Minimizing Hazardous Waste Settlement Liabilities

Tom K. Martella

The Comprehensive Environmental Response and Compensation Liability Act (CERCLA), also known as Superfund, states that the current owner or operator is responsible for the cleanup of contamination, whether the current owner or operator was responsible for the release or not (42 USC Section 9607 (a)). The CERCLA regulations also provide for a defense to this cleanup liability known as the "innocent landowner" defense. A landowner is eligible for the defense if the contamination was caused solely by an act or omission of a third party (42 USC Section 9607 (b)). The innocent landowner defense is available if: the third party is not an employee or agent of the landowner; the third party's act or omission did not occur in connection with a contractual relationship, existing directly or indirectly with the landowner; the landowner exercised due care with respect to the hazardous substance; and the landowner took precautions against foreseeable acts or omissions of such third party and the consequences that could foreseeably result from such acts or omissions (42 USC Section 9607 (b) (3)).[1] The act or omission statement refers to the connection with a contractual relationship.

Contractual relationship is defined to include land contracts, deeds, or other instruments transferring title or possession.

Contractual relationship is defined to include land contracts, deeds, or other instruments transferring title or possession. A purchase with a contractual relationship may rely on the "innocent landowner" defense if: (1) the purchaser acquired the property after the disposal of hazardous substances occurred on the property, and (2) at the time the purchaser acquired the property, he did not know and had no reason to know that any hazardous substances had been disposed on site (42 USC Section 9601 (35) (a)). The purchaser must have undertaken, at the time of acquisition, all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial practice in an effort to minimize liability in order to show that he had "no reason to know" of the hazardous waste.[2]

The CERCLA regulations excepts from the definition of contractual relationship acquisition of property by government entities which occur by condemnation or purchase in connection with the exercise of eminent domain authority or involuntary through escheat or any other such involuntary transfer or acquisition.[3] Government entities that fall under this category are not owners or operators as specified in Section 101 (20) (D) and Section 101 (35) (A) (ll) of CERCLA. However, the government entities may not have caused or contributed to the release of contamination and have exercised due care.

The regulations do not define the minimum requirements necessary to establish due diligence toward the innocent landowner defense or due care. The Environmental Protection Agency (EPA), as the enforcement

arm of the Federal government, has attempted to address this issue in relation to *de minimis* settlement requirements.

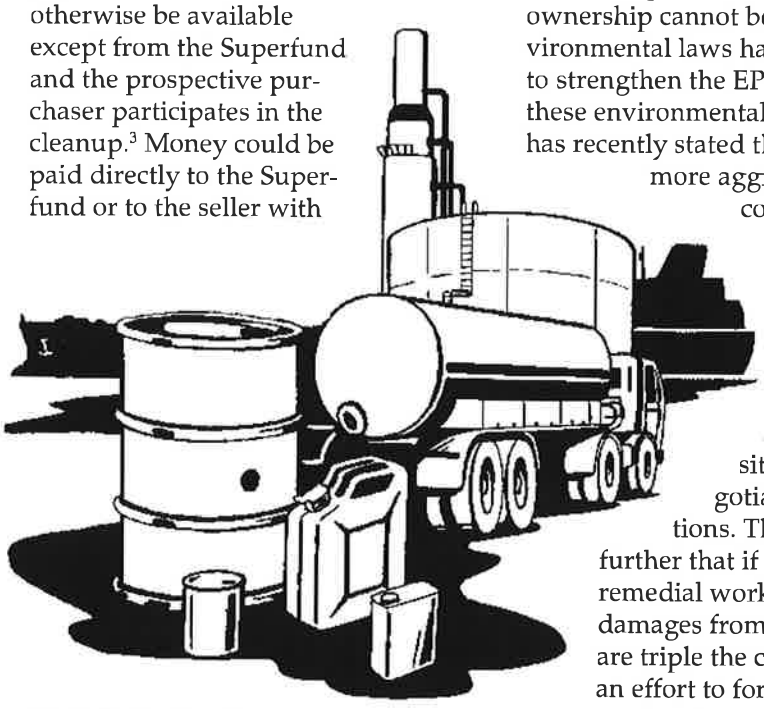
The landowner must provide information to the EPA to justify their "innocent landowner" defense. This information should include: (1) all evidence relevant to the knowledge of the landowner at the time of acquisition, including steps taken to determine previous ownership and uses of the property; (2) information pertaining to the condition of the property at the time of purchase; (3) documentation and evidence of representations made at the time of sale regarding prior uses; (4) purchase price of the property and the fair market value of comparable property at the time of acquisition, and (5) information regarding specialized knowledge on the part of the landowner which may be relevant.[3]

