The environmental perils of land ownership

by Jack D. Shumate

The essential point that must be borne in mind by all landowners is that it is no longer enough not to commit environmental sins. It is now necessary to be aware of the environmental laws and to take active steps to guard against their violation on your property.

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When the California Supreme Court announced its decision in Friends of Mammoth v Board of Supervisors of Mono County, 502 P. 2d 1049 (1972), many developers were surprised by the suggestion that environmental protection laws could prevent the execution of well-planned development projects. In that case, the California court ruled that the county could not issue a conditional use and building permit for a condominium project without the benefit of a complete environmental impact study.

Before that case, the environmental laws had been viewed with disinterest by the real estate industry, and it was hoped that Friends of Mammoth was merely one of those curious things that occasionally happens in California. The decade since Friends of Mammoth, however, has seen the enactment of a host of environmental regulations which pose a real peril for landowners. Because of the liability to which a property owner may be exposed without any fault or misconduct on his part, it is no exaggeration to say that the environmental laws pose the potential for disastrous economic impact upon landowners and developers.

My purpose today is to briefly point out a number of ways in which a property owner can be unwittingly exposed to liability under the environmental statutes and to suggest some steps which may be taken to minimize the exposure. It is not intended as a comprehensive survey of the environmental regulations enforceable by state and federal authorities, but is intended merely to alert property owners to the potential hazards.

At the outset it must be emphasized that many environmental statutes impose liability without regard to fault. Civil liabilities are strictly imposed in most cases and only potential criminal penalties require a finding of intent or even of knowledge.

The situations which can expose the property owner to liability can be broadly categorized into three groups: problems flowing from adjacent land; problems resulting from the actions of another party on the land; and what was there when you bought it.

Problems flowing from adjacent land

The Federal Water Pollution Control Act prohibits the discharge of oil or a hazardous substance to the navigable waters of the United States (33 USC § 1321). This hardly seems threatening until one considers the definitions contained in the Act, 33 USC § 1362. Subsection (12) provides in part:

> "The term 'discharge of a pollutant'...means (A) any addition of any pollutant to navigable waters from any point source..."
> (emphasis added)

"Point source" is defined in Subsection (14) as:

> "The term 'point source' means any discernible, confined and discrete conveyance, including but

not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged..."

Thus, any ditch, catch basin, or any other feature of the land capable of collecting a pool of liquid which can then overflow and reach water may become a point source of pollution of navigable waters. Further, the courts have held that navigable waters, for the purpose of the Act, includes any body of water which drains, either directly or ultimately, into any navigable waterway.

As a result, if polluting liquids drain onto the land from adjacent property, find a topographical feature such as a ditch in which they can accumulate, and then overflow into a creek which empties into a drain which empties into a river which flows into one of the Great Lakes, there may well be a violation of the Water Pollution Control Act. For such a violation, the owner of the land which qualified as a point source can be held strictly liable. In United States v Earth Sciences, Inc., 599 F.2d 368 (10th Circ., 1979), the court upheld an imposition of liability in a case where an unexpectedly early melt and runoff of snow from adjoining mountains flooded the defendant's catch basin, washing out corrosive liquids used in a metal extraction process. The court recognized that the defendant's only fault, if any, was failure to anticipate the sudden, unexpected melting of snow that year. Nevertheless, the court said:

"We believe it contravenes the intent of (the Act) and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point." (emphasis added)

The Act appeared originally to give some hope of relief to the innocent property owner by establishing four apparent defenses to liability, viz., an act of God; an act of war; negligence on the part of the U.S. Government; or the act or omission of a third party. The statute required that one of these four causes must be the sole cause of the pollutant discharge, however, and the courts have used this to substantially restrict the operation of the defenses.

In discussing the defense of act or omission of a third party, the courts have frequently raised the issue of whether the defendant used sufficient care to anticipate and prevent or mitigate the actions of the third party. In such a case, U.S. v General Motors Corporation, 403 F. Supp. 1151 (D. Conn., 1975), the court imposed liability in a situation where vandals, who entered an abandoned manufacturing facility by evading a security patrol and then scaling two fences, opened valves on oil storage tanks which caused several hundred gallons of fuel oil to spill.

