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DEVELOPING BROWNFIELDS:
TOOLS FOR TRANSACTIONAL LAWYERS AND DEVELOPERS TO
BETTER ASSESS RISK

PRESENTED TO THE SDCBA REAL PROPERTY
AND ENVIRONMENTAL LAW/LAND USE SECTIONS
DECEMBER 7, 2005

I. Assessing site history.

Typical first avenues:

Phase 1.

Learn as much as possible about site and neighboring site history.

Are there underground storage tanks (USTs) that have been or are present?

Are they properly permitted or have they all been removed?

ALL USTS must be permitted - either to operate or to close. NO abandonments are allowed.

Is there a history of receiving Notice of Violations (NOVs) or failing UST tank integrity tests?

Governmental environmental files review: DEH, RWQCB, DTSC, EPA..

Site "closure,"

Has site been closed? When is it projected to get closure?

"No further action" ("NFA") letter = "closure."

NFA letters can and do reopen when site conditions change, such as when construction activities encounter contamination.

Property Ownership since start of contamination.

Operations History.

People knowledgeable about relevant events.

People knowledgeable about relevant relationships.

Present and former owners, neighbors, employees.

Detailed site history can include:

For inquiries further back in time than last 15-20 years, consider:

Fire Department records such as Sanborn maps.

Aerial photographs.

Ex: Identification of bounds of junk yard in the 1920/1920s.

Historical Society photos.

Newspapers.

Satellite, Historical Photos.

City, county archives if governmental permit or approval ever required.

Ex: Identification of address property, owner/operator and years of operation as a junk yard in the 1920/1930s.

II. Assessing extent of contamination.

Technical review of environmental data.

Is the site “fully delineated?”

If not, what areas remain to be assessed?

ONE OF THE BIGGEST RISKS COMES FROM GLOSSING OVER THE UNKNOWNNS!

Quantify the unknown risk and adjust price.

How toxic and persistent is the contaminant?

What are the pathways to exposure?

Will contaminants be encountered during construction?

Will the intended constructive house sensitive individuals?

Will a barrier need to be constructed to block, for instance, benzene fumes from passing through a concrete slab and collecting in an enclosed space?

Are there concerns about further migration of contaminants to a neighboring property?

Are utility corridors affected which can create a host of other concerns, including potential for explosion when utility workers enter confined spaces?

Utility corridors can pose a problem when they intersect or are in the level of the fluctuating groundwater.

Water passes RAPIDLY through the pea gravel on which many pipes are laid, compared to the typical surrounding dense clayey sand mix, so pollution can travel farther, faster.

III. Key areas of risk.

Groundwater contamination.

Are drinking water aquifers, streams, bay, etc. actually or potentially affected?

How bad is the problem?

What is the pollutant of concern?

Rate of groundwater migration?

Are neighboring properties affected?

Could they be affected if remediation goes too slowly?

How conducive is the soil and groundwater to remediation?

IV. Loan limitation when site is not completely assessed.

With risk not completely defined, it may be difficult or impossible to get conventional loan.

Until the site is fully assessed, most lenders have policy of not lending or refinancing.

If major oil company accepts responsibility, it may be willing to provide indemnify a loan (e.g., SBA loan).

If you are a buyer, keep in mind the practical problem of finding a new buyer or obtaining refinancing.

V. The tug-of-war over contractual terms.

Buyer always seeks full indemnification from seller, but the indemnification may not be worth anything when and if the need arises (seller not financially able to honor it).

Seller always seeks to sell “as is,” but is still required to make all material disclosures to questions to avoid fraud.

Another key concern here is that federal law cannot be swept away or avoided by indemnification, sale “as is,” etc. (CERCLA 42 USC § 9607(e))

Contractual provisions do not insulate a party from the government or other parties.

VI. When is the state UST Cleanup Fund available? (H & S Code Ch. 6.75)

Owners and operators may have access up to \$1,500,000 for corrective action (site assessment and remediation) of leaking USTs for petroleum products.

Must be permits and compliance, which, on occasion, can occur after the fact.

New property buyer may gain access to the fund if no affiliation with a party which has caused ineligibility with the fund.

VII. The overlay with federal and state law.

An overview of key federal and state laws that typically pertain to contaminated properties follows:

A. Federal law:

1. **CERCLA.** Comprehensive Environmental Response, Compensation and Liability Act. 42 USC § 9601, et seq. (Liability; cost-recovery action). Briefly stated: Any owner or operator of a “facility” (any place where hazardous substances have come to be located) at the time of disposal of hazardous substances, or any current owner or operator of that facility, or anyone who contracted, agreed or arranged for such disposal, or anyone who accepts such hazardous substances, is liable for costs of removal or remedial

action by the government and other necessary costs of response by others. Liability is strict.

