ENVIRONMENTAL LAWS

AFFECTING REAL ESTATE

TITLE

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I. <u>INTRODUCTION</u>

As is easily visible after a brief review of the preceding Table of Contents, the purpose of this article is threefold:

(1) to explain the extend of the dangers to real estate titles arising from federal environmental laws, through a discussion of CERCLA,

(2) to suggest some techniques to avoid and to share the risks involved, and

(3) to provide a resource packet for later use on the subject.

II. DANGERS FROM CERCLA (& SARA):

A. LIABLE PARTIES

The Congress of the United States responded to a perceived nationwide environmental crisis and enacted what is entitled the "Comprehensive Environmental Response, Compensation, and Liability Act" ("CERCLA," also known as the "Superfund") which is found at 42 U.S.C. §9601 et seq. CERCLA was affirmed and amended in 1986, and the act embodying these amendments is entitled the "Superfund Amendments and Reauthorization Act" ("SARA").

CERCLA provides, under 42 U.S.C. §9607(a) "Covered Persons; Scope;...":

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) 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,
>
> (3) 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 or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which

there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for-

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effect study carried out under section 9604(i) of this title.

B. LIENS AND CIVIL FINES

It is provided, under 42 U.S.C. §9607(l) "Federal Lien":

(l) Federal lien

(1) In general

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) of this section) shall constitute a lien in favor of the United States upon all real property and rights to such property which-

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (a) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 9613 of this title.

(3) Notice and validity

The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notices shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of Title 26.

* * *

The State of Oklahoma has "by law designated one office for the receipt of such notices of liens," under the Uniform Federal Lien Registration Act. (68 O.S. §3401 et seq.) This Act provides, at 3403.A. & B.:

> A. Notices of liens, certificates, and other notices affecting federal tax liens or other federal liens must be filed in accordance with the Uniform Federal Lien Registration Act.
>
> B. After any notice required by the Uniform Federal Lien Registration Act to the owner of real property located in the Sate of Oklahoma, notices of liens upon real property for obligations payable to the United States and certificates and notices affecting the liens shall be filed in the office of the county clerk of the county in which the real property subject to the liens is situated.
>
> * * *

Under 42 U.S.C. §9607(c) "Determination of Amounts," liability shall not exceed:

> (c) Determination of amounts
>
> (1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed-
>
> * * *
>
> (D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

and civil fines shall be $25,000 per event plus $25,000 per day under 42 U.S.C. §9609 (if violations do not cease).

The main focus of concern in dealing with CERCLA, from the point of view of real estate lawyers, has been how to know who is included under the label "owner and operator." Initial attempts failed to convince the courts to interpret the "and" in the phrase "owner and operator" in §9607(a)(1) to be conjunctive so that a person was only liable if they were both the owner and operator. Thus, not only the non-owner operator became liable, but the non-operator owner became liable also.

While the Federal Lien language of 42 U.S.C. §9607(l) appears to allow the buyer and lender to preserve a priority ahead of the Federal Lien arising from federally imposed fines and clean-up costs, it is hollow protection indeed where the same purchaser or lender is unexpectedly found to be personally liable for the fines and costs.

Due to CERCLA, there is substantial cause for alarm about the well-being of our clients and, indirectly, of ourselves as their advisers.

III. DEFENSES TO CERCLA

A. GENERAL

Liability under CERCLA arises against any "owner and operator" "subject only to the defenses set forth in subsection (b) of this section" (42 U.S.C. §9607(a)).

The applicable "escape clause" in subsection (b) "Defenses," provides:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by-
>
> (1) an act of God;
>
> (2) an act of war;
>
> (3) 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 (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
>
> (4) any combination of the foregoing

paragraphs.

There is also an exemption from the definition of "owner or operator" provided in 42 U.S.C. §9607(20)(A) as follows:

> Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

These two avenues to establish non-liability are discussed in greater detail immediately below.

B. "INNOCENT PURCHASER DEFENSE"

As noted above, there is a statutory exemption from liability (i.e., 42 U.S.C. §9607(b)(e)), if the contamination results from:

> (3) 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 (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or

omissions;

The "Third Party" exemption is only available if the contamination was caused solely by an action of a third party unrelated by "contractual relationship" with the purchaser. (42 U.S.C. §9607(b)(3))

A land contract, deed, or other instrument, to the purchaser creates a "contractual relationship" unless:

1. acquisition occurs after contamination, and
   a. the purchaser, either,
      (1) did not know and had no reason to know of contamination, or
      (2) was a governmental entity who acquired by escheat or condemnation, or
      (3) acquired it by inheritance or bequest. (42 U.S.C. §9607(35)(A))

Acquiring contaminated property with actual knowledge destroys any exemption.

