

Environmental Due Diligence Fundamentals



Barbara U. Rodriguez-Pashkowski
Gust Rosenfeld, P.L.C.
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Why You Should Care



Municipalities, state agencies, developers, purchasers, lessees and security interest holders who purchase, accept as a gift or donation, condemn, or foreclose on ("take an interest in") contaminated commercial real estate:

1. May be liable for substantial environmental clean up costs.
2. May incur liability as an owner or operator.
3. May incur liability as a generator or transporter.

Why We Do Environmental Due Diligence

1. Federal:
 - A. Comprehensive Environmental Responsibility, Compensation, and Liability Act of 1980 ("CERCLA" – 42 U.S.C. §§ 9601 to 9675).
 - B. Strict Liability – Federal and all states.
 - C. Joint and Several Liability – Federal and most states except Arizona and Utah.
2. Categories of Federal Responsible Parties (See 42 U.S.C. § 9607(a)):
 - A. The owner and operator of a...facility, ("Owners" and "Operators").
 - B. 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 ("Owners" and "Operators").

Why We Do Environmental Due Diligence (continued)

- C. 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...owned by another party or entity... ("Arranger" or "Generator").
- D. Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities...or sites selected by such person... ("Transporter").

How to Avoid Liability CERCLA Defenses

1. The Traditional Federal Defenses:
 - a. Act of God.
 - b. Act of War.
 - c. The "Innocent Owner" Defense – 42 U.S.C. § 9607(b)(3).
2. Other Defenses:
 - a. Insecticide/herbicide.
 - b. Fiduciary/Security Interest.
 - c. A state or local government and its employees or authorized representatives are not liable for costs or damages incurred as a result of an action taken in response to an emergency created by the release or threatened release of a hazardous substance that is generated by or from a facility owned by another person. Gross negligence is excepted from this provision.

How to Avoid Liability CERCLA Defenses (continued)

3. The "Innocent Owner" Defense:

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...***if the defendant establishes*** by a preponderance of the evidence that:

 - a. No contractual relationship – “The term ‘contractual relationship’, for the purpose of section 9607(b)(3) [the innocent owner defense] of this title, **includes**, but is not limited to, land contracts, deeds, easements, leases, 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) [See B and C below] is also established by the defendant by a preponderance of the evidence.” 42 U.S.C. § 9601(35)(A).

How to Avoid Liability CERCLA Defenses (continued)

- B. The defendant is a government entity which acquired the facility by escheat [reversion of property to the state in the absence of legal heirs or claimants], or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
 - i. Because of uncertainty, EPA recommends securing the defense by conducting AAI.
 - ii. Uncertainty results from whether eminent domain authority is involuntary.
 - Settlement vs. condemnation.
 - Local jurisdictions differ.
- C. 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. Conducted *all appropriate inquiry* at the time of purchase.

How to Avoid Liability CERCLA Defenses (continued)

- D. Contiguous Property Owner Defense:

Exempts from owner or operator liability a person that owns land contaminated solely by a release from a contiguous, or similarly situated property owned by someone else, if the person:

 - i. Did not cause or contribute to the release or threatened release; and
 - ii. Is not potentially liable or affiliated with any other person potentially liable; and
 - iii. Exercises appropriate care in respect to the release; and
 - iv. Provides full cooperation, assistance, and access to persons authorized to undertake the response action and natural resource restoration; and

How to Avoid Liability CERCLA Defenses (continued)

- v. Complies with all land use controls and does not impede the performance of any institutional controls; and
- vi. Complies with all information requests; and
- vii. Provides all the legally required notices regarding releases of hazardous substances; and
- viii. Conducted *all appropriate inquiry* at the time of purchase and did not know or have reason to know of the contamination.

How to Avoid Liability CERCLA Defenses (continued)

- E. Bona Fide Prospective Purchaser Defense:
Exempts bona fide prospective purchasers (and their tenants) from owner liability so long as the person does not impede the performance of a response action or natural resource restoration, if the purchaser follows these requirements:
 - i. All disposal took place before the date of purchase; and
 - ii. The purchaser made *all appropriate inquiries* prior to acquisition; and
 - iii. Exercises appropriate care with respect to any release after acquisition; and

How to Avoid Liability CERCLA Defenses (continued)

- iv. Provides full cooperation, assistance, and access to persons authorized to undertake response actions or natural resource restoration; and
- v. Complies with land use restrictions and does not impede performance of institutional controls; and
- vi. Complies with all information requests; and
- vii. Provides all the legally required notices regarding releases of hazardous substances; and
- viii. Is not potentially liable or affiliated with any other person potentially liable.

This means you can knowingly acquire contaminated property and not be liable if you conducted a Phase I first and satisfied the above requirements.

Questions?

Barbara U. Rodriguez-Pashkowski
One E. Washington St., Suite 1600
Phoenix, AZ 85004
602-257-7494
bpashkowski@gustlaw.com