. Said consultant review shall consist of such further investigative and analytical work as Seller wishes, provided that it is completed within _____ days and a copy is provided to the Buyer within ____ days. If Seller elects to have said consultant review, termination of this Option and the Purchase by the Buyer shall not take effect until _____ days following the Buyer's written notice of termination if any.

11. Ownership of Documents. Any site assessments, documents, submittals, data, reports, analyses, or any other information shall be the property of the party paying therefor, but those which are the property of the Seller prior to Closing shall become the property of the Buyer after the Closing.

12. Indemnification. Seller agrees to indemnify and hold harmless the Buyer, and its successors and assigns, and all of Buyer's engineers, scientists, and consultants, from and against all liabilities, claims, losses, damages, or injuries, by whomever asserted, and in any way suffered, incurred, or paid as a result of any release or threat of release of oil or hazardous material on or from the premises, or the conduct of any site assessment, whether caused by any action or inaction of the Seller. This indemnity and hold harmless agreement shall survive the lapse of this Offer by termination, by execution of a Purchase and Sale Agreement, by delivery of the Deed, from Seller to Buyer or otherwise.

APPENDIX 5

CHECKLIST FOR INDEMNIFICATION CLAUSES[2]

Consider:

1. the scope of the indemnity, i.e., indemnity against liability and/or payment, or, preferably, both;
2. the duty to defend and bear defense costs;
3. the indemnitee's right to conduct its own defense with counsel of its choice at the expense of the indemnitor;
4. the indemnitee's right to approve the indemnitor's choice of counsel;
5. the allocation of costs for investigation prior to assuming the defense of a claim;
6. whether the indemnitee or the indemnitor will have the right to compromise or settle any claims, and the approval rights of the other party;
7. indemnitee's right to attorneys' fees and other costs incurred in enforcing the indemnity;
8. whether the indemnity includes or excludes protection against the indemnitee's negligence, active or passive;
9. whether notice to the indemnitor is required for recovery; and
10. the indemnitee's duty to mitigate or act reasonably.

APPENDIX 6

"BASIC" INDEMNIFICATION CLAUSE FOR PURCHASE AND SALE AGREEMENT

Seller agrees to indemnify and hold harmless the Buyer, and its successors and assigns, and all of Buyer's employees, agents, and consultants, from and against all liabilities, claims, losses, damages, or injuries, by whomever asserted, and in any way suffered, incurred, or paid as a result of any release of oil or hazardous material on or from the premises regardless whether caused by any action or inaction of the Seller. This indemnity and hold harmless agreement shall survive the delivery of the Deed from Seller to Buyer.

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[2] S.M. Reid & A.S. Hilleary, Indemnification and Contribution for Environmental Liability, 6 The ACREL Papers 63, 67 (1994).

APPENDIX 7

"INTERMEDIATE" INDEMNIFICATION AGREEMENT
FOR EXECUTION AS A SEPARATE CONTRACT

This agreement, dated this ___ day of _____ is entered into by and between (Indemnitor), of , and (Indemnitee), of _____.

The Indemnitor and Indemnitee heretofore have entered into a Purchase and Sale Agreement, pursuant to which Indemnitor has agreed to sell to the Indemnitee and it has agreed to buy from Indemnitor the real property described on Exhibit A attached hereto and made part hereof (Property). Indemnitor has advised the Indemnitee that there presently exists on the Property certain oil and hazardous materials. The Indemnitee acknowledges having received certain reports described on Exhibit B attached hereto and made part hereof, regarding the existing conditions of oil and hazardous materials on the Property.

In regard to such existing conditions, the Indemnitee has advised Indemnitor that it will not accept conveyance of the Property unless Indemnitor is willing to indemnify it on the terms and conditions set forth herein.