In order to establish that element showing the purchaser had no reason to know of the contamination, one needs (1) to undertake efforts ("all appropriate inquiry") to discover the contamination before acquisition and (2) document such efforts and their results. (42 U.S.C. §9607(35)(B)) This "due diligence" is discussed further in Chapter IV of this article. It should be noted that anyone discovering contamination on one's property and conveying it away without disclosure of such problem does not have

the "third party" defense under 42 U.S.C. §9607(b)(3).

C. LENDER'S DEFENSE

As noted above, the definition of "owner or operator" excludes:

> "A person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his <u>security interest</u> in the vessel or facility." (42 U.S.C. §9601(20)(A))

Taking a lender's mortgage lien on real property presupposes a possible loan default and a subsequent foreclosure with a resulting sale to either a third party or to the lender. Therefore, to be sure the collateral will--at the time of sale--have sufficient value to satisfy the mortgage debt, including principal and interest, plus any foreclosure costs, part of the underwriting process preceding the approval of the loan must include a review of the real property for possible environmental contamination or imminent risk of such contamination.

In addition, upon default and during consideration as to whether to purchase the parcel at the sheriff's, or marshal's, sale, the lender must take steps to assure itself that no contamination has either occurred, or, for the first time, become evident, during the interim. Obviously, the lender should not purchase a contaminated tract unless a conservative and thorough investigation discloses that any possible clean up costs and fines are clearly substantially below the value of the land.

If, after such pre-loan-approval and after pre-

foreclosure-purchase inspections, the lender goes ahead and makes the loan and also purchases the land at foreclosure sale, and <u>then</u> discovers the land was previously contaminated, in order to avoid liability, the lender will need to:

1. document it did not control the facility's operation prior to such acquisition, and

2. dispose of the land as soon as feasible.

The rule on this issue of "control" was published on April 29, 1992 and was codified at 40 CFR §300.1100. It provides, in part:

> (c) *Participation in Management Defined*. The term *participating in the management of a vessel or facility* means that the holder is engaging in acts of facility or vessel management, as defined herein.
>
> (1) *Actions That Are Participation in Management*. Participation in the management of a facility means, for the purpose of section 101(20)(A), actual participation in the management or operational affairs of the vessel or facility by the holder, and does not include the mere capacity to influence, or ability to influence, or the unexercised right to control facility operations. A holder is participating in management, while the borrower is still in possession of the vessel or facility encumbered by the security interest, only if the holder either:
>
> (i) Exercises decision making control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's hazardous substance handling or disposal practices; or
>
> (ii) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for

the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with the respect to:

(A) Environmental compliance or

(B) All, or substantially all, of the operational (as opposed to financial or administrative) aspect of the enterprise other than environmental compliance. Operational aspects of the enterprise include functions such as that of facility or plant manager, operations manager, chief operating officer, or chief executive officer.

Financial or administrative aspects include functions such as that of credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar functions.

A line of cases (copies of their head notes are attached hereto) have helped define, and often confuse, the circumstances under which a lender will, or will not, be exempt from liability, including the following two categories:

(a) Ownership:

i) U.S. v. Mirabile, 15 Enviro. Law Rept. 20994 (E.D. Pa. 1985):

A lender which acquired title at its foreclosure sale and resold the property within four months, was not liable as an owner because:

a) It took title solely to protect the security, and

b) activities of lender regarding site were solely prudent and routine steps to maintain the value of the land.

ii) U.S. v. Maryland Bank & Trust Company, 632 F.Supp. 573 (D. Md. 1986):

A lender which acquired title at its foreclosure sale and resold the property within four years, was liable as an owner because:

a) the lender gave up its protected status by taking title, and

b) it held title too long.

iii) Guidice v. BGF Electroplating & Manufacturing Co., Inc., 732 F.Supp. 556 (W.D. Pa. 1989):

A lender which acquired title at its foreclosure sale and resold the property within eight months, was liable as an owner because:

a) the lender gave up its protected status by taking title, and

b) it held title too long.

