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A Newsletter Covering Recent Environmental Developments and Caselaw

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Contents

Publisher……RTM Communications, Inc., Dean Jeffery Telego, President
510 King Street, Suite 410, Alexandria, VA 22314 USA 703-549-0977 or 800-966-7445
Editor…….Tacy Cook Telego, APR, VP RTMC.
Author……Lawrence Schnapf, Esq.

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The Schnapf Environmental Journal is a bi-monthly report that provides updates on regulatory developments and highlights significant federal and state environmental law decisions affecting corporate and real estate transactions, and brownfield redevelopment. The information contained in this newsletter is not offered for the purposes of providing legal advice or establishing a client/attorney relationship. Environmental issues are highly complex and fact-specific and you should consult an environmental attorney for assistance with your environmental issues.

DUE DILIGENCE/ AUDITING/ DISCLOSURE/ ENFORCEMENT

State Court Allows Claim To Proceed Against Consultant for Vapor Intrusion

A Nassau County judge refused to dismiss a complaint against an environmental consultant alleged to have improperly collected and interpreted vapor intrusion sampling.

In *The Tyree Organization, Ltd. v. Cashin Associates, P.C.*, 2007 N.Y. Misc. LEXIS 5351 (July 31, 2007), plaintiff was retained in 1998 by the owner of the Mobil service station to investigate and delineate the extent of groundwater contamination. The plaintiff detected limited groundwater contamination and installed a soil vapor extraction system but did not submit the results to the New York State Department of Environmental Conservation (NYSDEC). In 1998, the gas station owner retained plaintiff to implement a remedial action plan for a petroleum spill pursuant to a stipulation agreement. The plaintiff found that gasoline was present in the groundwater one block from the gas station but the concentrations appeared to be decreasing. When NYSDEC required additional investigation, the gas station owner hired another consultant who detected MTBE in the irrigation well of a school located one block further south.

When the Valley Stream Free School District learned that MTBE was detected in its well, the school district retained defendant to conduct indoor air sampling. After the sampling detected elevated levels of benzene, the school relocated the kindergarten classes to a building that housed its administrative offices. The new facility had to be reconfigured and the administrative offices moved to another location. As it turned out, because gasoline-powered equipment was stored at the school, the sampling results overstated the impact from the gasoline spill.

In 2002, the school district commenced an action to recover the fees it paid to the defendant as well as the costs for relocating the kindergarten and administrative offices. The plaintiff and Exxon Mobil reached a settlement where plaintiff agreed to pay $550K and Exxon Mobil $110K. As part of the settlement, the school district agreed to assign its rights against the defendant to the plaintiff.

Plaintiff then sought damages for breach of contract claim, negligence and unjust enrichment. After the plaintiff agreed to discontinue the latter two claims without prejudice, the defendant filed a motion to dismiss the breach of contract claim. The defendant asserted that it complied with the Environmental Laboratory Approval requirements of Public Health Law §502. However, the court said that complying with the Public Health Law does not necessarily establish that

the defendant exercised due care when conducting the indoor air sampling. In particular, the court said it could not determine without the benefit of expert testimony if evaluating indoor air using an acceptable method without taking into account the potential for gasoline vapors emanating from gasoline-powered equipment was good and accepted practice for an engineer functioning in the capacity of an environmental consultant. Accordingly, the court denied the motion to dismiss.

Commentary: *Because of the absence of well-established procedures for collecting vapor intrusion samples and the extremely low concentrations involved in vapor intrusion assessments, vapor sampling frequently may be inaccurate. Thus, it is extremely important for clients and their consultants to be familiar with state vapor intrusion analytical requirements and to establish the protocols to be used for assessing vapor intrusion. It is also important to advise the laboratory as to what screening levels to use and to ensure that the screening level is consistent with that required by a particular state for determining if further action is required.*

These are issues to be resolved through development of the ASTM Standard Practice for Assessment of Vapor Intrusion into Structures on Property Involved in Real Estate Transactions that is under the jurisdiction of ASTM Committee E50 on Environmental Assessment and is the direct responsibility of Subcommittee E50.02.06. The Standard Practice is due for full committee balloting in December. All negatives have been resolved therefore the Standard can go for final approval and be published in February 2008. The Standard is four-tiered approach designed to resolve conflicts within ASTM E 1527.05, remove confusion from the marketplace, and remove liability concerns by stakeholders in commercial real estate transactions. One of the biggest problems in ASTM E 1527-05 is the lack of definitions for a "release" and for "indoor air quality."