Information to demonstrate due care includes: (1) circumstances that lead to the discovery of the hazardous substance; (2) extent of the landowner's knowledge regarding the substance; (3) measures taken to abate any threats of harm to human health and the environment; and (4) measures taken to prevent foreseeable acts of third parties which may have contributed to the release.

The EPA will supplement the information produced to assist with the data acquisition and check the accuracy of the information provided to determine due diligence for innocent landowners and due care provision.

Settlement options vary and are based on the strength of the evidence demonstrating that each element of the third party defense has been satisfied. A *de minimis* settlement may only require that the landowner provide access and due care assurances against future contamination. In the event of an unconvincing demonstration, but the landowner is able to persuade the EPA that he would prevail in court, a *de minimis* settlement may include a cash consideration, as well as access and due care assurances. A landowner who cannot demonstrate due diligence is not eligible for a *de minimis* settlement, may be considered as any other potentially responsible party and share in the costs to cleanup the property.

A prospective purchaser of a contaminated property is not eligible for the innocent landowner defense if the purchaser knows of the contamination. However, the purchaser who know a property is contaminated may request a covenant from the EPA not to sue the prospective purchaser if an enforcement action is anticipated and if performance of or payment for cleanup would not otherwise be available except from the Superfund and the prospective purchaser participates in the cleanup.[3] Money could be paid directly to the Superfund or to the seller with proper controls. If the seller has agreed to perform response action.



The criteria presented to establish due diligence and due care can be provided in an environmental site assessment. The site assessment should be conducted by a qualified engineer, geologist, or hydrogeologist familiar with applicable environmental regulations to assess the potential environmental and health impacts, as well as applicable information to establish due diligence and due care. An attorney may also be used to supervise the assessment and address legal issues in order to help protect the prospective landowner by use of the attorney-client privilege in disclosing information. The attorney would also counsel the purchaser and engineer on the conduct of the assessment to help satisfy owner protection as provided under CERCLA.

Summary

The sometimes serious environmental implications of property ownership cannot be ignored and environmental laws have been enacted to strengthen the EPA's response to these environmental issues. The EPA has recently stated that it will be more aggressive in issuing compliance orders for remedial designs and actions to get the principle responsible parties (PRP) for Superfund site cleanups to negotiate site remediations. The EPA stated further that if they do the remedial work, they will seek damages from the PRPs that are triple the cost of cleanup in an effort to force PRPs to do the work or to recover EPA costs.

It is imperative that a prospective purchaser of a commercial or industrial property take all appropriate actions to protect themselves from obtaining a financial liability. In

Continued on Page 21

5. Lee and Donnelly (1988) report on a seven-variable model using these La Crosse data. Their results provide a constant, negative value of approximately $5,300, for floodplain location. The mean-selling price of a house in La Crosse during 1984-85, was $49,900; therefore, on average, the utility reduction implied by that model is 10.6 percent.

6. The SHAZAM 6.01 program provides for an heteroscedasticity adjustment as an ordinary least squares (OLS) command "option."

References

Andrews, R.L. and J.T. Ferguson, 1986, "Integrating Judgement with a Regression Appraisal," *The Real Estate Appraiser and Analyst*, 52(1):71-74, Spring

Brookshire, D.S., M.A. Thayer, J. Tschirhart, W.D. Schultz, 1985, "A Test of the Expected Utility Model: Evidence from Earthquake Risk," *Journal of Politican Economy* 93(2):369-389.

