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