In consideration of the purchase of the Property, Indemnitor is willing to provide indemnification to the Indemnitee with respect to the oil and hazardous materials identified in the reports on Exhibit B. It is the intent that the Indemnitor, and not the Indemnitee, shall bear all and any costs and liability associated with the oil and hazardous materials, including without limitation the investigation, analyses and any required remediation in accordance with [federal and state laws], and this Indemnification Agreement shall be liberally construed to such end.

The obligations of the Indemnitor in this Agreement shall survive the closing of the transaction contemplated and delivery of the Deed from Seller to Buyer in the Purchase & Sale Agreement. The obligations shall terminate on _____ or on the date the [sate agency] determines that no further is required, or on the date a consultant retained by the Indemnitee determines in writing that no further action is warranted, whichever occurs first.

Indemnitor hereby agrees to indemnify, hold harmless and defend the Indemnitee and its successors and assigns, and all of its employees, agents, and consultants, from and against any and all costs, losses, expenses, damages, claims, liens, encumbrances, obligations, actions, and causes of action of any kind whatsoever, including without limitation, attorneys' and other professional expenses and fees, suffered or incurred by, or asserted against the Indemnitee, which arise from or relate to, in whole or in part, the oil or hazardous materials or Indemnitor's failure to perform under this Agreement. Indemnitor agrees that the Indemnitee shall not suffer any costs or have any liability by contribution or otherwise, in whole or in part, on account of the oil and hazardous materials, except to the extent caused by the intentional or negligent action of the Indemnitee.

As used herein, the term oil and hazardous materials shall mean any petroleum product, hazardous or toxic substance, waste, or material present on the Property or emanating therefrom on or before the date of this Agreement (or hereafter in the case of hazardous materials on the Property on or before the date hereof and thereafter emanating from the Property) and defined generally as such in the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Superfund Amendments and Reauthorization Act (SARA), and regulations of the U.S. Environmental Protection Agency (EPA), and in [state laws] and regulations of the [state agency], unless indemnitor establishes that such product, substance, waste, or material (a) is not identified in the reports described on Exhibit B or (b) emanated onto the Property from a source located on other property.

In the event that investigation, analyses, or remediation is required, Indemnitor shall make all reasonable efforts to avoid any interruption of the use of the Property by the Indemnitee and, if such interruption is not so avoidable, Indemnitor shall make all reasonable efforts to minimize such interruption. Indemnitor shall provide the Indemnitee from time to time with copies of all notices, orders, communications, and the like that Indemnitor may receive from the [agency] or from other persons, and any response thereto by Indemnitor together with copies of all reports and filings which Indemnitor makes to DEP, or other person. Indemnitor agrees not to enter into any settlement, consent order, decree, or other agreement with the [agency] or other persons without obtaining the prior

written consent of the Indemnitee. The Indemnitee shall provide Indemnitor with access to the Property to the extent reasonably necessary to perform the obligations of Indemnitor hereunder, including access to any electric or other utility connections, and the Indemnitee shall not unreasonably interfere with Indemnitor in connection with the performance by Indemnitor hereunder. The Indemnitee shall provide the Indemnitor with copies of all notices, orders, communications, and the like that they may receive from the [agency] other persons, and any responses to such notices by the Indemnitee, together with copies of all reports or filings which they may make to the [agency], or other person. They agree not to enter into any settlement, consent order, decree, or other agreement with the [agency] or other person without obtaining the prior written consent of the Indemnitor.

To the extent allowed by law, Indemnitor shall retain the exclusive right to negotiate with, and to fulfill any requirement or claim made by, the [agency], or other person, related to the presence of oil or hazardous materials acknowledged on the property by this Agreement, including the right to settle or contest such requirement or claim.

In witness whereof, the parties hereto have executed this instrument under seal as of the date first set forth above.

_____ _____

_____ _____

_____
State of_____
County of_____

On this __ day of _____, personally appeared the above named _____, an individual, and acknowledged the foregoing to be his free act and deed.

