



Environmental Considerations: NYC as a Buyer of Real Property

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Statutes and Case Law

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Sources of Environmental Liability

- Federal
- State

CERCLA Liable Parties

- Current and Former Owners
- Current and Past Operators
- Generators
- Transporters

CERCLA

- Strict and Joint Liability
- Pre-existing contamination
- Cost Recovery or Contribution

CERCLA Cause of Action

- Release
- Hazardous Substance
- Facility
- Response Costs Consistent with NCP
- PRP

Key local government exclusions for “owner or operator”

- Involuntary Acquisition
(101)(20)(D)
 - Query - negotiated eminent domain acquisition
- Bequest or Inheritance

Key CERCLA Statutory Defenses

- Third Party Defense
- Prospective Bona Fide Purchaser (BFPP)
- Contiguous Property Owner (CPO)
- Innocent Landowner (ILO)

Third Party Defense

- Release caused “solely” by third party
- No direct or indirect “contractual relationship”
- Exercised Due Care
- Precautions Against Foreseeable Acts of Third Parties

- Applies to:
 - transactions after January 11, 2002
 - Purchasers and Tenants
 - brownfield and NPL sites

Elements of BFPP Defense

- Threshold Criteria
 - Conducted AAI
 - Not PRP or affiliated with PRP by:
 - direct or indirect familial relationship
 - contractual or corporate relationship
 - Corporate Reorganization
 - Disposal took place prior to acquisition

BFPP Defense Elements (cont.)

- Continuing Obligations
 - Complied with All Applicable Reporting Requirements
 - Undertake “Appropriate Care”
 - Cooperate and Provide Access to Persons Performing Response Actions
 - Comply With LUCs Provide Access for Persons Maintaining LUCs
 - Comply with EPA CERCLA Information Requests or Subpoenas

CPO Defense

- Threshold Criteria
 - Conduct AAI and have no reason to know of contamination
 - Not PRP or affiliated with PRP
 - Disposal took place prior to acquisition
- Same “Continuing Obligations” as BFPP

Innocent Land Owner

- Did not know or had no reason to know of contamination
- No “contractual relationship” where:
 - Government entity acquiring title through involuntary transfer or acquisition or;
 - exercise of eminent domain authority by purchase or condemnation
 - Query: discretionary action
- Must still exercise due care

Shielding City from CERCLA liability

- When acquiring by negotiated purchase, conduct AAI and obtain BFPP status CERCLA §§ 101(35)(B), 101(40).
- When condemning, City shielded from CERCLA liability so long as City did not cause or contribute to contamination CERCLA sect. 101(20)(D).
- When acquiring by gift, conduct AAI. Do not rely on Phase I, II of donor's consultant. No statutory shield.

RCRA

- Owner or operators of Treatment, Storage or Disposal Facilities (TDSF)
- Generator sites
- Petroleum USTs (DEC has partial delegation)
- RCRA obligations run with the land
 - Corrective action
 - Closure

RCRA (cont.)

- No RCRA cost recovery
- Injunctive relief available under 7002:
 - Any person who has or is contributing to;
 - Past or present handling, storage, treatment, transportation or disposal of;
 - Any solid or hazardous waste which MAY;
 - Present an imminent and substantial endangerment

Environmental Liability - State

- Navigation Law
- Petroleum Bulk Storage Act
- ECL Title 13 (Inactive Hazardous Waste Disposal Site)
- ECL Title 56 (ERP)
- Chemical Bulk Storage Act

Who is Liable Under Navigation Law

- “Discharger” strictly liable for:
 - cleanup and removal costs
 - direct and indirect damages
 - Soil and groundwater
- Discharger is any person responsible for causing a discharge. Includes:
 - Owner or operator of tank system
 - Owner of property where oil spill occurred
- Third Party Defense

Cost Recovery For Petroleum Spills

- Statutory Contribution Action
- Claim for Reimbursement from Spill Fund

Oil Spill Fund Liable for Following Damages

- Cost to restore, repair or replace real or personal property damaged or destroyed by discharge;
- Loss of Income;
- Reduction in Property Value;
- Loss of Tax Revenue (for 1 yr)
- Interest on loan(s) to offset economic harm from discharge

Claim Eligibility

- Not a “Discharger”
 - Are USTs still present?
 - Comply with reporting obligations?
 - Comply with TP defense?
 - Contract/Lease Provisions
- No Waiver of Claim Pursuant to NYSDEC Stip
- Cleanup and removal costs result of discharge
- Claim filed within SOL
- Cleanup and removal consistent with NCP?

