

Managing Environmental Liabilities in Contracting and Leasing

AAPA Port Administration and Legal Issues Seminar

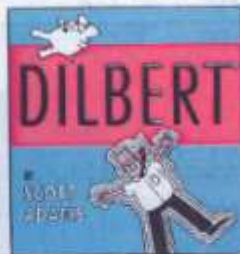
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Environmental Risk

- Disruption of operations on the property and increased costs of business.
- Loss of investment/property value or income.
- Cleanup liability to the owner and operator of the property regardless of the source of the contamination.
- Third party tort liability.



Managing the Risk

Know what and to whom you are Leasing, Buying or Selling

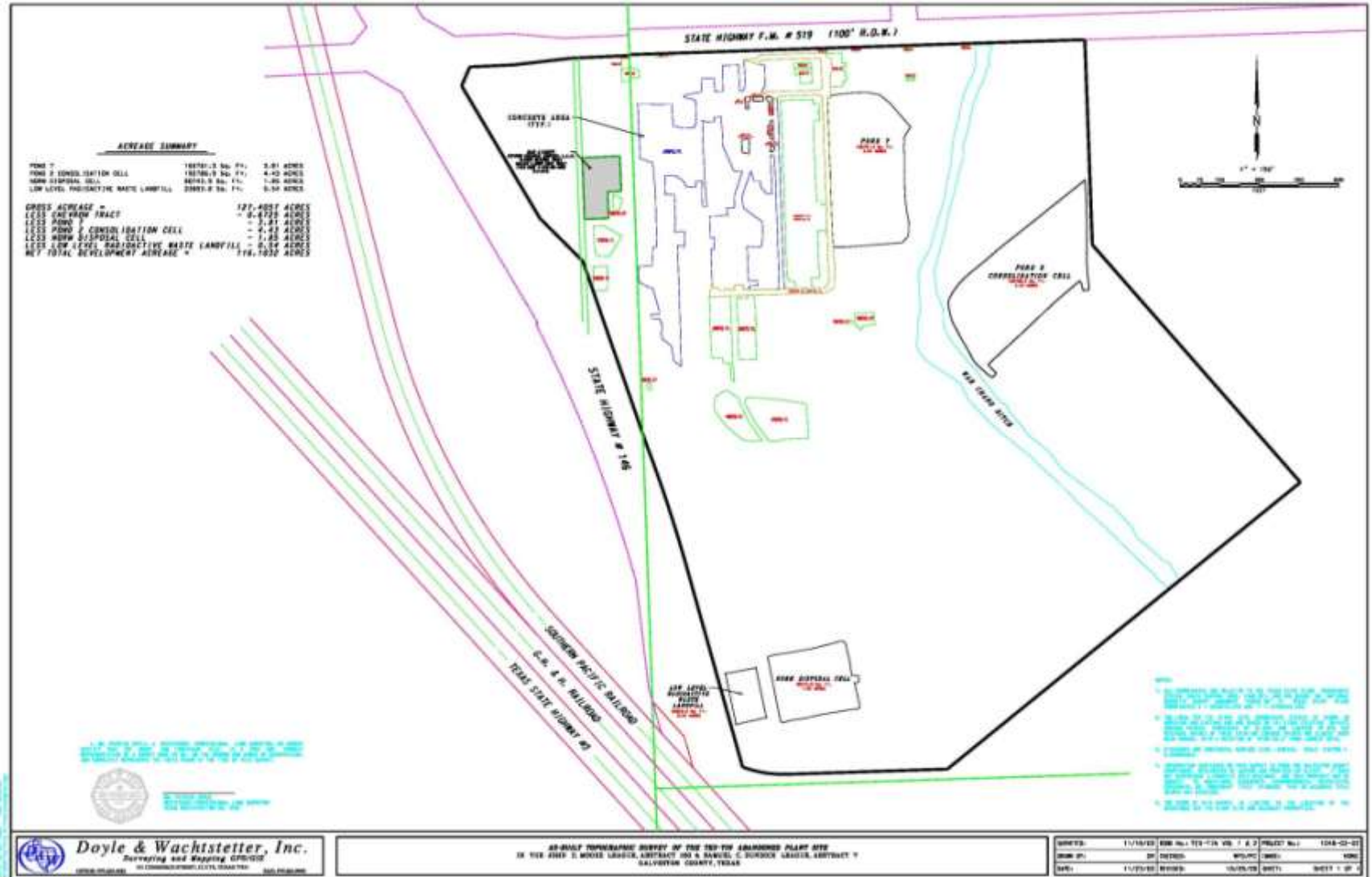
- Due Diligence to Identify the Risk
- Determine sales, lease or contract price
- Ensure feasibility of the transaction for the parties

Structure the Transaction to Account for the Risk

- Representations and Warranties
- Indemnities and Releases
- Agreed Remediation or Clean-Up
- Environmental Insurance and Third Party Liability Transfer
- Reconfigure the Boundaries
- Land Use Restrictions
- Price Adjustment
- State and Federal statutory protection



Superfund Site Redevelopment Example



Due Diligence and Environmental Site Inspection

Proper Due Diligence and Environmental Site Inspection is essential to:

- Identify any environmental issues that would affect the sale or lease price or willingness of the parties to proceed with the transaction;
- Identify any environmental issues that would limit the use of the property;
- Identify environmental issues that will need to be addressed in the final documentation;
- Set a benchmark or snapshot of the environmental condition at the time of the transaction; and,
- Satisfy the “All Appropriate Inquiries” standard.