Federal Appeals Court Rules Consultant Not Liable for Failing To Properly Estimate Remediation Costs

A 17-year dispute over whether an environmental consultant failed to adequately assess potential contamination at a site appeared to come to an end when the United States Court of Appeals for the Seventh Circuit upheld a ruling by a federal district court that the property owner had failed to prove damages flowing from the alleged negligent misrepresentation.

In *Kemper/Prime Industrial Partners v. Montgomery Watson Americas, Inc*., 487 F.3rd 1061 (7th Cir. 2007), the plaintiffs had retained Warzyn, Inc., a predecessor of the defendant, in February 1990 to perform an environmental assessment on a 120-acre property known as the Chicago Enterprise Center. Following a four month investigation that included soil and groundwater sampling, Warzyn issued two reports in June 1990 that identified several areas of contamination as well as a "major

area of concern" south of Building S. Warzyn indicated that there were no Sanborn maps for this area but the parties subsequently learned of the existence of such maps that revealed the presence of 26 underground storage tanks. The consultant also indicated that there were portions of the site that had not been investigated based on the scope of work.

After issuing its reports, Warzyn sent a draft letter proposing to quantify the costs of the area south of Building S. Handwritten notes by a principal of the plaintiff following a telephone conversation with Warzyn suggested that the estimated cleanup costs were approximately $300K. Based on the Warzyn reports, the plaintiff purchased the property.

The plaintiff sold significant sections of the property for several million dollars in profits between 1993 and 1996. However, after learning that the property was more extensively contaminated than disclosed in the Warzny reports, the plaintiff filed an action in 1997 for negligent misrepresentation. The purchasers of portions of the property joined in the litigation in 1999 but were dismissed in 2003 because they did not have the right to rely on the Warzyn reports. In 2004, the federal district court for the Northern District of Illinois concluded that the plaintiff was unable to produce any proof of its damages and dismissed the case with prejudice.

On appeal, the Seventh Circuit concluded that the draft letter and handwritten notes did not establish a basis for assessing damages with any degree of probability, and that there was no statement in the 1990 Warzyn report estimating the remediation costs or that the court could infer the cost of remediation. The plaintiff produced an expert affidavit that the standard practice at the time of the Warzyn reports was to "*at least provide a qualitative but more often quantitative evaluation of the potential liabilities….[and] it was not unusual to provide order of magnitude costs (or cost ranges) that bracket the potential liabilities*." The court, though, found this statement too vague to establish an industry standard practice that cost estimates should be provided for all possible remediation scenarios or that the plaintiff was entitled to view the Warzyn correspondence as a definitive statement of such costs. The court also determined that the $300K estimate was for a portion of the property that was not subject to the litigation. Moreover, the court pointed to language in the report indicating that additional sampling would be required to determine the extent of contamination at several areas of concern as evidence that the plaintiff could not reasonably have concluded that there were no other remedial costs except for those set forth in the draft letter. The court also found that the plaintiff had failed to reduce the environmental costs to reflect parcels that it had sold without remediating. In addition, the court said the plaintiff's cost estimate could not be used as evidence because the plaintiff's remediation estimate was based on an unrestricted use but the property was used for industrial purposes with no

evidence that the plaintiff or subsequent owners would change the use to non-residential.