Claim Procedure

- File “Application for Damage Compensation”
- Include appropriate documentation
- Placeholder to stop SOL
- Claims submitted to DEC for review of supporting documentation and to determine if:
 - Work was necessary
 - Costs were reasonable

Statute of Limitations (SOL)

- Claims shall be filed no later than:
 - 3 years after “date of discovery of damage,” and
 - 10 years after the discharge causing the damage, regardless of date of discovery (spill report? tank test failure?)
- Claims may be filed to toll the SOL

Petroleum Bulk Storage Act

- Applies to USTs and ASTs with “total” storage capacity of 1100 gallons
- Owners and operators:
 - Comply with Closure Obligations
 - Implement Corrective Action
- NYSDEC and USEPA have jurisdiction

PBSA (cont.)

- Tanks of concern:
 - USTs closed in place
 - USTs removed in past but no sampling
 - Unregulated or unregistered heating oil tanks
 - Abandoned tanks (not formally closed)
- Vapor Intrusion from removed tanks or residual contamination

Title 13-State Superfund

- TP, ILO and involuntary acquisition defenses
- Class 2 sites- equivalent to NPL
 - BFPP Non-liability letter from DEC
 - PPA
 - Delist or Reclassify or operable unit
- Class 3 Site: Cleanup Deferred
- Class 4 Site: Cleanup Completed with O&M
- Class 5 Site: Cleanup Completed without O&M

Environmental Restoration Program (ERP)

- Funds 90% of on-site contamination and 100% of off-site contamination
- 10% co-share may be satisfied by other grants
- No share for sale proceeds (and taxes) for costs
 - First \$\$ to local government up to its costs
 - Next \$\$ for amount of state assistance
 - Balance \$\$ to local government

Closing Remarks

- Conduct Phase I - no cost.
- If warranted, conduct Phase II before DCAS/Law negotiates/condemns
- If gift, ask DDC for Phase I, cost to cure study.
- If damaged goods, confer with Law (Environmental Law Division) about litigation.
- To manage cleanup, consider ERP (\$), BCP (DEC oversight) or DEP oversight.



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NYC Goals

The purpose of this course is to sensitize City professionals who acquire real property to the risks that property may be contaminated and how to address the contamination.

- Improve communication among acquiring agencies, DCAS, DDC, DEP and Law.
- Explain new procedures for acquiring potentially contaminated property.
- Expedite the cleanup of properties that are contaminated and their redevelopment.

City Acquisition Process

Acquiring Agencies - agencies that condemned land in 2005-2006

DEP-9	DOT- 6
SCA - 5	HPD - 4
DPR -3	DSNY -1
FDNY- 1	EDC- 1

City Acquisition Process (cont.)

- **CEQR**
 - Acquiring agency is lead
 - DEP reviews hazardous materials impact
 - Upon completion, DCP certifies application for ULURP
- **ULURP**
 - Community board, etc.
 - politics
- **DCAS**

As City's real estate broker:

 - Conducts appraisals
- **DCAS (cont.)**
 - Negotiates deals with willing sellers
 - Drafts purchase & sale contracts
- **Law**
 - Approves, closes negotiated purchases
 - Condemns real property
- **OMB**
 - Funds acquisitions, condemnations

Environmental Risks

- Risks
 - Liability
 - Financial - Unknown or extra costs
 - Time - Unexpected delays
 - Business and service interruption
 - Use restrictions
 - May not be able to use for intended purpose without further remediation

Key Terms

- Hazardous Substances—broadest category of industrial chemicals and environmental pollutants; CERCLA
- Petroleum—all refined petroleum products; NY Navigation Law
- Phase I (aka) AAI—records search, interview w/ owners, visual inspection
- Phase II -- subsurface investigation

CEQR

CEQR's focus is project's proposed impact
not on supporting City negotiation of
contaminated land

