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A Property Mechanic's Tool Box

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My father was a very skilled man. A mechanic by trade, he was also a skilled carpenter, able to fix anything. As a young man, I hung around my dad a lot, and as I did he tried to share many of these skills with me. I learned my way around auto mechanics, how to weld, basic carpentry, and machinery, but one thing I learned early on was that the right tool (even if you had to make it) made the job easier and more efficient. In fact, without the right tool the job may suffer.

While I dabble whenever possible with a wrench and hammer, I spend my work life practicing environmental law, more specifically the acquisition and development of contaminated land. It has been more than thirty years since the adoption of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which arguably had the most profound impact on the acquisition of real property in, well, the last thirty years. Even so, we still have people approach us unaware of the need to take precautions to protect themselves from environmental liabilities, in oncological fashion, coming in with problems that can only be managed and not eradicated.

The concept of assuming legal liability for past acts of pollution solely on the basis of property ownership is a principle that seems foreign to our legal structure. If not foreign, clearly unfair. Yet CERCLA ushered in a regulatory scheme that did just that. Unprotected landowners face potential joint and several liability for a host of expenses, the most significant of which is the cost to remediate property. Without the proper protocols or tools, the purchase of contaminated real property can result in huge liability, whether you know that the property is contaminated or not. The key, then, is to get out the toolbox and select the right tool to accomplish the desired end result. The first essential tool in the process is proper due diligence, referred to in this context as “all appropriate inquiry.”

As defined in CERCLA, “all appropriate inquiry” (sometimes referred to as AAI) is fundamental to any deal. Let me be very clear – there is no basis for a CERCLA defense without this formal procedure. If the property turns out to have environmental issues, failure to undertake AAI will expose a buyer to legal consequences. AAI is the process of conducting environmental due diligence to determine prior uses and ownership of a property and assess conditions at the property that may be indicative of releases or threatened releases of hazardous substances. AAI must be conducted by an environmental professional, and generally takes the form of a Phase I Environmental Site Assessment (ESA). An ESA is performed by completing a file review, including certain historical documents and examining the property to determine whether there is a recognized environmental condition or “REC.” A REC, as defined by the applicable ASTM standard, is “the presence or likely presence of any hazardous

substances or petroleum products in, on, or at a property: (1) due to release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment . . . .” There are other finer derivations of RECs, such as Controlled Recognized Environmental Conditions (CRECs) and Historical Recognized Environmental Conditions (HRECs). In brief, a CREC is a REC that has received regulatory closure, but is still subject to controls. An HREC is a past release that has been remediated below residential standards with no use restrictions.

The existence of a REC, CREC, or HREC does not necessarily mean that a deal cannot or should not go forward. It means that a buyer must look to determine what reasonable steps must be taken with regard to the issue found and then dig into the tool box to build the protections needed to meet individual risk tolerances. There are a number of tools in the tool box to deal with these potential liabilities, such as Reasonable Steps Letters or Comfort Letters, the Utah Voluntary Cleanup Program (VCP), a Utah Enforceable Written Assurance (EWA), Brownfields Programs, certain deal structures, and even some creative approaches such as a surface easement coupled with the lease of air rights.

Comfort letters are available in very limited circumstances where the EPA provides a measure of “comfort” by providing a letter to an interested party explaining the potential or actual involvement EPA may seek. The VCP is a Utah state program that can provide a liability release for liability under state law to qualified applicants. This liability release is transferable to subsequent property owners. An EWA is a letter issued to the applicant that provides the Utah Department of Environmental Quality will not bring an enforcement action under certain state laws provided the holder continues to satisfy the ongoing obligations associated with it. It is not transferable. Various deal structures may also be used as tools to trim liability.

The selection of the right tool to meet the objectives of an acquisition is critical and will take the help of a skilled mechanic. Without them, environmental liability is left unmanaged and a buyer exposed.