(b) Operator:

i) U.S. v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990):

A lender was liable as an operator due to participation in financial management of the facility sufficient to indicate the "capacity to influence" treatment of hazardous waste.

ii) In Re Bergsoe, 910 F.2d 668 (9th Cir. 1990):

A lender was not liable as an operator because it did not exercise actual management power at the facility.

IV. RISK AVOIDANCE AND RISK SHIFTING

A. GENERAL: MARKETABLE TITLE, CONTRACTS AND TITLE INSURANCE

Traditional pre-loan-approval or pre-purchase title investigations focus exclusively on record title as disclosed by the county's land records, with some on-site inspections or surveys conducted to identify any parties in possession and any encroachment issues. However, the steps to be taken to provide protection against environmental risks must go far beyond such a check of record title, which check usually does not disclose any glaring warnings anyway.

Not only will a title exam usually provide little in the way of warnings, even an analysis of the usual documents found in a real estate transaction (that usually provide both guidance and protections to the parties) are of little or no use.

An Illinois Court of Appeals recently held:

> Accordingly, we find that the presence of hazardous waste materials, in itself, is sufficient to preclude defendant from tendering merchantable title to plaintiff. Jones v. Melrose Park National Bank, 592 N.E.2d 562, 568 (App. Ct. Ill. 1992)

"But surely," we in Oklahoma would respond "the Illinois definition of merchantable, or marketable, title is different from ours here in Oklahoma." Well...here's the Illinois version, quoted in the Melrose Park case at 567:

> "Merchantable title is characterized as:
>
> "[A] title not subject to such reasonable doubt as would create a just apprehension of

its validity in the mind of a reasonable prudent and intelligent person; one that persons of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay the fair value of the land for." Sinks v. Karleskint (1985), 130 Ill.App.8d 527 (85 Ill.Dec. 807) 474 N.E.2d 767; Wilfong v. W.A. Schickendanz Agency, Inc. (1980), 85 Ill.App.2d 833, 337, (40 Ill.Dec. 625) 406 N.E.2d 828, 831.

It is further defined as "not perfect title, but rather title reasonably secure against litigation or flaws decreasing market value." (*Stevens v. Wilson* (1980), 86 Ill.App.3d 1047, 42 Ill.Dec. 118, 408 N.E.2d 496). Merchantability of real estate can and must be decided by the court as a matter of law when sufficient evidence concerning surrounding facts is determinable from the record. *Sinks v. Karleskint*.

And here is the Oklahoma definition from Oklahoma Title Examination Standard 4.1, which is taken from the language of numerous Oklahoma Supreme Court cases:

4.1 Marketable Title Defined

All title examinations should be made on the basis of marketability as defined by the Supreme Court, to wit:

"A marketable or merchantable title is synonymous with a perfect title or clear title of record; and is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record."

There seems to be little, or no, substantive difference in the two states' definitions of marketable title. If anything is different, it is that Oklahoma has a stricter definition (i.e., "perfect title").

Well, how about the fact that in the Melrose case there was an express contractual warranty from the seller that it had "received no notices from any city, village or other governmental authority of zoning, building, fire or health code violations in respect to the real estate that have not been heretofore corrected.", and such warranty was violated because the seller had received such notice and had failed to disclose it?

The OKC Metropolitan Board of Realtors standard form Seller's Disclosure Statement for Residential Property (SEE EXHIBIT "A") provides, in pertinent part, as follows:

> **OTHER** Please check Yes or No if any of the following are applicable to the property.
>
> * * *
>
> 74. ☐ Yes ☐ No Asbestos: Where _________________________ Removed or encapsulated ☐ Yes ☐ No Date _________________ Company _________________________________
>
> 75. ☐ Yes ☐ No Radon Gas: Tested ☐ Yes ☐ No
>
> * * *
>
> 77. ☐ Yes ☐ No Are you aware of lead base paint?
>
> 78. ☐ Yes ☐ No Are you aware of underground storage tanks?
>
> 79. ☐ Yes ☐ No Are you aware of landfill?
>
> * * *
>
> **OTHER DISCLOSURES** Please check Yes or No to any of the following:
>
> * * *
>
> 89. ☐ Yes ☐ No Are you aware of any substances,

materials or products which may be an environmental hazard on the property?

* * *

92. ☐ Yes ☐ No Are you aware of any notices issued or threatened to be issued by any governmental or quasi-governmental agency affecting the property?