Petroleum products are excluded from the definition of hazardous substance. 42 USC § 9601(14). However, petroleum products, such as waste oil, that are contaminated with other hazardous substances do not fall into this exception (*Tosco Corporation v. Koch Industries, Inc.*, 216 F.3d 886 (10th Cir 2000)), and the defendant has the burden of establishing that the petroleum exclusion is applicable. *Johnson v. Langley Operating Company* 226 F.3d 957 at n.4 (8th Cir. 2000)

Section 107 of CERCLA (42 USC § 9607) governs cost recovery actions by the United States and States. Numerous cases hold that these government plaintiffs are entitled to have private parties held jointly and severally liable under Section 107 of CERCLA, even if certain federal agencies are themselves PRPs. See, e.g., *State of California Dep't of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F. Supp. 2d 1028, 1036 (C.D. Cal. 2002); *United States v. Gurley*, 317 F. Supp. 2d 870, 882-883 (E.D. Ark., 2004). While defendants can argue for apportioned liability, they have the burden of showing either distinct harms or a reasonable basis for apportioning a single harm to public health and the environment. See e.g. *United States v. Hercules*, 247 F.3d 706, 716-18 (8th Cir. 2001); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 939 n.4 (8th Cir. 1995).

Section 113 of CERCLA (42 USC § 9613) governs cost recovery actions by private parties. Under the Ninth Circuit decision in *Pinal Creek Group v. Newmont Mining Corp.* 118 F.3d 1298. (9th Cir. 1997), contribution plaintiffs, are generally limited to seeking apportioned liability from contribution defendants.

The statute of limitations for CERCLA cases are quite long. Section 107 actions by the government must be brought six years after initiation of on-site construction of a *remedial* action or three years after completion of a *removal* action. (42 U.S.C. § 113(g)(2). However, since “removal” actions include the planning and oversight of the cleanup, the statute of limitations will usually not begin to run until the government has certified that the cleanup has been completed. *Illinois v. Grigoleit Company* 104 F. Supp. 2d 967, 975 (C.D. Ill. 2000), *California Department of Toxic Substances Control v. Alco Pacific, Inc.* 308 F. Supp. 2d 1124 (C.D. Cal. 2004). The limitations period for section 113 contribution actions is three years, and it begins to run when a judgment or administrative order is entered against the contribution plaintiff.

What are the defenses??? 42 USC § 9607(b)

- 1) Act of God.
- 2) Act of war.
- 3) Act or omission of a third party, other than an employee or agent of the defendant, and other than an act or omission in connection with a contractual relationship with the defendant, where defendant exercised due care and took precautions against

foreseeable acts or omissions of such third party.

“Contractual relationship” is defined at 42 USC § 9601(35)(A) to include, land contracts, deeds, easements, leases and other instruments transferring title or possession *unless* defendant acquired the property *after* the disposal of hazardous substances occurred *and* one of the following three circumstances applies:

- 1) At time of acquisition, defendant did not know and had no reason to know of the disposal. (So-called “due diligence” or “innocent landowner” defense);
- 2) defendant is a governmental entity;
- or 3) defendant acquired property by inheritance or bequest.

2002 Brownfields Amendments clarified the basis for “innocent landowner” protection, with the addition of the “All Appropriate Inquiry” (“AAI”) standard.

The EPA was directed to develop standards for AAI, which it did in November 2005. 70 Fed. Reg. 66070 (40 CFR Part 312). These standards become effective on November 1, 2006. (See attached EPA AAI Fact Sheet for details)

Key new points: environmental professional must do a comprehensive investigation, including interviews with past and present owners, operators and occupants, so the price will increase significantly.

2. **RCRA.** The Resource, Conservation and Recovery Act provides a "citizen suit" action *for injunctive relief only* at 42 USC § 6972. To prevail, you must show the party you are suing has disposed of a "hazardous waste" which has caused or may cause an imminent and substantial endangerment to the environment. The court may award attorneys' fees to the prevailing party. Liability is strict.

One early case involving multiple gas station operators shifted the burden of proof so that the landlord does not have to prove who contaminated what and how much during any particular tenant's term. Instead, the tenants have the burden of proving the release did not occur during their respective term. Zands v. Nelson (S.D. Cal. 1991) 779 F. Supp. 1254 . In Zands, the District Court for Southern California (retired Judge Gordon Thompson) held the release of petroleum into the environment at a gas station constitutes an abandonment of a hazardous material, thus falling within a definition of a "hazardous waste" within the purview of RCRA.