CEQR TM not require agency acquiring
real property to do a Phase I



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CEQR & Assessment of Contamination

CEQR Process

- Agency incorporates results of Phase I, II into Hazardous Materials Analysis of EAS
- DEP Review of EAS and backup materials
- DEP may require agency to conduct further investigation/remediation
- DEP may require restrictive declaration on site or employ another legal mechanism to ensure no threat to health or the environment
- Acquisition certified for ULURP with Negative Declaration or DEIS; ULURP clock starts

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City Acquisition Process

- Agency request to acquire site vetted by interagency committee
- Agency conducts environmental review
- Hazardous material impact reviewed by DEP
- ULURP application submitted and certified
- Owner notified; ULURP completed; capital eligibility; DCAS conducts negotiations

How the City acquires property

- Negotiated Purchase
- Condemnation (NY EDPL)
- Gift/Bequest

Negotiated Purchase

After ULURP is complete; OMB has allocated funds:

- If willing owner, DCAS offers Net Value (FMV-cost to remediate) for contaminated sites. Owners, however, insist on FMV. If deal, DCAS drafts contract
- DCAS not yet acquired property for less than FMV
- Law Department approval & closing
- Average time to reach deal—6 months

Condemnation

If unwilling owner: (wins lottery)

- ULURP completion
- OMB has allocated funds
- Law Dept processes vesting
 - EDPL Hearing - public purpose, ER, alternative sites
 - File damage and acquisition map
 - Title search
- Title vests -10-12 weeks

Negotiated Purchase

Year	# of deals	Acres	Price
2005	7	.91	\$1.04 M
2006	6	5.7	\$3.84 M

Condemnation

Year	# of deals	Acres	Price
2005	14	29.4	\$60.6 M
2006	15	24	Appraisals not complete

In the last ten years, City has paid \$422 million for property
acquired through condemnation.

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GIFTS / BEQUESTS

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Gift/Bequest

- No ULURP
- Donor letter to City offering land
- Mayoral approves offer and how to accept

Gifts/Bequests

- CERCLA exemption does not eliminate need for AAI
- City should not take the title prior to completion of AAI
- City may rely on donor AAI only under certain circumstances

Gifts

Year	# of deals	Acres	Consideration
2005	2	2.5	\$2
2006	2	10	\$2

Who should conduct AAI for city acquisition?

