



2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

**Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432**

Roundtable 1: Thursday, April 10, 2014 (10:10 am – 11:10 am)

Environmental and Toxic Tort – Changes in the Environmental Insurance Marketplace

“When it comes to environmental liability, the market is ever changing and with the increase of players in the environmental arena the exposures are coming in many different forms. Contrary to the old belief environmental exposures exist in virtually every facet of business whether that business is manufacturing, hospitality, agricultural, healthcare or construction (to name a few) and the lawsuits prove it as plaintiff bars look for new sources of recovery post tobacco. Today we are going to discuss some of those claims and overall risks for every industry - from some of the usual liability culprits (asbestos, underground storage tanks, buried debris, and clean fill) to some of the more emerging risks (like mold, Chinese drywall and vapor intrusion) among others. To succeed in today's world, firms and their professional advisors need to be aware of the legal landscape and the past and evolving claims otherwise, as the saying goes those who cannot remember the past are condemned to repeat it. Join several professionals who are at the forefront of these claims whether defending them in court, adjusting them under the various policies, or using them to advise clients as to why insurance is necessary.”

I. Working through a Transaction – Parties to a Brownfield Transfer (30 minutes)

A. Seller and Representatives

Various risk issues that need to be addressed by sellers in anticipation of selling an environmental impacted property. Topics will include environmental due diligence, known contamination, Ground Penetrating Radar, contractual indemnifications versus as-is asset sales and environmental covenants and restrictions on the site.

B. Buyer and Representatives

Discuss how buyers can select desirable sites, how to incorporate environmental challenges into the buyer process and how to deal with sellers that will not allow intrusive testing prior to sale.

C. Broker – Insurers

How brokers and insurers can be lodged into the negotiation and due diligence process to bridge the gap between seller and buyer.

D. Regulators

The ultimate regulatory program used to achieve regulatory closure of environmental issues at the site is key to mitigating unnecessary cleanup and costs. Some states afford protections for prospective buyers while others allow more flexible voluntary cleanup plans to proceed.

II. Potential Challenges - Some Expected, Some Unexpected Sources of Environmental Exposures (20 Minutes)

A. Historical Fill and Beneficial Reuse of Contaminated Soils

Many redevelopment sites require significant excavation in order to accommodate footprints of the proposed redevelopment. Increasingly, finding suitable disposal sites or beneficial re-use sites, without the fear of future liability associated with bankrupt disposal sites or improper re-use of materials is a unique challenge for developments. On the flip side, sites which require imported fill must evaluate the material being brought onto their property.

See http://lawschool.courtroomview.com/acf_cases/10644-pennsy-supply-inc-v-american-ash-recycling-corp-of-pennsylvania American Fly Ash is the manufacturer/distributor of AggRite, which is approved for use as paving material. However, the use of this product results in defective work and resulted in over 11,000 tons of AggRite to be disposed as a hazardous waste material.

See interesting article regarding beneficial reuse exposures
<http://www.waupacanow.com/courts/117249758.html>

B. Discovery of Contamination “post close” and Capital Improvements

When parties enter into a contract to buy or sell a brownfield, often times one party finds themselves in a favorable position while the other is not. This is evident in the NYC brownfield market where sellers are finding themselves controlling the deals and buyers are being forced to acquiesce to sellers terms. Sellers are demanding buyers: 1) can not perform intrusive subsurface testing prior to financial closing and 2) indemnify sellers for post close discovery of historical contamination. In this instance, buyers must rely upon previously completed and accessible environmental site assessments, ground penetrating radar or any other data made available to buyer. Buyers must try and determine breadth and potential of subsurface contamination, historical uses of target properties and insurability of known contamination. Further complicating matters are the buyers intended redevelopment plans and potential changes in use of target property.

C. On Site and Off Site Cleanup

Superfund is the common name for the **Comprehensive Environmental Response, Compensation, and Liability Act** of 1980 (**CERCLA**), a [United States](#) federal law designed to clean up sites contaminated with hazardous substances, as well as "pollutants or contaminants" which are defined more broadly.^[1] Superfund also gives authority to federal natural resource agencies, states and Indian tribes to recover natural resource damages caused by releases of hazardous substances, and created the [Agency for Toxic Substances and Disease Registry](#) (ATSDR), CERCLA's broad cleanup authority, to clean up releases or threatened releases of hazardous substances that may endanger public health or welfare or the (natural) environment was given primarily to the [Environmental Protection Agency](#) (EPA) and states, (though most states now have and most often use their own versions of CERCLA). EPA may identify parties responsible for hazardous substances releases to the environment and compel those parties to clean up the sites, or it may cleanup itself using the Superfund (a trust fund) and cost recover from responsible parties by referring such matters to the U.S. Department of Justice. The key difference between the authority to address hazardous substances and pollutants or contaminants is that the cleanup of pollutants or contaminants which are not hazardous substances cannot be compelled by unilateral administrative order.

