

**ENVIRONMENTAL ISSUES**  
**in**  
**REAL ESTATE TRANSACTIONS**

Prepared for the

**SOUTH CAROLINA BAR**  
**CLE DIVISION**

**REAL ESTATE SECTION**

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**THE VIEWS EXPRESSED HEREIN ARE THOSE OF THE AUTHOR  
AND NOT NECESSARILY THOSE OF THE LAW FIRM. FURTHER, THE  
INFORMATION CONTAINED HEREIN IS OF A GENERAL NATURE AND**

**IS NOT INTENDED TO BE RELIED UPON AS SUBSTANTIVE LEGAL ADVICE.  
THE ADVICE OF COMPETENT LEGAL COUNSEL SHOULD BE  
SOUGHT IN EACH INDIVIDUAL CASE.**

## ENVIRONMENTAL ISSUES

### 1. General considerations

- a. These materials are intended to be an introduction to environmental law and liability for real estate professionals. These materials include several documents that should prove to be valuable reference documents when dealing with an environmental question. However, these materials are only an introduction and should not be used as a substitute for appropriate professional advice.
- b. What follows is a brief list of environmental issues to be considered in making real estate decisions. The actual scope of work for each evaluation will depend upon the particular property, the property history, and its current uses. An initial comprehensive environmental site assessment prior to any commercial property acquisition may be a bit costly but could reduce the risk of future unexpected environmental liabilities. This information is presented with the understanding that different environmental consultants undertake different levels of inquiry, depending upon the scope of work requested by the user. Another concern is the need for a comprehensive asbestos survey prior to any renovation or demolition activity.
- c. Attached is an excerpt from the 1995 amendments to the State Underground Petroleum Environmental Response Bank Act (SUPERB) that provides for a security interest exemption from liability. S.C. Code Ann. § 44-2-80. SUPERB also provides protection from liability for purchasers of former UST sites which are eligible to participate in the SUPERB program.
- d. There are several attachments comprise excerpts from Standard E 1528-00, Standard Practice for Environmental Site Assessments: Transaction Screen Process (pages 1-9); Standard E 1527-00, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (pages 1-9); E 1903, Standard Guide for Environmental Site Assessments: Phase II Environmental Site Assessment Process (pages 1-6); and Standard E 2018-99, Standard Guide for Property Condition Assessments: Baseline Property Condition Assessment Process (pages 1-7). These standards were developed by the American Society for Testing and Materials (ASTM), with input from various disciplines, including regulators. It is expected that these protocols will be more widely used than any other protocol for conducting environmental evaluations. Permission to reprint these excerpts has been obtained from ASTM.
- e. Another attachment contains portions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980. 42 USCA § 9601(21) and § 9601(35). These excerpts include the liability provision of the Act which are the most relevant provisions for mortgage lenders. It also includes the primary language defining the basic premise for environmental due diligence.

**2. Reasons for Environmental Assessments**

- a. Why undertake a title search?
- b. Why purchase title insurance?
- c. Why perform a survey?
- d. Why not investigate the physical condition of the real estate?
- e. CERCLA liability extends to 4 categories:
  - i. the **owner and operator of a vessel or a facility;**
  - ii. **any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;**
  - iii. **any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and**
  - iv. **any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance**

**42 USCA § 9607(a).**

- f. **Obviously, a purchaser will become an "owner"**
- g. **CERCLA provides limited affirmative defenses**
  - i. **an act of God;**
  - ii. **an act of war;**
  - iii. **an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence**

that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeable result from such acts or omissions; or

- iv. any combination of the foregoing paragraphs
- h. Subparagraph (3) describes what is know as the "*innocent landowner*" defense
  - i. the acts or omissions of a third party must not be one with whom the defendant has a contractual relationship, which is defined as
  - ii. land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
    - (1) at the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility
    - (2) the defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation
    - (3) the defendant acquired the facility by inheritance or bequest.
  - i. To establish that the defendant had no reason to know, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.
  - j. The purpose of an environmental site assessment is to permit a purchase to satisfy one of the requirements to qualify for the "*innocent landowner defense*" to CERCLA liability that is, the practice that constitutes "*all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice*"

- k. **Select a "*qualified environmental professional*" who will perform prepare a Transaction Screen Process or a Phase I Environmental Site Assessment**
- l. **Essentially it has been generally accepted that good commercial or customary practice includes an environmental site assessment prior to the purchase of any commercial real estate**
- m. **The more commonly accepted formats for environmental site assessments were developed by ASTM as referred to above and depicted in the attached excerpts.**
- n. **To do otherwise would subject your client to potential liability for any environmental condition of the real estate**

**3. Major areas of environmental concern:**

- a. general business information;
- b. site information;
- c. site history, including past and present uses;
- d. operational information such as construction and operating permits;
- e. raw materials, containers, storage;
- f. aboveground storage tanks;
- g. waste storage areas;
- h. solid/hazardous waste generation, storage, treatment, disposal;
- i. air emissions;
- j. water supply/waste water;
- k. underground storage tanks;
- l. asbestos;
- m. lead;
- n. pcb information;
- o. radon;
- p. mold;
- q. wetlands;
- r. other issues.