Finally, the court observed that the plaintiff had sold all of the property by 2004 for a profit and that an affiliate of the plaintiff had not only agreed to remediate all the contamination but also indemnify the plaintiff for any environmental liabilities. Because the plaintiff had significantly benefited from its purchase and sale of the property, the court held that the plaintiff had failed to show it had suffered any pecuniary loss. Because of the absence of any damages, the appeals court upheld the dismissal of the action against the consultant.

Consultant Not Liable For Failing To Identify Adjacent Landfill

In *Watco v. Pickering Environmental Consultants, Inc*., 2007 Tenn. App. LEXIS 364 (Ct. App. 6/5/07), a state appeals court affirmed a ruling by a trial court granting a judgment in favor of a consultant-defendant.

In this case, the plaintiff agreed in December 1994 to purchase a 169-acre tract of undeveloped wooded land from National Bank of Commerce (NBC), acting as trustee for the Norfleet Charitable Remainder Uni-Trust (Norfleet Trust), for $880,588. The purchase was contingent on a satisfactory Phase I Environmental Site Assessment (ESA) that conformed to the ASTM E1527-94. At the time of the Phase I ESA, the land adjacent to the west was a county park. The defendant completed the Phase I ESA in July 1995 and provided an opinion letter to plaintiff acknowledging that the report was in connection with the sale of the property and expressly provided that the plaintiff could rely on the report. The letter went on to state that the defendant had not identified any "hazardous materials or environmental conditions" associated with current of former uses, and that no "significant environmental concerns" were identified in the surrounding areas that would represent a "significant environmental concern" to the property. As a result, the letter indicated that further environmental review was not recommended.

As it turned out, the county park had an unlicensed municipal landfill that operated from approximately 1955 to the mid-1970s. The land containing the unlicensed landfill had actually been owned by the Norfleet Trust and NBC had conveyed the land to the Shelby County Conservation Board pursuant to two deeds in 1980 and 1986.

During grading operations for a residential subdivision in March 2004, the plaintiff discovered garbage buried at a depth of 3 to 5 feet under approximately 30 acres of the western portion of the property. The plaintiff incurred substantial costs removing the garbage, and had to delay development while the solid waste was excavated and replaced with clean fill. The plaintiff then sought damages for professional negligence and negligent misrepresentation. The defendant filed a claim against NBC seeking indemnity under the Phase I

ESA contract but the court granted NBC's motion to dismiss on the grounds that the contract provided that disputes between the parties were to be resolved through arbitration.

In its claim for negligent misrepresentation, the plaintiff claimed that the defendant made a false statement when it stated it had complied with ASTM E1527-94. The parties also agreed that the ASTM E1527-94 established the standard of care for the professional negligence claim. The plaintiff's expert witness testified that the Phase I ESA did not identify the former landfill, that he was able to learn about the existence of the former landfill by contacting local officials and that defendant's failure to interview additional persons constituted a breach of its professional standard of care. The defendant's expert testified that the defendant had reviewed the standard database records provided by Vista Environmental Information and that the landfill was not identified in any of these records. Thus, the expert concluded that the records were not reasonably ascertainable or practically reviewable. The trial court found that both experts were equally qualified, informed and credible. In its decision, the court noted the plaintiff had the burden to prove that the defendant did not conform to the applicable professional standard. Because the proof was equally balanced as to whether the defendant had a duty to conduct further interviews than those required in the ASTM E1527-94, the court found in favor of the defendant.

On appeal, the court reviewed three components of the ASTM E1527-94 that environmental consultants were required to satisfy: Records Review, site reconnaissance and interviews.

The plaintiff's expert testified that his own record search uncovered minutes of a 1978 meeting held by the Shelby County Conservation Board where the residential landfill had been discussed. He asserted that the defendant could have easily obtained this record and therefore discovered the prior existence of the landfill. However, on cross-examination he admitted that the minutes did not precisely describe the name or location of the landfill and that the landfill had not been identified in any of the standard public records. He admitted that the defendant had reviewed all of the standard records and that the Vista system used by the defendant was an acceptable method for reviewing the standard sources of records required to be reviewed under ASTM E1527-94.