APPENDIX 8

"ADVANCED" INDEMNIFICATION AGREEMENT

1. PARTIES

This Agreement dated this ____ day of _____, is entered into by and between _____ ("Indemnitor") and _____ on its behalf and on behalf of its mortgages and all of its respective successors and assigns owning an interest in the Property from time to time, or holding any interest in the Property as mortgagee or Tenant, including without limitation any and all partners, partners of partners, affiliated entities, officers (including municipal officials), directors, shareholders, employees and agents of any of the foregoing from time to time (collectively, "Indemnitees").

2. RECITALS

2.1 Indemnitor has heretofore entered into an Option Agreement (the "Option Agreement") with _____ pursuant to which Indemnitor has agreed to sell to ____ and ____ has agreed to buy from Indemnitor certain real property described on Exhibit A attached hereto and made a part hereof (the "Property").

2.2 Indemnitor has advised _____ that there presently exist on the Property certain Hazardous Materials. _____ acknowledges having received certain reports described on Exhibit B attached and a part hereof regarding the condition of Hazardous Materials on the Property.

2.3 In regard to such existing condition, _____ has advised Indemnitor that neither _____ nor its nominee(s) will accept conveyance of the Property unless Indemnitor is willing to indemnify each and all of the Indemnitees on the terms and conditions more fully set forth herein.

2.4 As used herein, the term "Hazardous Materials" shall mean any hazardous or toxic substance, waste or material present on the Property on or before the date hereof and thereafter emanating from the Property) and defined generally as such in any federal, state or local statute, law, ordinance, code, rule, regulation, order or decree now in effect unless Indemnitor establishes that such substance, waste or material (i) is not identified on the reports described on Exhibit B attached and (ii) emanated onto the Property from a source located on other property. Such term shall include but not be limited to substances defined as "hazardous substances", "toxic substances", "hazardous materials", "oil", or the like in the Comprehensive Environmental Response, compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq.; the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 and 99-563; the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq.; the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. Section 6901 et seq.; the Federal Clean Water Act, 33 U.S.C. Section 466 et seq.; the Safe Drinking Water Act, 14 U.S.C. Section 1401-50; the Federal Clean Air Act, as amended, 42 U.S.C. Section 1857 et seq. or [state law list]; but such term shall not include asbestos.

2.5 In consideration of the purchase of the Property, Indemnitor is willing to provide indemnification to the Indemnitees and each of them with respect to the Hazardous Materials subject to and upon the terms, covenants and conditions set forth herein.

2.6 It is the intent that Indemnitor, and not the Indemnitees, shall bear all costs and liability associated with the Hazardous Materials, including without limitation their assessment and remediation in accordance with applicable law, and this indemnification Agreement shall be liberally construed to such end.

3. INDEMNIFICATION

3.1 Indemnitor hereby agrees to indemnify, hold harmless, and defend Indemnitees and each of them from and against any and all losses, liabilities, damages, claims, liens, encumbrances, obligations, actions, causes of action, costs, and expenses of any kind whatsoever, including without limitation attorneys' and other professional expenses and fees, suffered or incurred by, or asserted against Indemnitees, which arise from or relate to in whole or in part the Hazardous Materials or Indemnitor's failure to perform this Agreement. Indemnitor agrees that no Indemnitee shall suffer any costs and have any liability, by contribution or otherwise, in whole or in part on account of the Hazardous Materials except to the extent caused by the intentional or negligent action of such Indemnitee. Without limiting the generality of the foregoing, Indemnitor's obligation under this indemnification Agreement to indemnify, defend and hold Indemnitees harmless shall extend to any cost or damage to the Property or to any other property or resource, including without limitation ____ property owned by the _____ or the _____ and public and private water sources and supplies, as a result of the Hazardous Materials. Notwithstanding the foregoing, nothing in this Paragraph 3.1 shall be construed to increase or otherwise alter Indemnitor's obligations set forth in Paragraph 3.2 hereof with respect to assessment, containment, protection, treatment, disposal and/or removal of Hazardous Materials and clean-up of the Property.