The Superfund Amendments and Reauthorization Act of 1986 (SARA), made several important changes and additions to CERCLA, most significantly including Section 121 which added important minimum cleanup requirements, and 122 which required that most agreements with responsible parties to perform

remedial action be entered in federal court as a consent decree subject to public comment to address Congressional findings of "sweetheart deals" with industry by the Reagan-era EPA. (Note SARA funding is long gone & study new tech authority always existed, the reemphasis is dated at this point.

CERCLA authorizes two kinds of response actions:

1. **Removal actions.** These are typically short-term response actions, where actions may be taken to address releases or threatened releases requiring prompt response. Removal actions are classified as: (1) emergency; (2) time-critical; and (3) non-time critical. Removal responses are generally used to address localized risks such as abandoned drums containing hazardous substances, and contaminated surface soils posing acute risks to human health or the environment.¹
2. **Remedial actions.** These are usually long-term response actions. Remedial actions seek to permanently and significantly reduce the risks associated with releases or threats of releases of hazardous substances, and are generally larger more expensive actions which may include such measures as preventing the migration of pollutants with containment, or preferably removing and/or treating or neutralizing toxic substances. These actions can be conducted with federal funding only at sites listed on the EPA [National Priorities List](#) (NPL) in the United States and the territories. Remedial action by responsible parties under consent decrees or unilateral administrative orders with EPA oversight may be performed at both NPL and non-NPL sites, commonly called Superfund Alternative Sites in published EPA guidance and policy documents.
3. *Potentially responsible party* (PRP) is a possible polluter who may eventually be held [liable](#) under CERCLA for the contamination or misuse of a particular property or [resource](#). Four classes of PRPs may be liable for contamination at a Superfund site:
 1. the current owner or operator of the site;¹ the owner or operator of a site at the time that disposal of a hazardous substance, pollutant or contaminant occurred;
 2. a person who arranged for the disposal of a hazardous substance, pollutant or contaminant at a site; and
 3. a person who transported a hazardous substance, pollutant or contaminant to a site, who also has selected that site for the disposal of the hazardous substances, pollutants or contaminants

As demonstrated above, a PRP can be held liable under CERCLA for contamination and during the course of determining/apportioning liability, the PRP can incur legal defense expenses. Indemnity for cleanup along with legal defense could expose the accused of significant costs. A PRP can fund indemnity and defense by 1) paying funds from cash flow, retained earnings or borrowing or 2) can access a Pollution Legal Liability Insurance policy which provides coverage for legal defense expenses and other expenses.¹

D. Off Site Liability – Third Party property damage & bodily injury

Known contamination or the discovery of contaminants often leads to third party liabilities. Third party liabilities are bodily injury (personal injury) or property damage. The case of Katie Lowery, Richie Lowery, Johnny Jones, Angela Jones, Dennis Wingo and other Plaintiffs versus Alabama Power Company, Honeywell International Inc, Hanna Steel Corporation, Certainteed Corporation et al, filed in the Northern District of Alabama is a good example of this premise. “ On January 24, 2003, Katie Lowery and eight other residents of Jefferson County, Alabama filed suit in the Jefferson County Circuit Court against twelve corporations and 120 fictitious entities for discharging particulates and gases into the atmosphere and ground water. Their complaint, framed in six counts,³ alleged that this pollution caused them to suffer personal injuries, physical pain and mental anguish, and the loss of the use and enjoyment of their property; each plaintiff demanded compensatory and punitive damages of \$1,250,000. Between January 24, 2003 and June 20, 2006, the plaintiffs amended their complaint three times, adding more than four hundred plaintiffs⁴ and amending their prayers for

¹ <http://en.wikipedia.org/wiki/Superfund>

relief. The amended prayers for relief no longer claimed \$1,250,000 on each claim, but instead, sought “compensatory and punitive damages in an amount . . . in excess of the [court’s] minimum jurisdictional limit.” The third and final amended complaint, filed on June 20, 2006, added two defendants: Alabama Power Company (“Alabama Power”) and Filler Products Company, Inc. (“Filler Products”).² This case provides a good example of potential third party liabilities. Exposure to pollutants can cause mental anguish, physical harm or injury, including death. Furthermore, the plaintiffs allegation of loss of use or enjoyment of their property is also known as diminution in value. Each of these allegations are examples of tort liability. Pollution legal liability insurance is a useful and preemptive way to transfer risk arising from tortuous actions. Pollution liability insurance policies are structured in part to provide coverage for third party bodily injury and property damages claims, including third party diminution that result from sudden, accidental or gradual pollution events.

E. Natural Resource Damages

Natural resource injuries may occur at sites as a result of releases of hazardous substances or oil. Trustees use NRDA to assess injury to natural resources held in the public trust. This is an initial step toward restoring injured resources and services and toward compensating the public for their loss.

CERCLA and OPA Statutory Authority

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides a comprehensive group of authorities focused on one main goal: to address any release, or threatened release, of hazardous substances, pollutants, or contaminants that could endanger human health and/or the environment. CERCLA’s response provisions focus on the protection of human health and the environment. The statute also provides authority for assessment and restoration of natural resources that have been injured by a hazardous substance release or response.