While the courts have generally expressed themselves sympathetically toward parties who incur liability without fault, they have nevertheless imposed strict liability. A good example is U.S. v Texas Pipe Line Company, 611 F.2d 345 (10th Circ., 1979). In that case, the defendant's pipeline was struck by a bulldozer operated by a farm worker. Six hundred barrels of oil escaped before the flow could be shut off. The court noted that "the oil spilled into an unnamed tributary of Caney Creek, which discharges into Clear Boggy Creek, itself a tributary of the Red River." The court had no evidence as to whether these creeks were flowing at the time or whether they were dry. It noted that the defendant did everything properly to clean up the spill and was commended for its prompt, thorough action by Coast Guard officers in authority. Nevertheless, a civil penalty was assessed.

The court concluded:

"With respect to the penalty assessed, we sympathize with the company. Despite its lack of fault and prompt actions to clean up the spill, it was assessed a penalty. Still we must uphold the penalty."

It may well be, therefore, that the property owner who does not keep himself informed about what is draining onto his land from adjoining property and take adequate steps to protect himself from drainage of pollutants may find himself liable as the owner of a point source of discharge of pollutants to navigable water.

Problems resulting from the actions of another party on the land

Many of the environmental statutes provide that the owner and operator of a hazardous waste facility may be held jointly and severally liable for a release of pollutants to the environment. Under the strict liability theory, this is true even though the owner may be an absentee landlord with no knowledge of the operation. The U.S. Environmental Protection Agency (EPA) has made it very clear that they intend, in an appropriate case, to take full advantage of the joint and several liability. An example is the background statement published in the Federal Register of May 19, 1980, when EPA published proposed regulations (which have since become final) pursuant to the Federal Resource Conservation and Recovery Act (RCRA). The Agency said, at 45 FR 33169:

"The Agency's first priority is to protect human health and the environment. Thus, where there has been a default on any of the regulatory provisions, the Agency will attempt to gain compliance as quickly as possible. In so doing, the Agency may bring enforcement action against either the owner or operator or both. EPA considers the owner (or owners) and operator of a facility jointly and severally responsible to the Agency for carrying out the requirements of these regulations.

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"With most of the regulations, the Agency is primarily concerned with compliance, and is secondarily concerned with who ensures compliance. The Agency believes that decisions concerning who should be responsible for ensuring compliance for which requirements can properly and adequately be a matter between the owner and operator. Nonetheless, both the owner and operator ultimately remain responsible, regardless of any arrangement between them.

"Some facility owners have historically been absentees, knowing and perhaps caring little about the operation of the facility on their

property. The Agency believes that Congress intended that this should change and that they should know and understand that they are assuming joint responsibility for compliance with these regulations when they lease their land to a hazardous waste facility. Therefore, to ensure their knowledge, the Agency will require owners to co-sign the permit application and any final permit for the facility." (emphasis added)

Again, the apparent protection provided to the innocent landlord (by requiring that he co-sign any application for a hazardous waste permit) proved to be of questionable value. Shortly after the regulations became final, EPA issued a Regulatory Interpretation Memorandum noting that the question of who held what ownership rights in a given property was a matter governed by state law and that this could vary from state to state. EPA explained that it could not assume responsibility for knowing the facts as to ownership of a given piece of land and the applicable state law; therefore, it would accept the application for a hazardous waste permit as filed, assuming that all parties required by the regulations to sign it had done so. Thus, an applicant who leases land may apply for and obtain a hazardous waste permit from EPA without advising his landlord what is occurring. Nevertheless, the law makes the landlord jointly and severally liable for compliance with the regulations, including potentially expensive requirements for cleaning up hazardous wastes improperly disposed of.

An example of a case where an absentee landlord was held jointly responsible for the actions of its tenant is U.S. v Midwest Solvents Recovery, Inc., 484 F. Supp. 138 (N.D. Ind., 1980). In that case the individual defendants were a couple who merely leased land to the corporate defendant a number of years previously. The corporate defendant had built a chemical waste processing facility on the land. The court made no finding that the property owners had any knowledge of the business being conducted by the corporate defendant or of the contamination of the land with hazardous chemicals. Nevertheless, they were held jointly liable with the corporate defendant.

If the landowner has avoided the pitfalls of pollutants draining onto his land, tenants generating and disposing of hazardous waste on it, or a contractor using contaminated fill, he still may not be free from liability. He must yet concern himself with what may have been done on the land prior to the time he even owned it.