And the Greater Tulsa Association of Realtors standard form contract provides, in pertinent part, as follows:

> (B) ENVIRONMENTAL REPRESENTATIONS AND INSPECTIONS. Except as may be specified in Paragraph 11 below, Seller represents to the best of Seller's knowledge, that there have been no hazardous substances, as defined by the Federal Environmental Protection Agency, stored, released, disposed or used on the Property, including underground storage tanks; that there have been no special use permits, variances, or other land use authorizations issues concerning waste disposal on the Property; that the Property is neither listed with, nor adjacent to a site listed with, the Environmental Protection Agency as a hazardous waste site; and that Seller has received no notice of any legal or administrative proceedings regarding environmental issues affecting the Property.
>
> Within 15 days of the Effective Date of this Contract, Buyer, Buyer's agents, employees, independent contractors, engineers, surveyors, and representatives, shall have the right to enter upon the Property to survey, inspect, and conduct such environmental, soil, air, hydrocarbon, chemical, carbon, asbestos, lead based paint, and other tests Buyer deems necessary or appropriate. If the results of any such tests are unsatisfactory to Buyer, Buyer may cancel and terminate this Contract by delivering notice, in writing, to the Seller as provided in Paragraph 14 below within twenty-four (24) hours of the expiration of the time period specified in this paragraph and receive a full refund of all Earnest Money deposited.

* * *

> (E) ACCEPTANCE OF PROPERTY. If Buyer fails to (i) investigate the water and flood history, water risk, or environmental risks attendant to the Property; (ii) have the equipment inspected; (iii) have the structure and roof inspected; or (iv) deliver such notices in the manner specified, Buyer accepts the flood and water history and water risk, any environmental risks, the structure, and all equipment attendant to the Property and accepts all portions of the Property which are subject to Buyer's right of inspection in Paragraph 4(A), (B), (C) and (D) above, in the condition or state which existed at the expiration of the time periods stated in the above paragraphs.

["Greater Tulsa Association of Realtors," Contract for Sale of Real Estate, Standard Commercial/Improved 9/92 (Comm)]

So...no relief there.

But surely, title insurance would protect the grantee in such a situation. Not necessarily. The ALTA Form B Owner's and Lender's Policies provides as follows in their pre-printed Exclusions language (SEE EXHIBIT "B"):

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> 1.(a) <u>Any law, ordinance or governmental regulation</u> (including but not limited to building and zoning laws, ordinances, or regulations) <u>restricting, regulating, prohibiting or relating to</u> (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a

> part; or (iv) <u>environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy</u>.

Even the ALTA Endorsements for Restrictions, Easements and Minerals (Form 9) and for Condominiums (Form 4.1), only protect against those notices of environmental problems which are shown in the abstract, but are <u>not</u> excluded from coverage on the exceptions page of the policy. (SEE EXHIBITS "C" & "D").

Consequently--as a buyer, landlord, and lender--the best approach is to take steps to "AVOID THE RISK" and then (just in case) to take steps to "AVOID THE LIABILITY."

In the balance of this paper, we will "explore" several possible protective steps which are applicable to the prospective buyer, landlord and lender.

B. RISK AVOIDANCE AND SHIFTING STEPS

Because of the devaluation of real property as collateral to a lender, or for use or resale by an owner, which arises due to environmental damage or clean-up costs, the following six-step technique has been suggested to avoid and to minimize such inconvenience and financial detriment:

Step 1: <u>Risk Identification</u> - environmental audit

Step 2: <u>Risk Analysis</u> - analysis of audit information

Step 3: <u>Risk Shielding</u> - intervening entities (relinquish

control)

Step 4: Risk Shifting - private indemnifications

Step 5: Risk Reduction - remedial actions

Step 6: Risk Management - terminating transaction or managing operation/clean-up

(See: James N. Cahan, "Business Transactions: A Guide Through The Wilderness," Vol. 5, No. 1, Summer 1990, Natural Resources and Environment Quarterly, ABA, Section of Natural Resources, Energy and Environmental Law.)

1. Risk Identification

"An ounce of prevention is worth a pound of cure." This admonishment is especially applicable in the arena of environmental contamination. Just as checks of the land records reveal title defects and encumbrances, and land surveys disclose encroachments, environmental audits ferret out--in advance of incurring liability--environmental problems.

