

Environmental Transactions and Brownfields Committee Newsletter

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CURRENT TOPICS IN BROWNFIELD DEVELOPMENT

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Attorney Chris Foster sat down with Mikk Anderson, the senior vice president and a founding member of International Risk Group, LLC (IRG), and two of Mikk's colleagues, Brent Anderson, IRG's CEO, and Dwight Stenseth, vice president for real estate, for a candid and wide-ranging discussion of the many challenges facing current brownfield development. IRG has been developing and implementing brownfield projects since 2000 and has successfully transacted 16 projects throughout the United States, Europe, and Mexico. The following is a synopsis of the discussion among Foster and the IRG representatives.

Foster: *Give me your general appraisal of the state of the brownfield development industry today.*

IRG: I'd say the primary issue facing the industry is the availability of capital, regardless of the form of equity or debt. Funding has always been a challenge, but since the height of the great recession in 2009 the competition for capital has been intense. On top of that, regulatory constraints on institutional lenders such as

regional banks have severely reduced the flow of funds for all real estate development, including, of course, brownfield development.

Foster: *Has the tightening of private equity caused you to seek more public funding?*

IRG: That raises an important issue regarding IRG's business model and operations. When a lay person or perhaps even a typical attorney or environmental consultant thinks of a "brownfield development" project, he or she probably envisions a public-private partnership with public funding coming from money specifically allocated to brownfields. We consider this "typical" scenario to be more complicated and risky, involving a longer transaction time than the projects that interest us. In fact, only one of the projects that we currently have in progress involves brownfields funding grants from a public entity. In a very oversimplified description, our deals are profit driven rather than focusing on maximization of public benefits. Although the brownfield component is a necessary element of our projects, we are looking at the overall picture more in terms of a generic distressed asset development model. Which brings up another interesting aspect of our practice that may be instructive to attorneys and consultants reading this article. In our model of "real estate first, brownfield second," we tend to deal primarily with traditional real estate lawyers. In projects that are more public needs driven, developers are likely to be dealing with environmental

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**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

CALENDAR OF SECTION EVENTS

December 11, 2012

**E.U. Environmental Law and Policy Developments:
The Business View from Brussels**

Primary Sponsor: Environmental Law Institute
Washington, DC

January 25-27, 2013

ABA SEER Winter Council Meeting

La Concha Resort
San Juan, PR

February 6-12, 2013

ABA Midyear Meeting

Dallas, TX

February 26, 2013

Key Environmental Issues in US EPA Region 4

Atlanta, GA

March 21-23, 2013

42nd Spring Conference

Grand America Hotel
Salt Lake City, UT

April 11-12, 2013

ABA Petroleum Marketing Attorneys' Meeting

Washington, DC

April 18, 2013

ABA Public Lands and Resources Law Symposium

Missoula, MT

April 19-21, 2013

ABA SEER Spring Council Meeting

Greenough, MT

June 5-7, 2013

31st Annual Water Law Conference

Las Vegas, NV

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www.ambar.org/EnvironCalendar**

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attorneys and remediation consultants. Unfortunately, we see an experience gap on the part of the real estate lawyers on the environmental issues and on the part of the environmental attorneys with the real estate issues. Ideally there would be an expanded level of expertise encompassing both real estate and environmental issues with lawyers who routinely practice, or want to specialize, in this area.

Foster: *You operate throughout the United States. How do regional differences in oversight and implementation of remediation requirements affect you?*

IRG: Not surprisingly, we see differences among the states, but also among the various regions of the federal agencies. While technical specifications and requirements are similar, attitudes of regulators toward the benefits of redevelopment vary widely. If a regulator appears intent on finding a polluter to “punish” rather than helping transform a property, it colors how we approach a deal. We often find a tension between our desire to clean up a site and the regulator’s traditional command and control aim of penalizing the polluter, a tension that can produce an atmosphere hostile to our objectives. Certainly risk-based closures and *empowered* state and federal brownfields support personnel within governmental agencies are a step in the right direction but, unfortunately, we see the trend is toward increased regulatory experimentation rather than mimicking best practices. The variation among regulators within any one particular regulatory environment is a principal underwriting consideration.