The site inspection had been performed by an intern who had been supervised by a senior member of the defendant firm. The inspector had noted undulating terrain that was consistent with a previously known use as a quarry and observed some construction debris on an adjacent property. The parties agreed that the construction debris observed by the intern would not have resulted in the discovery of buried garbage located on a different adjacent parcel. The plaintiff's expert admitted that the site inspection would not by itself have resulted in any evidence of an recognized environmental condition at the property or that the park had

formerly been used as a dump. However, he testified that because the adjacent site was a county park, the defendant should have contacted the conservation board since that would have "probably led to further information."

Prior to Phase I ESA, NBC had advised the defendant that the real estate broker should be contacted for information about the prior uses of the property and other information. The plaintiff's expert testified that the broker did not have good knowledge of the uses and physical characteristics of the property and therefore could not qualify as a "key site manager" whom the defendant was required to interview. Instead, the plaintiff's expert asserted that the defendant was obligated to conduct interviews of additional persons such as the former owner or adjoining property owners. However, on cross-examination he conceded that the ASTM E1527-94 did not require interviews of former owners of the property or adjoining landowners.

The court concluded that while the ASTM E1527-94 standard directed the consultant to make an initial inquiry by contacting a key site manager, the standard allocated to the user the task of identifying the key site contact. Since NBC designated the broker as the key site contact, it was reasonable for the defendant to infer that the broker had good knowledge of the uses and physical characteristics of the property for purposes of complying with the interview component of the standard. Regarding section 10.5.1 of ASTM E1527-94, providing that the consultant make a reasonable attempt to interview at least one staff member of one a local fire department, health agency or local/regional office of a state agency having jurisdiction over hazardous waste disposal or other environmental matters, the defendant produced evidence that it had called and sent a follow-up letter to the state environmental agency and that the local office responded that the property was not on any known state list of sites with known or suspected releases of hazardous substances, and that none were identified within a four-mile radius. One of the defendant's employees also testified that it had contacted the local office of the USDA Soil Conservation Service, which was unaware of any environmental problems with the property. The court noted that both experts agreed that these agencies were appropriate sources of knowledgeable government officials and that these interviews technically satisfied the ASTM standard. Accordingly, the court found that the plaintiff failed to establish by a preponderance of the evidence that the defendant had provided false information when it stated it had complied with the ASTM standard if 1994 and affirmed the judgment entered by the trial court dismissing the claim of negligent misrep- resentation.

On the professional negligence claim, the appeals court began its analysis by stating that a standard of care is "*that level of care and diligence ordinarily employed by the average firm practicing in the same area and at the same time. A 'standard' such as ASTM E1527 only become the 'standard of care' if it us*

embraced as the ordinary way things are done." The court also note that the ASTM standard is by definition a flexible standard so that the way it will be applied will vary between consultants in different areas and at different times. The court discussed a 2000 study by the local Association of Soil and Foundation Engineers (ASFE) indicating that 73% of Phase I ESA proposals evaluated stated they would conform to ASTM and that not a single report was in strict conformance to the standard.

Based on this study and the totality of both experts' testimony, the court concluded that the standard of care and ASTM standard were not equivalent at the time of the 1995 Phase I ESA. As a result, the court said it would not limit its focus to the defendant's conformance to ASTM in determining if defendant was negligent. The plaintiff's expert testified that he had not conducted a formal study of the standard of care for Shelby County and similar communities in 1995 and that his testimony was based on his years of experience with consulting firms.

When asked if the defendant had complied with the standard of care for conducting Phase I ESAs in Shelby County, the plaintiff's expert simply indicated that it was his opinion that the defendant had breached the standard because they should have made some effort to find a knowledgeable person to interview about the past uses of the land around the site since they knew that it had been a quarry, that there were "little tell-tale" signs that quarrying had occurred right to the boundary, that there was level ground meaning it had been filled, and that the defendant needed to find a person who could discuss what was used to fill the land.