**4. Types of Environmental Risks Associated with Property Transactions**

- a. Has the site been properly characterized by a "*qualified environmental professional*"
- b. Has the assessment identified any "*recognized environmental conditions*"
- c. Can the costs of assessment and remediation be accurately estimated
- d. If remediation is required, will a remediation plan require regulatory approval
- e. Has the remediation been completed properly

- f. Will a No Further Action letter be issued and will it require additional remediation
- g. Is there a risk of third party claims
- h. Are natural resources damages or diminution of value claims possible

**5. Traditional Methods of Managing Environmental Risks**

- a. Extensive site characterization
  - i. Will be costly
  - ii. May be time-consuming
  - iii. May not have unlimited access to the site
  - iv. Parties may not be able to agree on the extent of assessment
- b. Adjustments to purchase price
  - i. Parties may not be able to agree on adjusted purchase price
  - ii. Parties may not be confident or satisfied with the transaction
- c. Contractual Indemnification Provisions
  - i. Provisions in purchase and sale agreements
    - (1) Seller agreement to indemnify the purchaser for claims arising from historic contamination
    - (2) Purchaser agreement to indemnify the seller for claims arising from prospective releasers
  - ii. Problems associated with contractual indemnification provisions
    - (1) Uncertainty of the timing and amount of claims
    - (2) Future financial ability of indemnitor to pay
- d. Escrow of a portion of the purchase proceeds
  - i. Funds may not be available

- ii. Funds may be tied up for a long period of time
- iii. Escrow amount may be inadequate
- e. E&O Insurance of environmental consultant
  - i. Require professional liability insurance for environmental consultant providing environment assessment services
  - ii. Must prove negligence of consultant to recover
  - iii. E&O limits or contractual limitations of liability may not be adequate
  - iv. Claims-made requirements and aggregate limits may make recovery difficult
- f. Remediation contractor's liability insurance
  - i. Require CGL and pollution liability of any remediation contractor for activities of contractor that might cause or exacerbate contamination
  - ii. Must prove negligence of contractor to recover
  - iii. The activities of such contractors seldom result in furthering contamination
  - iv. Smaller contractors may have inadequate limits of liability coverage
  - v. It may be difficult for some contractors to secure pollution legal liability coverage

## **6. Non-traditional Methods of Managing Environmental Risks**

- a. Brownfields program offers prospective purchasers the ability to negotiate an agreement which provides a covenant not to sue from appropriate state or federal agencies and also offer contribution protection to an innocent purchaser
  - i. Brownfields agreement typically requires there to be a responsible party available
  - ii. Program requires purchaser to undertake limited assessment and/or remediation and must be oversight costs
- b. Environmental Insurance products are now available
  - i. Favorable changes in insurance market and acceptability of insurance coverage offers advantages

- (1) Shifts the risk to insurance carrier over multi-year basis
  - (2) Offers a quicker resolution of environmental issues
  - (3) Quantifies cost of the transaction
  - (4) Allows a precise quantification of the assumed environmental liability
  - (5) Stabilizes the rate of return on investment
  - (6) Replaces or backs up indemnification
  - (7) Flexibility in policy wording and realistic premiums
- ii. Types of coverages
- (1) Cleanup Cost Cap - first party coverage
    - (a) Covers remediation cost overruns or change orders above contractor's estimated cost of remediation
    - (b) Also covers unknown contamination discovered during remediation activities
    - (c) Insures changes in regulatory standards
  - (2) Pollution Legal Liability - first and third party coverage
    - (a) Covers unknown contamination
    - (b) Provides toxic tort coverage for third party claims
    - (c) Includes personal injury and property damage coverage

## 7. Summary

- a. Any commercial real estate transaction should include an examination of the environmental condition of the property just as it would the condition of the title to the property.
- b. Important pre-development considerations which are time-sensitive include:
  - i. asbestos survey and notification to DHEC if any demolition or renovation of existing structures is involved

- ii. wetlands delineation and permitting, if applicable
  - iii. construction permits for any sources of air emissions which must be obtained prior to any construction of any permanent structures
  - iv. land-disturbing and storm water permit
- c. When in doubt, ask an environmental professional.

## Attachment A

State Underground Petroleum Environmental Response  
Bank Act (SUPERB)  
S.C. Code Ann. § 44-2-80

## Attachment B

Comprehensive Environmental Response, Compensation  
and Liability Act of 1980  
42 USCA § 9601(21)

## Attachment C

Comprehensive Environmental Response, Compensation  
and Liability Act of 1980  
42 USCA § 9601(35)

## Attachment D

### ASTM Standard E 1528-00 Standard Practice for Environmental Site Assessments: Transaction Screen Process (pages 1-9)

These pages contain only a portion of the Standard.  
Copies of the complete Standard may be purchased from ASTM at (610)  
832-9585

## Attachment E

### ASTM Standard E 1527-00 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (pages 1-9)

These pages contain only a portion of the Standard.  
Copies of the complete Standard may be purchased from ASTM at (610)  
832-9585

## Attachment F

### ASTM Standard E 1903 Standard Guide for Environmental Site Assessments: Phase II Environmental Site Assessment Process (pages 1-6)

These pages contain only a portion of the Standard.  
Copies of the complete Standard may be purchased from ASTM at (610)  
832-9585

## Attachment G

ASTM Standard E 2018-99  
Standard Guide for Property Condition Assessments:  
Baseline Property Condition Assessment Process (pages  
1-7)

These pages contain only a portion of the Standard.  
Copies of the complete Standard may be purchased from ASTM at (610)  
832-9585

# Attachment H

## Pollution Legal Liability AIG Specimen Policy