An even more serious problem can arise when contamination of the land results from the improper actions of a contractor employed by the property owner. An example might be the use of contaminated fill material by a contractor. In that situation, the site could become a hazardous waste disposal facility under both state and federal law. The property owner could become liable for the cost of cleanup under RCRA and state law, but he might also become liable for damage to natural resources or to residents of adjoining land under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund).

A particular word of caution is appropriate concerning the type of fill material used at a construction site in the State of Michigan. The Michigan Solid Waste Disposal Act, P.A. 1978, number 641, regulates the landfilling of many substances which do not qualify as hazardous substances under other state laws or under federal law. Landfilling of such non-hazardous substances nevertheless requires licensing under the State Act and Section 16 of the Act, MCL 299.416, requires that at the time of licensing of a sanitary landfill a restrictive covenant must be imposed upon the land. The restrictive covenant must be placed on record and substantially restricts the use of the property for a period of 15 years following completion of the land filling operation. The use of non-hazardous landfill material which is nevertheless subject to regulation under the Michigan Act, therefore, could effectively destroy the usefulness of the property.

What was there when you bought it?

If the landowner has avoided the pitfalls of pollutants draining onto his land, tenants generating and disposing of hazardous waste on it, or a contractor using contaminated fill, he still may not be free from liability. He must yet concern himself with what may have been done on the land prior to the time he even owned it. That the landowner may have purchased the property prior to the effective date of any of the environmental statutes may not matter — he may still find himself liable some day for hazardous materials that were dumped on the land many years ago. This would be the case if old deposits of hazardous chemicals began leaking from the land and seeping out to adjacent property or to ground or surface water.

In U.S. v Price, 523 F. Supp. 1055 (D. NJ, 1981), a RCRA enforcement action, the current owners of property were held jointly liable for chemical dumping on the property which ceased in 1972, some six years before the current owners bought the property and four years before enactment of RCRA. The court found that an impressive array of toxic chemicals had been dumped on the property and had begun to seep, contaminating adjacent property and ground-water supplies. When this was called to the attention of the various defendants, no one took action because the operators of the property at the time of the dumping no longer owned it and the current owners had not been responsible for the dumping or even aware of it at the time they purchased the land.

The court held that the leaking of the toxic waste constituted an on-going act of disposal which was regulated by RCRA and for which the current owners were jointly and severally liable.

The court noted that the current owners were members of a limited partnership which occasionally bought land for speculation. One of the three members of the partnership was a real estate broker. In discussing the current owner's position, the court concluded:

> "They bought the property several years after all dumping had ceased and therefore argue that they never have and are not now 'contributing to' the disposal of any hazardous wastes. This argument, however, is predicated on (an) erroneous premise...the idea that 'disposal' requires some active behavior. That is simply not so. As owners of the property, they are, we conclude contributing to the disposal (i.e., leaking) of wastes merely by virtue of their studied indifference to the hazardous condition that now exists. The idea that ownership imposes responsibility for hazardous conditions on one's land is certainly not novel...As sophisticated investors, they had a duty to investigate the actual conditions that existed on the property or take it as it was. They deliberately chose the latter course. Moreover, they became aware in the summer of 1979 that toxic chemicals had been dumped at the landfill, but they have done nothing to abate the hazardous condition that exists. Under these circumstances, they may be held responsible to stop the continued leaking of contaminants from the site." (emphasis added)

Will EPA really hold an innocent property owner liable?

The answer to that question is — **YES!** Not only will EPA hold an innocent property owner liable, but the Agency is increasingly using the awesome compulsive authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA — the Superfund law) against property owners.

Most of the federal environmental statutes require EPA to go into federal court for a mandatory injunction ordering the cleanup. If EPA can argue that there is an imminent hazard to public health or the environment, it can use the authority of § 106 of CERCLA. That section authorizes the Agency to simply issue an administrative order to immediately undertake the cleanup. If the recipient does not clean up promptly, EPA can do it and recover treble damages plus interest from the date of issuance of the cleanup order plus a civil penalty of up to $5,000 per day.

EPA has taken actions in two recent Superfund cases in Michigan which makes it clear that they will use this authority on an innocent property owner.

In re: Auto-Ion involved the facility of a company which had engaged in the chemical treatment of electroplating waste. The company had gone out of business leaving substantial quantities of untreated hazardous waste on the property. EPA issued a cleanup order under authority of section 106 of CERCLA to ten different parties: the former owner of Auto-Ion, eight companies which had been identified as sources of hazardous waste sent to the site for processing, and the company which had sold the property to Auto-Ion.