The Oil Pollution Act (OPA) was enacted in reaction to the *Exxon Valdez* oil spill and provides authority for oil pollution liability and compensation as well as for the Federal government to direct and manage oil spill cleanups. Similar to CERCLA, OPA contains authorities to allow the assessment and restoration of natural resources that have been contaminated by the discharge, or threatened discharge, of oil.

Natural Resources Defined

Both CERCLA and OPA define "natural resources" broadly to include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources..." Both statutes limit "natural resources" to those resources held in trust for the public, termed [Trust Resources](#). While there are slight variations in their definitions, both CERCLA and OPA state that a "natural resource" is a resource "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" the United States, any State, an Indian Tribe, a local government, or a foreign government [CERCLA [§101\(16\)](#); OPA [§1001\(20\)](#)].

NRD are for injury to, destruction of, or loss of natural resources, including the reasonable costs of a damage assessment [CERCLA [§§101\(6\)](#); [107\(a\)\(4\)\(C\)](#); OPA [§§1001\(5\)](#); [1002\(b\)\(2\)](#)]. The measure of damages is the cost of restoring injured resources to their baseline condition, compensation for the interim loss of injured resources pending recovery, and the reasonable cost of a damage assessment [[43 CFR Part 11](#) ; [15 CFR Part 990](#)].

This principle is demonstrated in the case of *Cline v. American Aggregates Corporation*, 15 Ohio St.3d 384, 387 (1984). “Defendants operated a [quarry](#), and as part of the process of extracting [limestone](#), underground [aquifers](#) were dewatered. The plaintiffs on the neighboring land alleged that this dewatered

² <http://www.ca11.uscourts.gov/opinions/ops/200616324.pdf>

and polluted their wells. The trial court granted [summary judgment](#) to the defendants on the authority of *Frazier v. Brown*, which allowed a landowner absolute use of the water on their land despite ramifications for neighboring landowners.”³

F. Continuity of Coverage Counsel: Pre & Post Close

Insurance carriers often speak freely of transition to and from outside counsel and this can create conflict especially when an insured acquires a brownfield site. These deals are often complex and involve a myriad of legal issues that all parties to the deal (Seller, Buyer, Counsel, Brokers and Insurers) must understand and these understandings must be clearly documented in an insurance contract.

After a transaction closes, all parties stand ready to act when a claim is presented. However, counsel for the insurers are often brought into a deal when a claim is presented and are not privy to pertinent information and communications prior to claim. This often presents complications that can be prejudicial to the insurer and to the insured. We suggest continuity of counsel is preferential to all as it ensures alignment of interests among all interested parties.

G. Vapor Intrusion

“Vapor intrusion generally occurs when there is a migration of volatile chemicals from contaminated groundwater or soil into an overlying building. Volatile chemicals can emit vapors that may migrate through subsurface soils and into indoor air spaces of overlying buildings in ways similar to that of radon gas seeping into homes. Volatile chemicals may include volatile organic compounds, select semivolatile organic compounds, and some inorganic analytes, such as elemental mercury, radon, and hydrogen sulfide.

In extreme cases, the vapors may accumulate in dwellings or occupied buildings to levels that may pose near-term safety hazards (e.g., explosion), acute health effects, or aesthetic problems (e.g., odors). Typically, however, the chemical concentration levels are low or, depending on site-specific conditions, vapors may not be present at detectable concentrations. In buildings with low concentrations of volatile chemicals, the main concern is whether the chemicals may pose an unacceptable risk of chronic health effects due to long-term exposure to these low levels. A complicating factor in evaluating the potential chronic risk from vapor intrusion is the potential presence of some of the same chemicals from emission sources in the building (e.g., household solvents, gasoline, cleaners) that may pose, separately or in combination with vapor intrusion, a significant human health risk.⁴

In *Voggenthaller v. Maryland Square, LLC*, a federal district court in Nevada granted plaintiff-homeowners’ motion for summary judgment finding that their groundwater, contaminated by dry-cleaning chemicals, constituted an imminent and substantial endangerment under the Resource Conservation and Recovery Act (“RCRA”). The *Voggenthaller v. Maryland Square* case, 2010 WL 2947296, is interesting because despite the complex facts and legal issues involved, the district court drilled down to the expansive statutory language of RCRA’s citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), and found, as a matter of law, that both the environment and the homeowners were endangered by the contaminated groundwater and chemical vapors. The district court was swayed by the fact that the defendant property owners had previously filed their own lawsuit against the dry cleaner alleging the same type of RCRA imminent and substantial endangerment claim, which colored the court’s view of the defendants’ credibility. In addition,

³ Casner, A.J. et al. *Cases and Text on Property, Fifth Edition*. Aspen Publishers, New York, NY: 2004, p. 65

⁴ <http://www.epa.gov>

the state agency's failure to order any cleanup of the contamination to address the homeowners' concerns prior to the homeowners' lawsuit influenced the court as well.⁵

⁵ <http://www.taftlaw.com/news/publications/detail/645-court-rules-against-property-owners-in-vapor-intrusion-groundwater-citizen-suit-case>