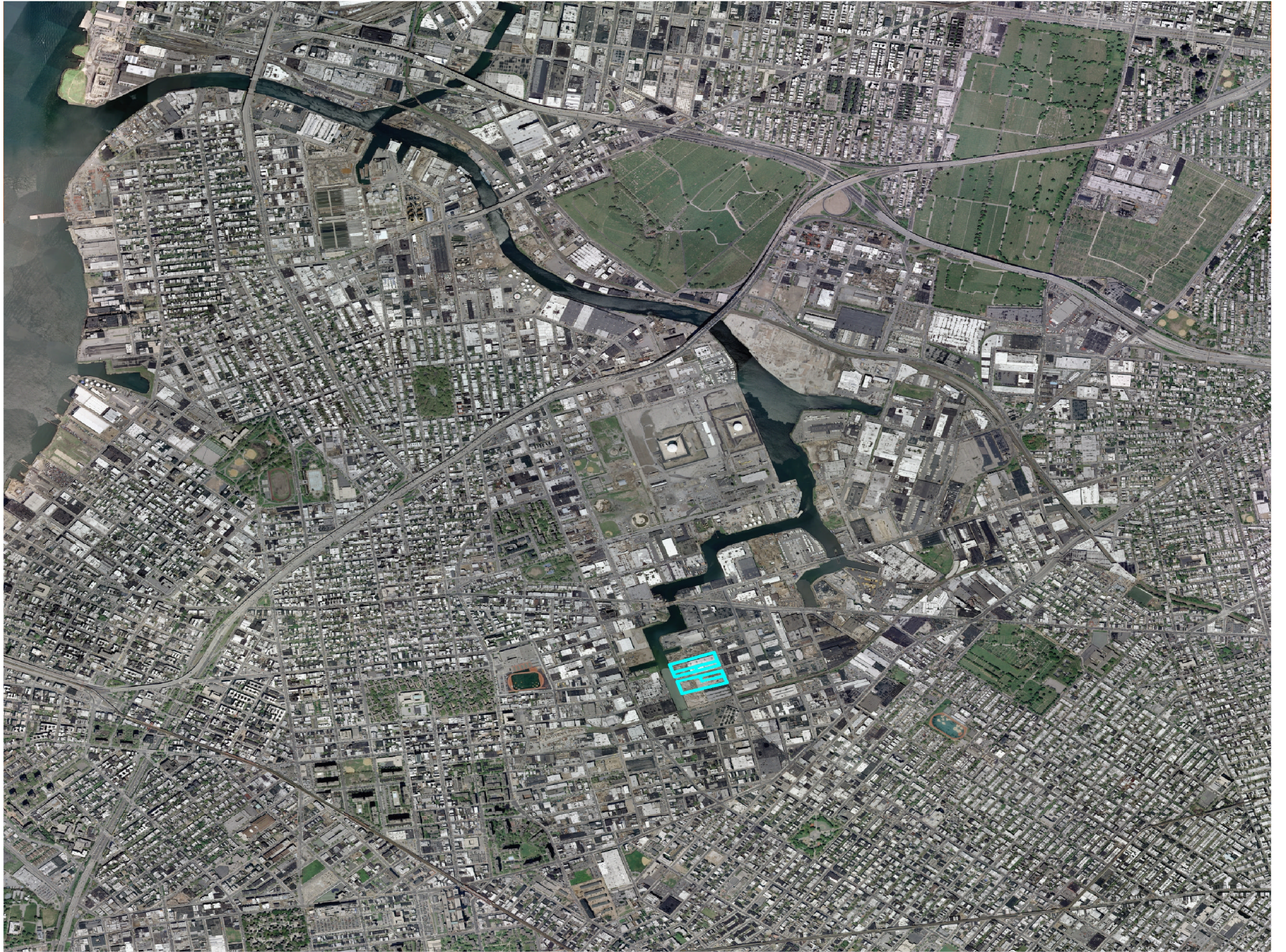
- When and under what conditions can the city rely on the seller's, condemnee's and or donor's due diligence?
 - Outdated
 - Reliance letters
 - Appropriate insurance coverage

Case Study: 161 Varick Avenue

Mark McIntyre, MOEC

Chronology

- 1986
 - DSNY identifies 8-acre, vacant lot on industrial land suitable for construction of BK1 & BK4 garages
- 1986 - 1988
 - Project undergoes environmental review, deemed a Type I action. Lead agencies issue Conditional Negative Declaration.
- 1988
 - Board of Estimate approves agency's ULURP application, authorizing DSNY to acquire site





Chronology (cont.)

- 1988 - 2000
 - DSNY discovers contamination
 - City's finances delay acquisition
 - Rhino Trust sells half the site to local firm which then sells to Waste Management (WM), which creates major solid waste facility on land for which DSNY has ULURP approval.
 - WM sues DSNY. Suit dismissed two years later.
- September 2000
 - City condemns site, one of DSNY's largest acquisitions. Final price would be \$9.2 million.

Site Development

- Nov. 2001 - DSNY obtains possession. Hires Jacobs Facilities as construction manager to build two garages.
- Jan. 2002 - Initial soil test by Jacobs finds greasy, black soil and PCBs.

Jacobs' Investigation

- Feb. 2002

Jacobs hires engineering Liro Kassner to conduct environmental assessment. One week later, Liro completes Phase I. Prior site uses included:

- Lumber yard that manufactured pressure treated wood
- Coal company
- Asphalt paving company

Jacobs' Investigation (cont.)

- LIRO's Phase II, or subsurface investigation, found:
 - PCBs, including hot spot area with 156 ppm, three times federal hazardous waste level.
 - Volatile chemicals
 - Petroleum compounds
 - Metals

Remediation

Jacobs oversaw removal of 77,000 tons of contaminated and hazardous soil, including:

- PCBs, disposed at three separate facilities depending on concentrations
- Buried bulkhead timbers
- Smashed drums containing oil
- flatbed railroad car
- 3 vertical feet of C&D waste left by WM customers

Remediation (cont.)

