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## Environmental pollution: Could your business be liable?

One of the most dangerous areas of real estate liability today is environmental pollution. Liability laws are written such that unsuspecting buyers, sellers and lenders may become responsible for millions of dollars in damages and cleanup – even though the pollution may have occurred years before any of the current parties were involved.

What activities may have caused environmental pollution? In older properties, asbestos may be present in heating systems, chimneys and floor and ceiling materials, and lead may be found in plumbing system solder. Radon gas contamination is a one-in-three possibility in below-ground or on-grade construction types. Formaldehyde may be found in the air due to certain types of insulation, paneling and plywoods.

More obviously for sites that are now or have in the past been used for commercial purposes, environmental pollution can be traced to improper or inadequate waste disposal. Were chemicals of any sort used on your property at any



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### ■ Buyer, seller and lender liability.

Testing for these problems can be quite inexpensive, but the solutions are never cheap. Under a complex Environmental Protection Agency guideline called the Compensation and Liability Act (CERCLA), an owner of a contaminated property is strictly liable for the *entire* cost of cleanup – even when someone else caused the pollution!

Even though there is an “innocent landowner defense” under CERCLA, it requires that the purchaser did not contribute to the pollution problem

time during its history? Recently our firm surveyed a 120-bay freight terminal that, we found, has underground traces of nerve gas and underground pollution from city water

treatment chemicals.

and that before obtaining the property, he conducted a thorough investigation that failed to disclose the problem.

This means that banks are at risk as well. Lenders that have foreclosed on contaminated properties or that have received a deed-in-lieu of foreclosure can be held liable under CERCLA. Moreover, in addition to the liability for the cleanup, a lender that acquires a contaminated property also may be liable for damages caused by the pollution to other property owners or persons.

### ■ The environmental review and other liability safeguards.

So what can buyers, sellers and lenders do to protect themselves from this sort of liability? First and most important, they should consider getting an environmental review (a Phase 1 environmental site assessment) of the property before they acquire it. The Phase 1 Environmental Site Assessment can be used by the buyer to satisfy one of the requirements to qualify for the innocent landowner, contiguous property owner or bona fide prospec-

tive purchaser limitations under the scope of CERCLA. A Phase 1 Environmental Site Assessment, completed by ASTM Standard E-1527-05, constitutes “all appropriate inquiry” into the previous ownership and uses of the property consistent with good commercial or customary practice. The buyer, seller and/or lender also should consider obtaining warranties, limitations of liability and covenants against any hazardous materials on the property, together with indemnification agreements whenever possible. Finally, they should also look into the availability and cost of insurance that protects owners against problems like these.

Today’s buyers, sellers and lenders are in a most difficult situation. While the steps outlined above don’t guarantee protection (insurance may not be available or cost-prohibitive, and warranties are only as valuable as the financial strength of the company who grants them), they can help. Environmental audits, however, are an essential form of protection against environmental hazards liability.▲