In contrast, the defendant's expert specifically testified that he had reviewed six other environmental reports that had been conducted in Shelby County in 1995 and that based on this review, the defendant's report has conformed to the standard of care. He said the defendant was provided the name of a person to contact by the landowner, the contact indicated that the adjacent land had been used as a quarry, no evidence of dumping was observed during the site reconnaissance, and the standard of care in effect in 1995 in Shelby County did not require the defendant to interview prior owners or adjacent owners. As a result, the court affirmed the trial court's ruling that the plaintiff had failed to establish by a preponderance of the evidence that the defendant had breached the applicable standard of care.

Commentary: *This case is full of nuggets for environmental consultants, attorneys and their clients. First, although this case came to trial 20 years after the CERCLA innocent purchaser defense was enacted, the case illustrates that real estate developers, lenders and attorneys should not assume that the ASTM E1527 will necessarily serve as the standard of care for the environmental consulting industry. In some cases, the local due diligence practices may vary and not rise to the level that may be required to successfully assert liability defenses. In other instances such as in New Jersey, the ASTM E1527 will not*

satisfy the requirements of the state innocent purchaser defense. Nevertheless, the case does show how the ASTM E1527 protocol has evolved and improved over the years.

Freddie Mac Amends Environmental Documentation Requirements

In our June 2006 issue, SEJ reported that Freddie Mac had amended Chapter 13 of its Multi-family Seller/Servicer Guide (Multifamily Guide) to provide for radon due diligence requirements for multi-family properties. Freddie Mac also recently amended its Multifamily Environmental Report (Form 1103) to include radon; compliance with the radon requirements of the Multifamily Guide are to be discussed in a new section IV-10 and any sampling results are to be attached in section VI. As with the prior version of Form 1103, the consultant must certify that the environmental report was prepared in accordance with the Multifamily Guide and that the report was prepared in a manner consistent with generally accepted industry practices and standards.

Freddie Mac also amended the obligations of closing attorneys. The company acknowledged that in some areas of the country, an attorney's opinion of title has historically been commonly acceptable to private institutional mortgage investors in lieu of title insurance. To accommodate this practice, Freddie Mac announced that attorney opinion of title will now be required to provide an opinion on environmental protection liens in lieu of the American Land Title Association (ALTA) Endorsement 8.1. The opinion must address three issues: environmental liens at the time the opinion is issued, State lien statutes that could give rise to a priority lien, and any exceptions that could result in subsequent superliens taking priority over the mortgage.

The suggested form of attorney opinion appears in item 7 as follows:

> "There is (i) no environmental protection lien recorded in those records established under State statutes for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge, or filed in the records of the clerk of the United States district court for the district in which the land is located, nor (ii) are there any environmental protection liens provided for by any State statute in effect on the date of this opinion, which could achieve priority over the Mortgage except those listed below (list any State statute that allows a lien for environmental protection that can attain priority over the lien of the insured Mortgage; if none, state 'none')."

FTC To Review "Green" Marketing Claims

In our Climate Change Theme Issue earlier this year, we suggested that the Federal Trade Commission (FTC) may start reviewing the environmental marketing claims of companies. Apparently due to the explosion of green marketing claims being asserted by businesses, the FTC recently announced it was requesting comments to systematically review its green marketing guidelines and was particularly interested in environmental claims for offsetting carbon dioxide (CO_2) emissions (72 FR 66091, 11/27/07).

The FTC's has established Guides for the Use of Environmental Marketing Claims ("Green Guides") that appear at 16 CFR Part 260 and were last revised in 1998 (63 FR 24239, May 1, 1998) . The Green Guides explain how the FTC intends to apply Section 5 of the Federal Trade Commission Act (FTC Act) prohibiting unfair or deceptive advertising environmental marketing claims.