42 U.S.C. §9601(35)(B) provides:

> (B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely

> presence of contamination at the property, and the ability to detect such contamination by appropriate inspection. (emphasis added)

Here in Oklahoma--in response to such requirement for "all appropriate inquiry"--many lenders have a two-step Environmental Audit process which stops at the end of Phase I and before Phase II, if the Phase I inspection discloses no warning signs to justify a more in-depth Phase II investigation.

A copy of a sample Phase I Environmental Assessment Report is attached hereto (SEE EXHIBIT "E"). This type of Report is accepted by a major Oklahoma Savings & Loan Association for approving a mid-sized commercial loan (i.e., $250,000.00 - $1,000,000.00) and the Assessment usually costs between $1,500.00 and $2,500.00. The table of contents for the attached Phase I Environmental Assessment Report includes the following:

a. Executive Summary

b. Objectives

c. Site Description

d. Site Background and Operating History

e. Environmental Setting

f. Property Inspection

g. Regulatory Inquiries

h. Conclusions and Recommendations

i. Limits of Investigation

A brief review of the attached Phase I Environmental Assessment Report reveals that this procedure entails a review of

public records on the tract's uses and ownership history, aerial photos, and an on-site inspection. Only if the records review or the inspection show suspicious results will a soil sample or other Phase II steps be taken.

When potentially dangerous conditions are identified under the Phase I study, a more comprehensive Phase II assessment must be undertaken to more precisely identify the dimensions of the problem. Such inspections would involve extensive field and laboratory testing of the site and the improvements and materials on it. The projected cost of such a Phase II review is difficult to project, but could easily reach $10,000.00.

In order to help define this "all appropriate inquiry," insofar as such "inquiry" must be "consistent with good commercial or customary practice," a two part document entitled "Standard Practice For Environmental Site Assessments" for commercial real estate is under development under the direction of the American Society for Testing and Materials ("ASTM"). There are two working documents available dated December 1, 1992 entitled: "Standard E.50.02.01: Transaction Screen Process," and "Standard E.50.02.2" Phase I Environmental Site Assessment Process."

The first document (50 pages) provides a screening questionnaire to help decide if a Phase I is needed. The second document (35 pages) provides guidance for the conduct of a Phase I Environmental Assessment. The suggested Table of Contents for the Phase I Environmental Site Assessment Report is attached hereto (SEE EXHIBIT "F").

2. Risk Analysis

The analysis of the Phase I or Phase II Environmental Assessment Report will identify the existence of past, current or even future problems, the type and degree of contamination and possible necessary further investigative or remedial steps. The attached sample Phase I Environmental Assessment Report includes not only raw information, but Conclusions and Recommendations as well.

It is possible that the parties to the current transaction will terminate the deal at the end of the Phase I stage or will at least begin to incorporate the newly discovered factors into their negotiations--impacting: price, granting of indemnifications, or limiting planned future uses.

3. Risk Shielding

An individual or corporation might attempt to insulate itself from liability by creating a separate entity which would undertake the risky acquisition or operation. However, the developing case law relating to liability of parent corporations, and officers and directors, renders this technique almost useless. The only way to successfully isolate such liability involves giving up so much control that the parent loses the ability to protect itself through ensuring that there be reasonable efforts taken to ensure safe and prudent operations by the subsidiary or sister entity.

4. Risk Shifting

While governmental actions to enforce clean-up efforts

cannot be avoided by private contractual agreements between the private parties, the parties themselves--seller and buyer, landlord and tenant, and lender and borrower--can allocate and shift the risk between each other by warranties, representations and indemnifications.

Prospective purchasers might find EXHIBIT "G" useful to include in its contracts.

Prospective landlords could use something like EXHIBIT "H" to prohibit the introduction of hazardous materials onto their premises and to establish the liability of the tenant. (SEE EXHIBITS "G" and "H"; these are from "Environmental Law Update From Various Perspectives--The Property Owner's Perspective," Environmental Law OBA CLE, Fall 1990, Publication No. 400, Chapter 3, R. Thomas Lay.)

Sellers and tenants will obviously seek to avoid giving the representations and indemnifications found in these sample clauses, and will seek indemnifications of their own, against future events. However, sellers will be forced to disclose any material defects in the property to avoid allegations of fraud or misrepresentation.