3.2 Indemnitor hereby expressly covenants, for the benefit of all Indemnitees, diligently to take all actions, from and after the date hereof, as may be necessary or appropriate with regard to assessment, containment, protection, treatment, disposal and/or removal of the Hazardous Materials on and clean-up of the Property and /or other property to which the Hazardous Materials have emanated, including taking all actions as are required by applicable law or any governmental agencies, all of which shall be undertaken and performed by Indemnitor at the sole cost and expense of Indemnitor and in compliance with all applicable laws and regulations. Nothing in the foregoing sentence shall require Indemnitor to take any further action with respect to any given Indemnitor to take any further action with respect to any given Hazardous Material as long as a determination has been made by the applicable governmental agencies that such Hazardous Material has been properly remediated to within any site-specific quantity or concentration required by such agency and that no further remedial action is required with respect to such Hazardous Material. Indemnitor shall make all reasonable efforts to avoid any interruption of the

use of the Property by Indemnitees and, if such interruption is not so avoidable, Indemnitor shall make all reasonable efforts to minimize such interruption. Indemnitor shall provide each Indemnitee from time to time holding a fee interest in the Property with copies of all notices, order, communications and the like that Indemnitor may receive from any regulatory agency involved in the regulation or control of Hazardous Materials on the Property and any responses to such notices by Indemnitor to such regulatory agencies, together with copies of all reports and filings which Indemnitor makes to any such agency.

3.3 As a condition to the obligations of Indemnitor hereunder, Indemnitees shall provide Indemnitor with access tot he Property to the extent reasonably necessary to perform the obligations of Indemnitor hereunder, including access to any electric or other utility connections required therefor, and shall not unreasonably interfere with Indemnitor in connection with the performance by Indemnitor of its duties and obligations hereunder. Except in the case of emergency, Indemnitor shall provide Indemnitees with reasonable prior notice of its entry onto the Property. Each Indemnitee shall also provide Indemnitor with copies of all notices that such Indemnitee receives from any regulatory agency involved in the regulation or control of Hazardous Materials on the Property if such notices appear not to have been sent also to indemnitor.

3.4 As security for the obligations of Indemnitor hereunder, Indemnitor agrees, upon payment of at least $_____ of the Purchase Price (as defined in the Option Agreement) in cash, at Indemnitor's election, either (i) to deliver to an escrow agent (mutually chosen and reasonably satisfactory to the parties) an irrevocable standby letter of credit, in form and issued by a bank reasonably satisfactory to the parties, or (ii) to establish a cash escrow account with the escrow agent, in form and at a bank reasonably satisfactory to the parties, (collectively, "Collateral") in the amount of $_____, which Collateral shall provide that it may be drawn by _____ in the manner hereafter provided in 3.4.1 upon ____ certification that Indemnitor has not performed it obligations hereunder and the cost to reasonably cure such default. _____ shall have the right to draw upon such Collateral in accordance with 3.4.1 in an amount equal to such cost. Except as provided below, any interest earned on the cash escrow account shall remain in the account. indemnitor shall be entitled to draw upon the cash escrow account (or correspondingly to reduce the letter of credit upon renewal) in the amount of (a) any interest earned on the cash escrow account or (b) its reasonable, third-party expenses in effecting its direct remediation obligations on the Property hereunder, provided that Indemnitor delivers to _____ a statement of its third-party environmental consultant that the funds remaining after such withdrawal are sufficient in its reasonable judgement to complete Indemnitor's remediation obligations hereunder. (With respect to draws for Indemnitor's expenses, Indemnitor shall also deliver to _____ copies of invoices or other reasonable evidence of such remediation expenses.) Except as provided in the next to the last sentence of this paragraph, however, Indemnitor may not reduce the remaining balance below $_____. If Indemnitor delivers to the escrow agent a letter of credit, Indemnitor shall cause such letter of credit to be renewed annually at least thirty (30) days prior to it then expiration date (and ____ may draw such letter of credit in full if it is not so renewed). Indemnitor shall be entitled to the return of any security provided under this paragraph upon the termination of its remediation obligations as provided for in Section 3.2 of this Agreement. _____ may assign its rights under this paragraph to any single Indemnitee hereunder (either for itself or as representative of two or more Indemnitees) and such rights may be similarly re-assigned by such Indemnitee.