The property was sold to Auto-Ion in 1963 under the terms of a ten-year land contract. The contract was paid off according to its terms and a deed given in 1973. There was no evidence that the land contract vendor had been involved in any way in the hazardous waste operation; indeed, EPA's administrative record in the case stated, with respect to the vendor:

> "Although there is no reason to believe this company participated in or had any knowledge of (the) illegal waste management practices at (the site), (it) did retain title to the site until 1973, when Auto-Ion fulfilled the terms of the 1963 land contract entered into by the two parties."

Nevertheless, EPA issued the section 106 Order to the land contract vendor as well as the other parties.

Section 107(a) of CERCLA provides that the persons responsible for the cost of cleanup includes "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 ****" In the Auto-Ion case, the question was whether a land contract vendor who was not in any way involved in the operation of the facility and did not dispose of any hazardous waste at the facility was liable as an "owner." The definition of the term "owner" provided in the Act, section 101(20)(A) is as follows:

> "'Owner or operator' means *** any person owning or operating such facility, and *** in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility ***" (emphasis added)

The vendor took the position that it held legal title under Michigan law only as security for the payment of the purchase price and should therefore come within the scope of the exception. Following an Administrative Hearing in which the vendor presented evidence to indicate that it was not involved in any way in the operation of the waste treatment business and offered its arguments based upon Michigan real estate law, the 106 order was withdrawn with respect to the vendor. The EPA document withdrawing the 106 Order, however, is strictly limited to the facts of the case and does not resolve the general issue of whether a land contract vendor can be held liable under CERCLA for the actions of its vendee.

In re: Saginaw Paint Company is a case where two property owners were required to dispose of hazardous waste resulting from the operations of a neighboring company. In that case each of the property owners had entered into a lease authorizing Saginaw Paint Company to make limited use of the property. Saginaw Paint went bankrupt leaving several hundred barrels of inflammable solvents and paint waste on the property of the two lessors. In each case, the storage of the barrels of inflammable material on adjoining property was a violation of the terms of the lease, but EPA nevertheless issued to each lessor an order requiring each lessor to clean up that portion of the hazardous waste left on its property. One of the lessors had already informed EPA of its intention to go forward and clean up its own property, but EPA chose to issue the section 106 Order anyway. The property owner was thus subject to the treble damages and $5,000 per day civil penalties in the event that the cleanup was not promptly done in the method directed by EPA.

The property owner can protect himself only if he actively prevents violation of environmental laws.

The cleanup by the two lessors to Saginaw Paint Company cost those two parties a total of more than $65,000.

Can the property owner protect himself?

The purchaser or owner of property can probably never completely protect himself from potential environmental liability, but he can take some steps to greatly reduce his exposure. First, as pointed out in U.S. v *Price,* supra, he can and should know what he is buying. The purchaser of land should thoroughly investigate the past uses of the property. Who has owned it and what has been done with it? Has it been used as a landfill? Has there been a manufacturing facility on it? If so, what waste products resulted from the manufacturing process and how were they disposed of? Finally, if there is any suggestion that hazardous chemicals may have been disposed of on the property, even though that disposal may not have been illegal at the time it occurred, the purchaser would be well-advised to take adequate soil borings and have them analyzed for chemical contaminants. This is expensive, but, like buying insurance, it may avoid financial disaster later.

Once the land has been purchased, the investor must always bear in mind that he remains jointly and severally liable for what is done on the property. If a lessee is to be put in possession, particularly for an industrial use, the owner should obtain adequate information about the intended use and disposal of any waste products to know whether they are subject to regulation under state and federal environmental laws. Having once satisfied himself that the tenant's use will not violate any of those laws, the landlord still needs to check, from time to time, to make sure that there has not been any change in the tenant's operation which would violate environmental laws.

If the land is vacant, the owner still cannot forget it. He needs to be familiar enough with it to know whether there is drainage of pollutants occurring from adjoining land or whether his property is perhaps being used as the site for "midnight dumping." If this is occurring and the property owner does not take reasonable steps to control the situation, he may find himself held liable.

The essential point that must be borne in mind by all landowners is that it is no longer enough not to commit environmental sins. It is now necessary to be aware of the environmental laws and to take active steps to guard against their violation on your property.