5. Risk Reduction

When all efforts to avoid connections with a contaminated site fail, or when the benefits of the transaction clearly outweigh the liabilities, the parties can contract when, how and by whom the clean-up effort will be undertaken. Relatively specific projects such as underground tank excavation

or asbestos removal (or encapsulation) are common enough occurrences to have relatively definable and finite costs. Therefore, the economics analysis of the transaction can incorporate such risk reduction efforts.

6. Risk Management

In the event some risk of contamination continues to exist when the transaction is consummated, and this fact is known before consummation, the obligations of the parties to comply with environmental laws and to monitor pollution migrating towards the site can be documented and agreed to. The threatened termination of a lease or acceleration of a loan can be powerful tools in securing on-going compliance with environmental management laws, and allows for requirements for early warnings and early remediation efforts.

C. CONCLUSION

Any site is a potential environmental time bomb whether it involves asbestos in a residential, school or office setting, or toxic wastes under a gasoline/convenience store or a manufacturing or maintenance facility.

Due diligence in advance, proper paper work to protect oneself during operations and prompt remediation when necessary, are the only ways to protect oneself and one's client, since the usual review of the land records will seldom disclose this kind of a problem and because the usual land records recording requirements do not prevent the assertion of a claim by the government or a private party against a subsequent buyer or lender

as an individual.

V. <u>LIST OF AUTHORITIES</u>

A. STATUTES AND REGULATIONS

1. CERCLA, 42 U.S.C. §9601 et seq.
2. CERCLA, 40 CFR 300
3. CERCLA Regs., 57 Fed. Reg. 18344

B. CASES

1. <u>Jones v. Melrose Park National Bank</u>,. 592 N.E.2d 562 (App. Ct. of Ill. 1992)
2. <u>U.S. v. Mirabile</u>, 15 Env't. Law Reptr. 20,994 (E.D. Pa. 1985)
3. <u>U.S. v. Maryland Bank & Trust Company</u>, 632 F.Supp. 573 (D. Md. 1985)
4. <u>Guidice v. BFG Electroplating & Manufacturing Co., Inc.</u>, 732 F.Supp. 556 (W.D. Pa. 1989)
5. <u>U.S. v. Fleet Factors Corp.</u>, 901 F.2d 1550 (11th Cir. 1990)
6. <u>In Re Bergsoe</u>, 910 F.2d 668 (9th Cir. 1990)
7. <u>New York v. Shore Realty Corp.</u>, 759 F.2d 1032 (2nd Cir. 1985)

C. ARTICLES

1. "*Owner Beware: Lender Liability and CERCLA*," ABA Journal, p. 68, Feb. 1993, Sean Sweeney, LANE, ALTON & HORST, Columbus, Ohio.
2. "*The Basics of RCRA Subtitle C and SARA Title III*," Environmental Law OBA CLE, Fall 1991, Publication 428, Chapter 2, Michael Graves, et al., HALL,

ESTILL, et al., Tulsa, OK.

3. "*Environmental and Natural Resources Updated*," Recent Developments in Oklahoma Law OBA CLE, Fall 1991, Publication 532, Chapter 6, Mark D. Coldiron, McKINNEY, STRINGER & WEBSTER, P.C., OKC, OK.
4. "*CERCLA: An Overview of the Comprehensive Environmental Response, Compensation , and Liability Act of 1980, as Amended*," Environmental Law OBA CLE, Fall, 1991, Publication 428, Chapter 1, Patricia G. Parrish, MUSSER & BUNCH, OKC, OK.
5. "*Environmental Law Update - The Lender's Perspective*," Environmental Law OBA CLE, Fall 1990, Publication 400, Chapter 4, Clyde V. Crutchmer, McKINNEY, STRINGER & WEBSTER, P.C., OKC, OK.
6. "*Environmental Law Update From Various Perspectives - The Property Owner's Perspective*," Environmental Law OBA CLE, Fall 1990, Publication 400, Chapter 3, R. Thomas Law, OKC, OK.
7. "*Environmental Issues From a Title Examiner's Perspective*," CLE Oklahoma City Title Attorneys Association, November 10, 1989, Paula Fuhrman Cail, OKC, OK.

EXHIBIT "A"

EXHIBIT "B"

EXHIBIT "C"

EXHIBIT "D"

EXHIBIT "E"

EXHIBIT "F"

EXHIBIT "G"

EXHIBIT "H"