3.4.1 (a) If _____ believes that it is entitled to draw upon the letter of credit or the cash escrow account, it shall make written demand therefor upon the escrow agent. The escrow agent shall promptly give the Indemnitor written notice of such demand, including a copy of such demand. The Indemnitor shall have the right to object to such draw or reduction by giving the escrow agent written notice of such objection at any time within ten (10) business days after receipt of escrow agent's notice under this Section, but not thereafter. such objection notice shall set forth the basis for objection. upon receipt of such objection notice, the escrow agent shall promptly give notice of such objection, including a copy thereof to ____ . If the escrow agent does not receive any objection notice in accordance with this Section, the escrow agent shall promptly pay the draw.

(b) If the escrow agent shall have received a notice of objection provided for above, the escrow agent shall continue to hold the objected to amount (drawing such amount from the letter of credit and holding such amount as a cash escrow account if the Collateral is a letter of credit) until (i) the escrow agent receives written notice from both Indemnitor and ____ directing the disposition of the objected to amount, or (ii) litigation arises between Indemnitor and ____, in which event the escrow agent may deposit the objected to amount with the Court in which

such litigation is pending, or (iii) the escrow agent takes such affirmative steps as the escrow agent elects in order to terminate the escrow agent's duties, including, but not limited to, deposit of the objected to amount in Court in an action for interpleader.

3.5 If Indemnitor shall fail to properly initiate and diligently perform any of its obligations under Section 3.2 above, then any indemnitee may at its election, but without the obligation to do so, if such failure continues more than thirty (30) days after notice to Indemnitor, or sooner, if required by law, cure such failure. any amounts paid as a result thereof, together with interest thereon at the [state] judgement rate per annum (currently 12%) commencing from the tenth (10th) day after demand for payment, shall be immediately due and payable by Indemnitor to such Indemnitee.

4. PROCEDURE

4.1 In the event that any Indemnitee shall have any claim for which indemnification is available under this Agreement ("Claim"), the Indemnified Party shall give notice to Indemnitor of such Claim with reasonable promptness ("Notice"). The Notice shall set forth, in reasonable detail, all facts and information then known to the Indemnitee which form the basis for the Claim. The failure to give the Notice shall in no case prejudice the rights of any Indemnitee under this Agreement unless Indemnitor shall be prejudiced by such failure, and then only to the extent the indemnitor shall be prejudiced by such failure. Nothing herein shall be deemed to prevent the giving from time to time of additional or further Notices, including such as may expand the nature or scope of an existing Claim, identify an additional Claim or identify additional Indemnitees.

4.2 After receipt of a Notice, Indemnitor shall promptly take all such actions as are necessary or appropriate to defend and save harmless the indemnitees from and against a Claim, including, but not limited to, the engagement of legal counsel for the purpose of defending against the Claim. The Indemnitees shall have the reasonable right of approval with respect to any legal counsel selected to defend a Claim.

4.3 No Indemnitee shall settle or compromise any Claim without the written approval of Indemnitor, which approval shall not be unreasonably withheld or delayed, provided that Indemnitees shall have the right to settle or compromise any Claims with regard to which no Indemnitee seeks indemnification or defense hereunder so long as no Indemnitee admits any liability with regard to such settlement or compromise. An Indemnitee may, if it so elects, engage its own separate counsel to advise it in connection with any Claim, but the expense of such separate counsel shall be borne solely by such Indemnitee, unless otherwise provided herein.

4.4 In the event that any Claim shall result in a final judgement or award against an Indemnitee (including a settlement or consent decree receiving final judicial approval), Indemnitor shall be liable to pay the full amount of such judgement or award immediately upon becoming final (i.e. not subject to further appeal or judicial or administrative review and/or rehearing).