As part of the Green Guides review, the FTC will be holding public meetings or workshops on a number of green marketing topics. The first meeting will address claims for carbon offsets and renewable energy certificates (RECs), which can be used to compensate for CO_2 emissions (72 FR 66094, 11/27/07). The FTC indicated that companies often use offsets or RECs to claim that their products are "carbon neutral" but that it was difficult for consumers to verify the truth of such claims or that they have actually achieved the environmental benefit. The FTC plans to focus on whether purchasers of carbon offsets are simply funding projects that would have taken place anyway. This is particularly true for projects mandated by environmental regulations, the agency said. Although the market for carbon offsets is relatively small, it is growing rapidly. Indeed, the amount of CO_2 emission credits traded in the United States tripled from 2005 to 2006.

Commentary: *The Green Guides apply to environmental claims included in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means, including marketing through digital or electronic means, such as the Internet or electronic mail. They also encompass any claim about the environmental attributes of a product, package or service in connection with the sale, offering for sale, or marketing of such product, package or service for personal, family or household use, or for commercial, institutional or industrial use.*

The Green Guides outline four general principles for environmental claims: qualifications and disclosures should be sufficiently clear and prominent to prevent deception; claims should make clear whether they apply to the product, the package, or just a component of either; claims should not overstate an environmental attribute or benefit; and comparative claims should be

presented in a manner that makes the basis for comparison clear. In addition, the Green Guides address eight specific categories of environmental claims: general environmental benefits, degradable,compostable, recyclable, recycled content, source reduction, refillable, and ozone safe/ozone friendly. Each Green Guide describes the basic elements necessary to substantiate the claim, including examples of qualifications that may be used to avoid deception, and contains examples of uses of terms that do and do not comport with the guides. In many of the examples, one or more options are presented for qualifying a claim. The Green Guides state that these options are intended to provide a "safe harbor" for marketers who want certainty about how to make environmental claims, but that they do not represent the only permissible approach to qualifying a claim.

According to a recent study by TerraChoice, there are approximately 1,018 products ranging from flooring to air fresheners to mouthwash that make 1,753 environment claims and that the majority of so-called "green" products were labeled in ways that were vague or deliberately misleading. Topping the list of what it calls the "six sins of green marketing" was hidden trade-offs, such as paper products marketing themselves as 10 percent recycled. Another common form of what the Pennsylvania-based firm termed "greenwashing" was irrelevance; it indicated that labels such as "all natural," are meaningless when one considers the fact that arsenic and mercury are also natural. Similarly, the company said that many products have labels declaring them "CFC-free," even though CFCs, or chlorofluorocarbons have been banned since 1978. The company also identified instances of what it terms false environmental advertising, such examples included a dishwasher detergent that advertised "100 percent recycled paper" packaging bit it came in a plastic container and shampoos labeled "certified organic" that had no proof of certification.

Some trade organizations are beginning to caution businesses about their green marketing claims. Indeed, the director of the National Advertising Division of the Council of Better Business Bureaus recently warned that companies should expect an increase in claims by competitors challenging the accuracy of environmental claims. A recent article in Advertising Age indicated that green advertising can be fraught with danger if a company's performance does not match its environmental claims and suggested many companies might be better off not raising their head above the parapet by touting their green profile.

IRS Private Letter Ruling Reduces Attractiveness of Cost-Cap Policy

The principal reason for purchasing a cost cap policy is to limit remediation costs of a project. However, another potential benefit that some policyholders considered was the possibility that the cost of the premium could be deducted as an "ordinary and necessary" expense in the year the policy was purchased pursuant to section 162 of

the Internal Revenue Code. Under section 162-1(a), insurance premiums for fire, storm, theft, accident or other similar losses can be treated as deductible business expenses.

Unfortunately for one insured, the IRS in a private revenue ruling determined that the premium could not be deducted as an expense. Instead, had to be capitalized. In Rev. Rul. 2007-47, the IRS indicated that the arrangement did not resemble the requisite risk shifting necessary for an insurance contract because there was already a known risk and the only uncertainty was the amount that the insurer would have to pay. Instead, the IRS found that the risk was more akin to an investment risk on the part of the insurer.