Foster: *What changes would you like to see in the environmental regulatory structure and operation?*

IRG: We would like to see a change in the attitude of public sector economic development professionals toward the promotion of urban brownfield development, which we feel is vastly underserved, and away from the

promotion of suburban greenfield development. Although cleaning up a rural paper mill obviously has benefits to society, few new jobs are likely. By contrast, transforming an abandoned urban factory to productive commercial and residential uses should be the central purpose of brownfields programs as the economic benefits are far greater. Viewed this way it could become a central tenet of sustainability initiatives. Brownfields capital, especially public monies, should not be targeted to abandoned sites with no economic value.

We feel the environmental regulators need to team with economic development folks to revisit the impacts of their regulatory schemes and why they exist in the first place. In our experience it has often been difficult for regulators to shift their focus from pursuing a reluctant responsible party to now helping appropriately clean up a site to enable safe and productive uses. Although not completely analogous, look at most states’ underground storage tank programs. Almost all of them function at a high level of efficiency and effectiveness. These programs have maintained their focus on what was designed to be accomplished and the best way to achieve it.

Foster: *You have described changes in philosophy and attitude. Give me some examples of specific regulatory requirements that would be on your “wish list” for changes.*

IRG: First and foremost, environmental regulators need sufficient power and flexibility to assist in crafting cleanup strategies with a brownfield developer that can be tailored to a new site use both in technique and schedule. If that takes new legislation, so be it. Additionally, statutes should be amended to put in place greater long-term protection from cleanup liabilities for a redeveloper and subsequent site owners/users. The specter of joint and several liability continues to greatly discourage investment in brownfield sites, particularly debt financing in this age of stiff banking regulations. Some states are addressing this through regulation or

legislation to sever joint liability among users, lenders, and responsible parties. Additionally, the uncertainty associated with remediation costs of a brownfield site and its impact on appraised value affects confidence in the collateral value of the asset when viewed from the perspective of a lender. Perhaps the federal government could acknowledge the benefits of urban brownfield investment toward the social responsibilities of the banking industry, sort of brownfield “brownie” points, perhaps similar to federal initiatives encouraging lending in economically depressed locales.

Foster: *What is your prediction for where the brownfield development industry will be in 10 years?*

IRG: Generally we are optimistic about the future of brownfield development. With the realities of long-term abundant natural gas easing fears of spiraling energy costs, we believe there will be a strong trend to “re-shore” manufacturing jobs. This means new, very large investments in plant and equipment which we think will be urban centric. It would be a shame if poorly thought-out regulations incentivized these new facilities toward greenfield sites and not toward reuse of our current industrial sites and their

attendant infrastructure. Look at the new Volkswagen plant in Chattanooga, Tennessee. It is built on a former Army explosives plant site. What a far better use of this land than tearing up some wonderful farm land and leaving the Army plant to slowly fester in decades of clean up for no clear reuse. But industry will not want to wait years for any site to get regulatory closure. We need a system that allows private reuse planning to confidently move forward and that incorporates cleanup actions as part of the effort, not as a preliminary phase. Again, some states are more sensitive to this issue of addressing the need for accelerated closure. They are likely to see increased investment in brownfield sites as a result.

The current generation entering the work force wants predominantly an urban lifestyle. We need to build urban housing and put the jobs near them. As the concept of sustainability gains traction, this approach is the only one that makes sense. Ten years from now in the most vibrant and prosperous of our cities, brownfield development will just be considered part of normal development.

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ABOUT-FACE: HOW AN ENVIRONMENTALLY CONSCIOUS NORTHEAST STATE HAS MOVED ONE GIANT STEP CLOSER TO BECOMING A METALLIC MINERAL MINING STATE

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When you think of the state of Maine, you probably think of lobsters or lighthouses. The last thing you would think of is metallic mineral mining, and that is for good reason. According to the Maine Geological Survey's Web site, "[n]o metals have been mined in Maine since 1977." Moreover, Maine's metallic mineral mining laws and rules, which were last rewritten in 1991, have effectively made mining in the Pine Tree State impossible. Statutory changes enacted in 2012, however, put Maine on a path to make metallic mineral mining part of the local economy in the near future.