Court, A.T., 1939, "Hedonic Price Indexes with Automobile Examples," in *The Dynamics of Automobile Demand*, Detroit: General Motors Corporation.

Donnelly, W.A., and R.L. Andrews, "Understanding and Using Variance in Regression Based Appraisals," *The Real Estate Appraiser and Analyst*, 54(3):50-58, Fall.

Dubin, R.A., and A.C. Goodman, 1982, "Valuation of Education and Crime Neighborhood Characteristics through Hedonic Housing Prices," *Population and Environment* 5(3):166-181, Fall.

Farrar, D.E., and R.R. Glauber, 1967, "Multicollinearity in Regression Analysis: The Problem Revisited," *The Review of Economics and Statistics*, 49:92-107.

Freeman, A.M., 1979, "Hedonic Prices, Property Values and Measuring Environmental Benefits: A Survey of issues," *The Scandinavian Journal of Economics*, 81:154-173.

Griliches, Z., 1961, "Hedonic Price Indexes for Automobiles: An Econometic Analysis of Quality Change," Staff Paper 3, *Government Price Statistics Hearings*, U.S. Congress, Joint Economic Committee, Washington: U.S. Government Printing Office, 173-196, January.

Harrison, D., and D.L. Rubinfeld, 1974, "Hedonic Housing Prices and the Demand for Clean Air," *Journal of Environmental Economics*, 5:81-102.

Lee, S., and W.A. Donnelly, 1988, "The Evaluation of Real Estate Markets using Hedonic Price Indexes," CRES Working Paper 1988/7, Canberra: The Australian National University, July.

Miller, N.G., 1982, "Residential Property Hedonic Pricing Models: A Review," in C.F. Sirmans, ed., *Research in Real Estate*, vol. 2, Greenwich, CT: JAI Press, pp. 31-56.

Palmquist, R.B., 1984, "Estimating the Demand for the Characteristics of Housing," *The Review of Econimics and Statistics*, 66:394-404.

Park, W.M., and W.L. Miller, 1982, "Flood Risk Perceptions and Overdevelopment in the Floodplain," *Water Resources Bulletin*, 18(1):89-94, February.

Rosen, S., 1974, "Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition," *Journal of Political Economy*, 82(1):34-55.

Shilling, A.C., J.D. Benjamin, and C.F. Sirmans, 1985, "Adjusting Comparable Sales for Floodplain Location," *The Appraisal Journal* 53:429-436.

Sweetland, D., and W. Colclough, 1986, "Ridge Regression: A Word of Caution," *The Appraisal Journal* 54(2):294-300.

White, H., 1980, "A Heteroskedastic-Consistent Covariance Matrix Estimator and a Direct Test for Heteroskedasticity," *Econometrica*, 48:817-838.

White, K.J., and S.A. Haun, 1988, *Introduction to the Theory and Practice of Econometrics: A Computer Handbook using SHAZAM, SAS and GAUSS*, New York: John Wiley & Sons.

Minimizing Hazardous Waste Liabilities

Continued from Page 7

addition to considering the cost of cleanup action, the prospective purchaser must also consider the devaluation of the property value after finding hazardous wastes have been disposed on it.

There are legal remedies to these hazardous waste liabilities, but the purchaser must protect himself before acquisition to not only retain the legal defense provided under the regulations, but also retain the option of not consummating the purchase agreement until an environmental site assessment has been complete on the property.

References

1. "Environmental Factors in Business Transactions and Bankruptcy," Richard L. Griffith, National Business Institute Publication 11F7109, November, 1988.
2. "Innocent Land Ownership," Jeffery H. Howard, Linda E. Besfield, *Real Estate Today*, August, 1988.
3. "Guidance on Landowner Liability Under Section 107 (a) (1) of CERCLA, *De Minimis* Settlements Under Section 122 (g) (1) (B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property," EPA 9835.9, June 6, 1989.