4.5 The fact that Indemnitees may have received reports described in Exhibit B or will hereafter receive and review copies of reports, assessments, filings and the like describing the Hazardous Materials shall not relieve Indemnitor from the liability and indemnification obligations to the Indemnitees to which Indemnitor is subject pursuant to the provisions of this Agreement.

5. MISCELLANEOUS PROVISIONS

5.1 This Agreement shall be binding upon and inure to the benefit of the Indemnitees and their respective heirs, estates, personal representatives, successors, and assigns. Indemnitor acknowledges that the Indemnitees, as intended beneficiaries including third party beneficiaries, have acquired or will acquire interests in the Property in reliance on the covenants and indemnities in this Agreement. All of the covenants and indemnities in this Agreement shall survive the transfer of any or all right, title and interest in and to the Property by Indemnitor or any Indemnitee; and any Indemnitee may enforce the terms of this Agreement as a third-party beneficiary even if not a signatory hereto. _____, on behalf of the Indemnitees, acknowledges that the provisions with respect to Hazardous Materials contained herein apply to substances, wastes and materials present on the Property on or

before the date hereof and thereafter emanating from the Property) and each Indemnitee, by acceptance of the rights and benefits hereof, agrees to comply with the federal, state, and local laws and regulations described in Section 2.4 with respect to any hazardous or toxic substance, waste or material placed by such Indemnitee on the Property after the date hereof.

5.2 This Agreement is made in, and shall be governed, enforced and construed as a contract under seal made under the laws of the [state], excluding the laws regarding conflicts of laws.

5.3 This Agreement constitutes the entire understanding and agreement of the parties with respect to the subject matter hereof, and shall supersede and replace all prior understandings and agreements, whether verbal or in writing with respect to the subject matter hereof. The parties confirm and acknowledge that there are no other promises, covenants, understandings, agreements, representations, or warranties with respect to the subject matter of this Agreement except as expressly set forth herein.

5.4 This Agreement may not be modified, terminated, or amended in any respect, except pursuant to an instrument in writing duly executed by Indemnitor and the Indemnitee affected thereby (it being agreed that no other Indemnitee shall be so affected).

5.5 In the event that the Indemnitor or any Indemnitee shall bring any legal action or other proceeding with respect to the breach, interpretation, or enforcement of this Agreement, or with respect to any dispute relating to any transaction covered by this Agreement, the losing party or parties in such action or proceeding shall reimburse the prevailing party or parties therein for all reasonable costs of litigation, including reasonable attorneys' fees, including matters on appeal.

5.6 All captions and heading herein are for convenience and ease of reference only, and shall not be used or referred to in any way in connection with the interpretation or enforcement of this Agreement.

5.7 In the event that any provision of this Agreement shall be adjudicated to be void, illegal, invalid, or unenforceable, the remaining terms and provisions of this Agreement shall not be affected thereby, and each of such remaining terms and provisions of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

5.8 No delay or omission by Indemnitor or any Indemnitee in exercising any right or power hereunder shall impair any such right or power or be construed to be a waiver thereof, unless this Agreement specifies a time limit for the exercise of such right or power or unless such waiver is set forth in a written instrument duly executed by the person granting such waiver. A waiver by any person of any of the covenants, conditions, or agreements hereof to be performed by any other party shall not be construed as a waiver of any succeeding breach of the same or any other covenants, agreements, restrictions or conditions hereof; any such waiver by one Indemnitee shall not be construed as a waiver by any other Indemnitee.

5.9 The parties agree to execute any further documents, and to take any further actions, as may be reasonable and appropriate in order to carry out the purposes and intent of this Agreement.