Commentary: *Like other revenue rulings, this determination was limited to the facts. The IRS indicated it did not apply to reinsurance agreements (including retroactive reinsurance such as loss portfolio transfers), arrangements covering unanticipated environmental exposures, arrangements covering unanticipated cost overruns or arrangements involving product warranties.*

There have been a number of other interesting tax-related decisions this year. We will cover them in the final SEJ issue for 2007.

REAL ESTATE COMMENTARY AND ANALYSIS

Fractional Property Interests Complicate Due Diligence

Law students are taught in Real Property Class that property ownership consists of multiple rights that should be viewed as a bundle of sticks that may not necessarily all belong to the same person. Each stick represents a separate right or interest in the land such as the right to sell, lease or subdivide the land, convey mineral rights, construct buildings, harvest its resources and exclude trespassers. The sticks can be conveyed individually or collectively depending on the extent of the interest conveyed in a transaction. Thus, a landowner may lease surface rights to one person, transfer the underground mineral rights to another entity while still holding the remaining sticks in the bundle such as the right to sell the land, though the sale may be subject to rights extended to others. The government or community has increasingly been viewed as holding some of the sticks such as the right to tax, take property under eminent domain, and establish rules to regulate use or protect certain natural resources.

The past two decades have seen the emergence of complex real estate financing transactions that have enabled landowners to extract value by slicing the sticks of property rights into thinner and thinner twigs. Unfortunately, state and federal laws that impose liability on owners and operators of contaminated sites have not kept up with the creative and innovative forms of real estate ownership. For example, it is unclear if a commercial condominium could be considered a CERCLA owner by virtue of its fractional ownership in the land represented by the unit deed or could it be deemed to have exercised sufficient control over the property to be considered a CERCLA operator? As a result of this uncertainty, environmental consultants are often uncertain if a REC identified on a property pertains to the particular fractional interest held by the client, much less the significance of the REC to the client.

One of the more common scenarios where this issue arises is when a property contains a ground lease. For example, a consultant may be asked to perform a Phase I ESA on a shopping center and is advised that certain buildings should not be evaluated because they are subject to ground leases and are not of the property. While the structures are not the property of the landowner, they can still impact the property. In this situation, it would make sense to evaluate the structure as if it was an adjacent parcel under E1527-05.

A more difficult question is when the property to be investigated is the building on a ground lease. There are many scenarios when this construct may be used, but it has frequently been employed when

developing contaminated properties. Often a developer has developed the site and a ground tenant then builds a structure. The consultant will often be told that it should just focus on the building issue since the client does not own the land. Many times, a land use control was required as part of a cleanup but may not have been properly recorded or the ground tenant is not even aware of the restrictions. If the land use control has not been recorded or an engineering control has not been maintained and that could trigger a re-opener, then who is responsible? Certainly the developer should be, but perhaps it was a limited liability corporation that no longer has any assets. Could the ground tenant be responsible? If the building is the primary development on the site, the building owner/operator could possibly be viewed as an operator of the site for purposes of CERCLA liability or state environmental laws.

A more complicated but common situation is where a hotel or office building occupies the air above the land pursuant to a development agreement. There may be a sub-surface garage that serves as an engineering cap and an easement granted in favor of the building so its occupants can use the garage. Does the owner of the building occupying the air above contaminated land have liability if the engineering control is not recorded or maintained? Again, if the building is the dominant structure on the land, it is quite possible that the building owner or manager could be liable as an operator of the site unless it has taken steps to obtain a formal covenant not to sue or other liability release from the appropriate state agency.

In the end, liability will be based on the particular facts of each case. However, the take home lesson for the consultant is that it continue to focus on the land and leave it up to the lawyer to advise the client if the land beneath the client's building poses a risk of liability.

The Schnapf Environmental Journal

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