- Remediation cost \$5.2 million, and delayed garages' construction by 17 months.
- Remediation was largest change order for this \$82 million project; created longest delays in project completion.
- Today, six years later, Bk 1/BK 4 garages are still in construction. Garages expected to open in September, 2007-- 29 months after original completion date.



RICKSCHULES ST

NO PARKING

BK-4

BK-1

sanitation
COMMUNITY DEVELOPMENT DEPARTMENT
BROOKLYN
WASTEWATER TREATMENT PLANT





Lessons

- City acquired 161 Varick without a Phase I or Phase II study. CEQR not require Phase I, then or now.
- Delays - State Involvement. Liro reported PCB contamination to state DEC. DEC sought to direct site cleanup, which DSNY successfully resisted.
- DSNY never sought to recover cleanup's cost from WM or Rhino Trust. Unlike private buyers, City rarely sues seller when it takes possession of damaged property, including contamination.

Lessons (cont.)

- Condemnation precludes parties from allocating liability, e.g., no indemnification.
- When City condemns, CERCLA shields City from liability for hazardous substances, but not for petroleum liability under NY Navigation Law.

Condemnation Law

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City of New York v. Mobil

City of New York v. Mobil, 12 A.D. 3rd. 77

(2nd Dep't 2004) - In determining a property's value in a condemnation trial, evidence that the property is contaminated and the cost to remediate the contamination is not relevant and therefore inadmissible.

- Property is valued as if remediated
- Award escrowed to pay for subsequent remediation.

City of NY v. Mobil

- City had condemned land from Mobil. Earlier, a significant petroleum spill had occurred on site. After possession, City sued Mobil under Navigation Law for cleanup costs, damages.
- In condemnation proceeding, Mobil moved for a motion in limine to exclude evidence the property was contaminated. Motion granted. Within year, 3rd, 4th Dep'ts adopted City v. Mobil

Rationale

- Judge Gerges, 2d Dept. excluded evidence of contamination to prevent potential double recovery by City:
 - City would pay a reduced value in the condemnation trial;
 - Mobil would reimburse the City for its cleanup cost in Navigation Law proceeding

Impact on City

- Under City v. Mobil, City pays appreciably more when it condemns property that is contaminated.
 - City paid Mobil initial award of \$809,000 in 1998
 - After 2d Dept decision, subsequent appraisal valued property at \$3.6 million - difference (\$2.8 million) escrowed awaiting outcome of Nav. Law litigation

Condemnation Law

- Condemnor must pay FMV:
 - Willing seller, willing buyer
 - Highest and best use
 - Date of vesting

Majority View

- City v. Mobil is minority view
- Majority view -- Evidence of contamination is relevant when determining property's value.

Why Exclude?

- 2d Dept's concern: potential double recovery. But:
 - Common law -- plaintiff cannot recover twice for same injury.
 - Courts offset what the City might gain from reduced value for property from what Mobil would pay City for remediation.

CERCLA sect. 9614 (b)

- “Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act.”

City Options

- Limit City v. Mobil - introduce evidence of contamination when condemnee not caused contamination. Without chance of double recovery, 2d Dept should reconsider City v. Mobil.
- Outside 2d Dept, introduce evidence of contamination when condemning land in Manhattan and Bronx.

Due Diligence

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Types of Property Owners

- Interested owners
 - Gift, Acquisition
- Disinterested
 - Acquisition, condemnation
- Recalcitrant owners
 - Litigation, enforcement action, condemnation
- Insolvent owners
 - Tax lien foreclosure

Solutions

- Remedy or cure issues prior to transfer
 - Seller remedy
 - Re-price property
 - Do not close
- Remedy or cure issues after transfer
 - Take as is

Buyer's Due Diligence Issues

- Environmental
 - AAI/ASTM- Presence of contamination (Phase I evaluation)
 - Site characterization (Phase II site assessment)
 - Environmental impact
 - Compliance issue
 - Regulatory approval
 - Brownfield incentives
 - City environmental review
- Improvements
 - Physical repairs
 - Code violations
 - Functionality
- Financing
 - Pro forma
 - Appraisal
- Risk Management Plan
- Exit Strategy
- Transportation
 - Accessibility
 - Traffic Studies
- Taxes
- Utilities
- Permits
- Zoning
- Political
- Community Support
- Market
- Feasibility of Development
 - Adaptive Reuse
 - Redevelopment
 - Reposition

Why has EPA established AAI?