5.10 All notices, demands or other communications required or permitted to be given in connection with this Agreement, or the transactions contemplated hereby, shall be in writing, and shall be deemed delivered when personally delivered to a party (by personal delivery to an officer or authorized representative of a corporate party) or, if mailed, three (3) business days after deposit in the United States mail, postage prepaid, certified or registered mail, return receipt requested, addressed to the parties as follows:

If to Indemnitor:

With a copy to:

If to any Indemnitee: then to any address any Indemnitee from time to time notifies Indemnitor (and in the case of _____ with a copy in the case of _____).

Any person may change its address for notice by written notice given in accordance with the foregoing provisions. Each Indemnitee who gives notice of an address to Indemnitor agrees also to notify Indemnitor at such time as it no longer has any interest in the Property.

5.11 As used herein, the masculine, feminine or neuter gender, and the singular and plural numbers, shall each be deemed to include the others, whenever and wherever the context so indicates.

5.12 This Agreement may be executed in one or more counter part copies, and each of which so executed, irrespective of the date of execution and delivery, shall be deemed to be an original, and all such counterparts together shall constitute one and the same instrument.

5.13 Indemnitor shall continue to be subject to and bound by all of the terms of this Agreement, for the benefit of all Indemnitees, notwithstanding any determination that the Hazardous Materials identified to date have been fully and properly remediated or that no further remedial actions are required with respect to the Hazardous Materials identified to date.

5.14 All rights and remedies of the Indemnitees hereunder shall be cumulative and may be exercised singularly or concurrently by any or all of them. Indemnitor agrees that any of the terms, covenants and provisions contained in any deed, partnership agreement, lease, note, mortgage, and any other instrument affecting the Property may be altered, extended, modified, waived, released, or cancelled, all without any consent of Indemnitor or any effect on Indemnitor's obligations hereunder. The failure of any Indemnitee to insist upon strict compliance with any of the terms of this Agreement shall not be considered to be a waiver of any such terms, nor shall it prevent any Indemnitee from insisting upon strict compliance with this Agreement at any time thereafter. Indemnitor's obligations hereunder are primary and direct, and shall not be reduced or otherwise affected by the liability of any other person now or hereafter obligated with respect to the Hazardous Materials, including any Indemnitee. A separate action or actions may be brought and prosecuted against Indemnitor hereunder, whether or not action is brought against any other person and whether or not any person is joined in such action or actions.

5.15 Indemnitor acknowledges and agrees that it may be impossible to measure accurately the damages to the Indemnitees resulting from a breach of Indemnitor's covenants under this Agreement, that such a breach will cause irreparable injury to the Indemnitees, and that the Indemnitees may not have an adequate remedy at law in respect of such breach. Therefore, all covenants shall be specifically enforceable against Indemnitor, and Indemnitor hereby waives, and agrees not to assert, any defense against an action for specific performance of such covenants. This clause shall not prejudice the Indemnitees' rights to assert any and all claims for damages incurred as a result of Indemnitor's breach hereof or for other equitable relief.

5.16 Indemnitor consents to the exercise of personal jurisdiction over Indemnitor by any federal or state court in the [state] and consents to the laying of venue in any jurisdiction or locality in the [state]. Service of process may be effected by any means permitted by the court in which any action is filed, or, at any Indemnitee's option, by mailing process, postage prepaid, by certified mail, return receipt requested, to Indemnitor at the foregoing address.

IN WITNESS WHEREOF, the parties hereto have executed this instrument under seal as of the date first set forth hereinabove.

CORPORATION, _____

Indemnitor for itself and all Indemnitees

By: _____ By: _____

Its: _____ Its: _____

APPENDIX 9

WARRANTIES AND REPRESENTATIONS FOR LEAKING UNDERGROUND TANK CLEANUP

Seller Warrants Disclosure and Remedial Actions

The Premises have been used for the storage of petroleum products or derivatives, and Seller hereby advises Buyer that (1) discharge of such products into the soil and groundwater may have occurred from time-to-time in the past, and (2) soil and groundwater may have petroleum and its constituents or residuals therein. Buyer and Seller acknowledge that Seller has notified the [agency] that there is evidence of a release or threat of release of oil or hazardous materials, as those terms are used in [state law] on the premises. The Seller warrants that Seller has completed the following Remedial Actions ("Remedial Actions"):

(a) The removal of all surface and sub-surface structures, including without limitation, tanks, pipes, and conduits, including those which have been abandoned;

(b) The removal of all soil with petroleum hydrocarbons in excess of _____ ppm from the Premises;

(c) The commencement of pumping and treatment of groundwater on the premises; and

(d) Submittal to the [agency] of the necessary written reports to satisfy requirements of the [agency, laws] and regulations thereunder.

