Legal Issues in the Pipeline Environment

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Pollution prevention is viewed today as the best way to achieve further environmental quality, and therefore, the best demonstration of corporate environmental sensitivity. Environmental statutes and national pollution-control programs of the past 20 years have emphasized containment and treatment of pollutants after they are produced. During the 1990s and beyond, however, emphasis is expected to shift to preventing pollution by eliminating or reducing environmental impacts at their source.

Exposure to civil (and criminal) liability arising from environmental complaints can best be controlled and reduced by (1) a consistent, company-wide demonstration of environmental responsibility and sensitivity; (2) the effective communication and consistent documentation of environmental impacts (at all levels and across all relevant functional groups); (3) the formulation of an effective response to a problem and its ultimate resolution; (4) the aggressive identification and assessment of environmental concerns presented by a complaint or dispute; and (5) the prompt formulation and implementation of a strategy in response to an environmental action or complaint. This article addresses three areas impacted by the proliferation of environmental damage litigation:

- Right of way acquisition and divestiture: suggestions for avoiding problems.
- When problems arise, claims and defenses in surface and subsurface damage cases.
- Dealing with the problems; suggestions for effective handling of environmental damage claims.

ACQUISITION AND DIVESTITURE: SUGGESTIONS FOR AVOIDING PROBLEMS

The pre-acquisition stage is the best chance to avoid environmental liabilities. Federal and state environmental regulation places tremendous responsibility upon entities acquiring property to avoid problems that occur when a polluted property is acquired.

Before acquiring any property, an acquisition review must be conducted. The following is a checklist of inexpensive, efficient steps to take in due diligence before acquisition.

- Determination of existing use—suspected uses (dump, chemical processing)
- Visual site inspection—note suspect conditions (presence of transformers, disturbed areas, oily sheens, unusual odors, storage tanks, barrels or drums)
- Historical aerials/USGS topographic map
- Government agency check—records/permits—underground storage tanks.
- Interview seller, prior owner, neighbors, etc.

The only defenses to Superfund liability are those expressly listed in section 107(b) of CERCLA, 42 U.S.C. section 9601 et seq. In addition to acts of God or acts of war, the only defense available to a party is the so-called third-party-defense, where the defendant can avoid liability if the damages derive "solely" from an act or omission by an unrelated third party.

The acquiring party, after exercising due diligence, may be an innocent purchaser and thus avoid liability for clean-up. CERCLA requires the buyers of property if there are to be characterized as innocent purchasers, to conduct what has become known as the "environmental due diligence" investigation. To meet the statutory standard, the buyer must have undertaken (1) "at the time of acquisition," (2) "all appropriate inquiry into the previous ownership and uses at the property," (3) "consistent with good commercial or customary practice," (4) "in an attempt to minimize liability."

The level of inquiry that must be conducted will increase as certain threshold risks on the property are identified. Judged by the standards imposed by CERCLA regulations, due diligence of investigation requires thorough examination of all aspects of the property's history and use.

If, after purchasing property, the buyer learns of environmental problems with the property, the buyer may have the innocent purchaser (third-party) defense available. If, however, the buyer sells the contaminated property without disclosing the problems, the innocent purchaser defense is not available as a defense in a subsequent action by the future owners against past owners for CERCLA liability.

Indemnification agreements or releases can be used to shift CERCLA and common law liabilities to the seller or buyer. The courts generally enforce such agreements if normal contract considerations are present.

Releases or indemnification agreements must contain, in addition to standard contract terms, language that states at a minimum these general provisions:

- Specific problems released: the release must recite that it covers problems not only to the surface, but to the subsurface soils and waters as well.
- Intent: the release needs to state clearly that the parties understand and intend that the compensation paid by the release is for any and all damages, including both soils and water. (You may consider adding a statement that the compensation is being paid in lieu of further cleanup or remediation by ____.) The releasor must acknowledge that the release is releasing all present and future claims, and that the release covers presently apparent damages, as well as those that may not be presently known or evident.
- Disparity of bargaining power: there is case law that is relatively harsh in voiding a release where there is an obvious disparity in knowledge and bargaining power. Thus, the releasor should acknowledge the opportunity to consult counsel and state in the agreement that the releasor is not relying solely on the representations of the releasee.

Problem-free acquisition and divestiture is best achieved by a proactive rather than reactive approach. It is important to continually refine procedures for evaluation of prospective acquisitions and divestitures and to anticipate future problems.

When problems arise: claims and defenses in surface and subsurface damage cases

In developing plans for avoiding problem properties, it is important to know what are the areas of exposure for property owners or lessees. While not exhaustive, the theories of recovery most frequently relied on by plaintiffs include: nuisance (public/private), negligence/negligence *per se*, trespass, unjust enrichment, strict liability, and intentional/negligent infliction of emotional distress.

Nuisance

Nuisance is the most attractive common law theory because every activity or condition is arguably a nuisance; nuisance provides certain damages not recoverable under other theories; and certain common law defenses are not applicable to nuisance claims.

The Oklahoma Supreme Court has defined a nuisance to arise anytime one uses one's own property in a manner that results in injury to another, [1] and any conduct that results in injury to another. [2]

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