Contractual Environmental Risk Shifting or Allocation

- Representations and Warranties and “As Is” Clauses
- Indemnities and Releases
- Agreed Remediation or Clean-Ups
- Land Use Restriction and Compliance Oversight
- Reconfiguring the Property Boundaries
- Escrow or set aside of funds to address issues
- Environmental Insurance
- Assignments of Claims



Representations and Warranties and “As Is” Clauses

- Generally do not transfer environmental liability, but may give rise to a breach of contract claim
- May be limited to personal knowledge or high level employee knowledge
- “As Is” Causes generally only cuts off reliance damages
- Only as good as the party making the rep or warranty



Indemnities and Releases

- Only as good as the party making the indemnity
- Should express an intent to cover environmental liabilities
- Should be as specific as possible and must NOT be ambiguous or subject to reinterpretation



Indemnities and Releases, Cont.

- Any ambiguity may result in the indemnity being unenforceable
- Indemnification for negligence and strict liability often must be stated in express terms
- Must set forth an allocation if the indemnity does not cover all risk



Agreed Remediation or Clean-Ups

- May be better at addressing anticipated or known environmental risk
- Should establish the cleanup standard – pre-existing condition, industrial or commercial standard
- Set forth time frames and acceptable interference
- Allow for coordination between the parties



Land Use Restriction and Compliance Oversight

- Limits future exposure to environmental issues
- Increases the likelihood of environmental compliance
- Heightens awareness of issues during operations
- Holds tenant or operator accountable



Other Mechanisms

- Reconfiguring the Property Boundaries
- Escrow accounts, price reduction or set aside of funds to address issues
- Insurance
- Assignments of Claims



Federal Statutory Protections

Federal Brownfields Amendments to CERCLA

- bona fide prospective purchasers
- contiguous property owners
- innocent landowners



Each Requires All Appropriate Inquiries

AAI Standard for CERCLA is set forth in 40 C.F.R. Part 312:

- the inquiry must be conducted by or approved by an environmental professional;
- interviews with past and present site owners and occupants;
- reviews of historical sources and records (as far back as possible);
- clean-up lien search and governmental (federal, state and local) record search;
- visual inspection of the facility and adjoining properties;
- a consideration of the relationship of the purchase price of the property to the value of the property uncontaminated; and
- must address data gaps and consideration of any other known or reasonably ascertainable information about the property.



Environmental Professional

An Environmental Professional must:

- hold a professional engineer's or geologist's license and have the equivalent of 3 years of full-time relevant experience, or
- be licensed or certified by the United States government (or state, tribe or U.S. territory) to perform environmental inquiries in compliance with the regulations and have the equivalent of 3 years of full-time relevant experience, or
- have a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science or earth science and the equivalent of 5 years of full-time relevant experience, or
- have the equivalent of 10 years of full-time relevant experience.



AAI Report and Declarations

- **The report must:**
 - Document the results of the inquiry
 - Include an opinion as to whether identified conditions indicate a release or threatened release
 - Identify and explain data gaps
 - Be updated within 180 days of closing
- **The declarations (two) must:**
 - Certify the qualifications of the Environmental Professional
 - Certify that all appropriate inquiries were conducted in accordance with the rule



What is Not Required

The new AAI rules do not:

- Require that a property owner retain the report
- Send the report to the EPA, state environmental agency or otherwise change any reporting requirements



Bona Fide Prospective Purchasers (or Lessee) Requirements

- Contamination occurred before the property was acquired;
- Purchaser made “all appropriate inquiries” into the previous use and ownership of the property;
- Purchaser exercises “appropriate care” with respect to the contamination and takes “reasonable steps” to:
 - stop a continuing release
 - prevent future releases
 - limit exposure to humans and natural resources
- Purchaser demonstrates that there is no affiliation with responsible parties;
- Purchaser complies with any necessary land use restrictions and institutional controls;
- Purchaser provides assistance and access to the property; and
- Purchaser complies with information requests and provides legally required notices.



Contiguous Property Owner or Lessee Requirements

The owner or lessee must prove that he or she:

- Has undertaken “All Appropriate Inquiry;”
- Did not know or have reason to know that the property was contaminated;
- Did not cause, contribute or consent to the contamination;
- Is not potentially liable or affiliated with any other person who is potentially liable via family relationship, contractual, corporate or financial relationship (or the reorganization of an entity that was potentially liable);
- Has taken reasonable steps to:
 - stop any continuing release,
 - prevent any threatened or future release, and
 - prevent or limit exposure to any hazardous substance released on or from property owned by that person;
- Complies with land use restrictions and institutional controls;
- Is providing assistance and access; and
- Complies with information requests and provides the legally required notices



Innocent Landowners

A person seeking to avoid liability on the basis that they are an “innocent landowner” must show that:

- The release of hazardous substances was caused by the act or omission of a third party with whom the person does not have an employment, agency or contractual relationship;
- They have undertaken “All Appropriate Inquiry;”
- They did not know or have reason to know that the property was contaminated;
- They did not cause, contribute or consent to the contamination;
- They have taken reasonable steps to:
 - stop any continuing release,
 - prevent any threatened or future release, and
 - prevent or limit exposure to any hazardous substance released on or from property owned by that person;
- They have complied with land use restrictions and institutional controls;
- They are providing assistance and access; and,
- They have complied with information requests and provided the legally required notices.



Things to Remember

- Address environmental issues upfront and make terms as specific as possible
- Indemnity: must meet “Express Strict Liability” standard and should include an allocation provision
- CERCLA Brownfield's Protection: AAI
- Tariff can provide extra overlaying protection





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