Seller Warrants Compliance and Assumes Cleanup Costs

All of the Remedial Actions above were done and shall be continued and completed in accordance with applicable governmental requirements. All of the Remedial Actions were done and shall be continued and completed under the supervision of an environmental engineering or environmental consulting firm experienced and qualified in such Remedial Actions and applicable governmental regulations. All of the Remedial Actions did and shall comply with the current regulations and policies of the [agency] under [state law]. All Remedial Actions which have not been completed by the time of the transfer of the Deed of the Premises to the Buyer shall be completed within a reasonable period of time thereafter, by the Seller, at the expense of the Seller. In any event, the Remedial Actions shall be completed by the Seller no later than _____ after the delivery of the Deed.

If, after the delivery of the Deed, the [agency] requires additional Remedial Actions (the "Additional Actions") beyond the implementation of the Remedial Actions, Seller, at its own cost and expense, shall cause such Additional Actions to be implemented within a reasonable time, in any event within any time frame required by the [agency] for such Additional Actions. The Buyer shall cooperate with the Seller in implementing any Additional Actions, including granting the Seller, its agents, employees, and independent contractors reasonable access to the Premises for the purpose of implementing the required Remedial Actions and Additional Actions.

APPENDIX 10

LEASE PROVISIONS ON HAZARDOUS MATERIALS

(TENANT'S PERSPECTIVE)

Landlord hereby agrees to defend, indemnify and hold Tenant harmless from and against any and all liabilities, losses, damages, costs, expenses (including, without limitation, reasonable attorneys' fees and expenses), causes of action, suits, claims, demands or judgements of any nature arising out of or in connection with the existence, release or threatened release of oil or other petroleum products, hazardous materials, hazardous waste or hazardous or toxic substances, including, without limitation, asbestos, all as defined by applicable law and regulation (collectively, "Hazardous Materials") in, to, around, or on the Premises and the property where the Premises are located (the "Property"), unless such Hazardous Materials are released by Tenant, its agents or contractors. Without limiting the foregoing, in the event that any such Hazardous Materials are determined to be located on the Premises and/or Property, Landlord shall, at Landlord's sole cost, promptly remove the same from the Premises and/or the Property in a manner complying with all applicable laws and regulations and the provisions of this Lease. The provisions of this Article shall survive termination or expiration of this Lease.

(LANDLORD'S PERSPECTIVE)

Tenant hereby represents and warrants that no health hazards, oil or other petroleum products, (except fuel and lubricating oils), hazardous materials, hazardous wastes, or hazardous or toxic substances are or shall be associated with its use of the Premises, all as defined by applicable law and regulation (collectively, "Hazardous Materials"). In the event of any breach of this provision, Tenant agrees to defend, indemnify and hold harmless Landlord, its agents, employees, successors and assigns, from and against any and all liabilities, losses, damages, costs, expenses (including, without limitation, reasonable attorneys' fees and expenses), causes of action, suits, claims, demands or judgements of any nature arising out of or in connection with (1) the presence of any Hazardous Materials on or in the Premises, or the release or threatened release of any Hazardous Materials therefrom or from any property of Tenant located on or in the building; (2) any failure by Tenant to comply with the terms of any order issued by any federal, state or municipal department or agency having regulatory authority over environmental matters, with regard to the Premises; and (3) any lien or claim relating to Hazardous Materials. The provisions of this Article shall survive termination or expiration of the Lease.