B. State law:

1. **Nuisance.**

Nuisance can be a tricky area because of the distinction between continuing and permanent nuisance, the resulting statute of limitations and different standards of proof.

The basic definition of nuisance is anything that interferes with the comfortable enjoyment of life or property by being injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property. Civ. Code § 3479; Koll-Irvine Center Property Owners Assn. v. County of Orange (1994) 24 Cal.App.4th 1036. The tortious conduct that leads to a nuisance is not material and can be based on negligent, reckless, intentional, or ultrahazardous behavior. Barnhouse v. City of Pinole (1982) 133 Cal.App.3d 171; and see, Mangini v. Aerojet-General Corp. (1991) 230 Cal.App.3d 1125. Both the party who maintains the nuisance as well as the party who creates the nuisance are responsible for the ensuing damage, regardless of who currently possesses the property. KFC Western, Inc. v. Meghrig (1994) 23 Cal.App.4th 1167; Wilshire Westwood Associates v. Atlantic Richfield Co. (1993) 20 Cal.App.4th 732.

Soil and groundwater contamination constitute grounds for a nuisance action. Beck Development Co. v. Southern Pacific Transportation Co. (1996) 44 Cal.App.4th 1160.

Permanent nuisances are those causing a permanent injury. Damages are assessed once and for all. Shamsian v. Atlantic Richfield Company (2003) 132 Cal.Rptr.2d. 635. A nuisance is permanent if it appears improbable as a practical matter that the nuisance can or will be **abated**. Considerations include the feasible means of, and alternatives to, abatement, the time and expense involved, legitimate competing interests, and the benefits and detriments to be gained by abatement or suffered if abatement is denied. Beck Development Co. v. Southern Pacific Transportation Co. (1996) 44 Cal.App.4th 1160.

By contrast, a nuisance that can be **discontinued or abated at a "reasonable cost by reasonable means"** is a continuing nuisance. (Mangini v. Aerojet-General Corp. (1996) 12 Cal.4th 1087, 1103. A key factor in determining whether contamination may be abated at a reasonable cost is whether the cost of remediation would greatly exceed the value of the land after remediation. Beck Development Co. v. Southern Pacific Transportation Co. (1996) 44 Cal.App.4th 1160, 1222.

Courts often look to see if a continuing nuisance or trespass claim could be asserted when a permanent nuisance would be barred. E.g., Mangini v. Aerojet-General Corp. (1991) 230 Cal.App.3d 1125 (Mangini I); Capogeannis v. Sup. Ct. (1993) 12 Cal.App.4th 668. A nuisance must be considered permanent if plaintiff fails to prove a nuisance is abatable. Beck, 44 Cal.App.4th 1160, 1221.

2. **Trespass.**

The same analysis is used for trespass as for nuisance. Continuing and permanent

trespass analysis applies. Also like nuisance, trespass is governed by a three-year statute of limitations under Code of Civil Procedure section 338(b).

Trespass is an unlawful interference with possession of property, whereas a nuisance is an interference with the interest in private use and enjoyment of the land and does not interfere with possession. Mangini v. Aerojet-General Corp. (1991) 230 Cal.App.3d 1125. Trespass exists when chemical contamination migrates from one property to another. An essential element of trespass is an actual physical entry or intrusion onto real property by a person or a tangible thing. San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893. Like nuisance, trespass can be based on an act that is negligent, reckless, intentional, or as a result of an ultrahazardous activity. Resolution Trust Corp. v. Rossmoor Corp. (1995) 34 Cal.App.4th 93.

3. **Negligence.**

A negligence action is available where a property owner allows contamination of soil and groundwater. Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal.App.4th 334 (negligence action against property owner who contaminated soil and groundwater while operating a gas plant).

4. **Negligence Per Se - Evidence Code 669.**

Contamination of groundwater allows a cause of action for Negligence Per Se under Evidence Code section 669(a). Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal.App.4th 334. The discharge of gasoline into groundwater constitutes a violation of California Fish & Game Code section 5650.

5. **Leases/Contract.**

Leases are frequently an issue. Consider continuing obligations to lessee in lease assignments. An assignment does not absolve the tenant of the obligations of the lease, and, as such, the tenant acts as a surety for the assignee for the duration of the lease, even when the landlord consents to the assignment. Valley Investments, L.P. v. BancAmerica Commercial Corp., 88 Cal.App. 4th at 822; Kendall v. Ernest Pestana, Inc. (1985) 40 Cal.3d 488,500, 502. Also, in Meredith v Dardarian (1978) 83 Cal.App.3d 248, 255, the court held if a lease contains an option to renew or extend, which is binding on the lessor, and the assignee exercises the option, the lessee remains liable.