- The 2002 Brownfields Amendments to CERCLA required EPA to promulgate regulations establishing standards and practices for conducting AAI.
- The effective date: November 1, 2006
 - Either AAI standard or ASTM E1527-05
 - 1 year shelf life

Shelf Life

AAI Section 312.20

ASTM E1527-05 Section 4

4.6 . . . the following components must be conducted or updated within 180 days prior to closing:

- (i) interviews with owners, operators, and occupants;
- (ii) searches for recorded environmental cleanup liens;
- (iii) reviews of federal, tribal, state, and local government records;
- (iv) visual inspections of the property and of adjoining properties; and
- (v) the declaration by the environmental professional responsible for the assessment or update

Shelf Life

AAI Section 312.20

ASTM E1527-05 Section 4

4.7.1 . . . [If reports are older than one year], the information shall not be used without current investigation of conditions likely to affect RECs. Additional tasks may be necessary to document conditions that may have changed materially since the prior *environmental site assessment* was conducted.

Objectives of AAI

- Identify conditions indicative of releases or threatened releases
- Identify particular information:
 - Uses and occupancies of property
 - Uses of hazardous substances
 - Waste management activities
 - Corrective actions and response activities
 - Institutional and engineering controls
 - Nearby and adjoining properties with environmental conditions

Why Comply with AAI?

- CERCLA liability protection when negotiating deals
- Understand potential environmental risks (costs and delays)
- Comply with “continuing obligations”

When to go to NY DDC

- Phase I assessment- No cost to acquiring agency
 - How to evaluate Phase I results
- Phase II assessment - Agency must Pay
 - Do you need to do?
 - Do you need more information?
- Mark Canu (718) 391-1391
 - canum@ddc.nyc.gov

Next Steps

- When Phase II confirms a contaminated site
 - Consult with Senior Management
 - Agency confers with OMB
 - Contact DCAS
- Unwilling Seller
 - Consult with Senior Management
 - Agency confers with OMB
 - Contact Law Department



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Access

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Different Methods of Access

- NY EDPL section 404
- NYC Ad. Code sect. 24-602

Access

EDPL sect. 404 - grants City right to enter any real property to conduct surveys and subsurface investigations

- Includes authority to enter when City condemns or acquires real property by negotiated purchase
- If landowner objects, Law Dept will commence an action to gain access.
- Except bankruptcy

ACCESS (cont.)

NYC Administrative Code sect. 24-602 -
City has right to respond to emergencies
involving release or threatened release of
hazardous substances

- DEP's authority includes right to conduct
subsurface investigation as part of
emergency response

Remediation

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Post-Closing Remediation

- Goals:
 - Conduct remediation
 - Preserve defenses and cost recovery rights; agency consult with Law Dept.
 - Coordinate remediation with construction to minimize costs and delays
 - Properly segregate contaminated soils from clean fill/soils

Post-Closing Remediation

- Petroleum
 - Notify NYSDEC to obtain spill number
 - Prepare and obtain NYSDEC approval of work plan
 - File preliminary claim with Oil Spill Fund to toll SOL
 - Do not execute Stipulation with waiver of rights to Spill Fund
 - File amended claim when NYSDEC determines remediation completed

Post-Closing Remediation

- Hazardous Substances
 - Implement remediation under oversight document to preserve contribution rights
 - Explore funding options (ERP)
 - Cleanup should comply with NCP (e.g. public participation)
 - Record necessary land use controls
 - Consider Developing “Due Care” plan to document “reasonable steps”

Closing Remarks

- Conduct Phase I - no cost.
- If warranted, conduct Phase II before DCAS/Law negotiates/condemns
- If gift, ask DDC for Phase I, cost to cure study.
- In condemnation trial, Law should introduce evidence of contamination against condemnee w/ clean hands.
- If damaged goods, confer with Law (Environmental Law) about litigation.
- To manage cleanup, consider ERP (\$), BCP (DEC