A Brief History of Metallic Mineral Mining in Maine

Currently, Maine is not a metallic mineral mining state, though that has not always been the case. The 1800s saw various mining operations in Maine, including what the Maine Geological Survey calls a "mining boom" from 1879 to 1882, where mining of iron, silver, copper, lead, and zinc expanded rapidly. Mining and mining activity in the more recent past, however, drove the debate before the state legislature when this issue was debated earlier this year.

The recent experience with remediation of the Callahan mine played a big part in legislative debates regarding expanding mining opportunities in Maine. In 1968, the Callahan Mining Corporation began open-pit mining in Brooksville, Maine. This mine yielded copper, zinc, lead, and a small amount of silver. This open-pit mine was active until 1972, when the mineral reserve became depleted. As early as 1975, there were indications of contamination at this site, though efforts to clean up what is now a Superfund site did not begin until the early 2000s, with actual remediation not

starting until 2011. The Callahan mine experience is an unfortunate story that was fresh on Mainers' minds and became *the* cautionary tale that the environmental lobby told over and over again when metallic mineral mining legislation was considered.

Of course, not all of Maine's history with metallic mineral mining has been negative. In the same year that mining last ceased in Maine, 1977, a large deposit was discovered in Maine at Bald Mountain. According to the Maine Geological Survey, this is an estimated 36 million-ton copper-zinc lode that also contains significant gold and silver deposits. Not surprisingly, the landowner who now owns Bald Mountain was one of the primary drivers of the legislative reform adopted this year. While much of the discussion of this legislative proposal centered on Bald Mountain, other deposits also have been discovered but not developed in Maine, including the Mount Chase copper-lead-zinc-silver deposit, discovered in 1979, and the Alder Pond deposit with an estimated 1.5 to 3 million tons of high grade copper-zinc ore, discovered in 1985.

While a number of deposits were discovered in the 1970s and 1980s, Maine's regulatory stance had evolved since the time of those discoveries to, effectively, prohibit metallic mining in Maine. In 1991, spurred by news that a mining company was interested in developing Bald Mountain, the legislature adopted a new mining law. That law and its resultant regulations—which were based on technologies and practices that are now over 20 years old—made metallic mining virtually impossible.

Factors Influencing Change in Approach to Metallic Mineral Mining

At the beginning of this year, Maine was operating under laws and regulations that, effectively, prohibited metallic mineral mining. The law of regulatory inertia, and Maine's long history of strict environmental regulation, seemed to dictate that this condition would endure. Somehow, something happened that caused a change. What happened was a confluence of factors, both economic and political, that led to legislative action.

Economically, there was a very motivated landowner who was interested in making Maine's metallic mineral mining laws and regulations workable. Bald Mountain, an estimated 36 million ton copper-zinc lode that also contains gold and silver deposits, had been identified in the 1970s but had not been exploited. Adding to this landowner's motivation was the fact that world metal prices were high, particularly copper, gold, and silver prices. Economically, the time was right to expand mining options in Maine.

One other factor that was part economic and part political is the location of Bald Mountain. This deposit is located in Aroostook County, Maine's northernmost county. Aroostook County, known in Maine as simply "The County," is vast, the largest county east of the Mississippi River, and rural. Natural resources-based industries in The County—forestry and potato farming are large drivers of the local economy, and the future prosperity of the area is questionable. The County is currently experiencing out-migration, particularly among its youth, and has lost population every census since its population figures peaked in 1960. Politically, The County is well-known, and many Maine politicians feel an obligation to do what they can to limit the recent demographic trends in The County. Metallic mineral mining was framed as a chance to grow opportunity in The County, a place where opportunity is lacking.

The economic and demographic trends experienced in The County are not limited to that county or even to northern Maine. The economic condition of the state as a whole also played a role in this debate. While mining legislation was being considered by the state legislature, a story was published in one of the state's largest daily newspapers titled "Maine Earnings Growth Ranks Worst Among States; Incomes Lowest in Region" (<http://bangordailynews.com/2012/03/29/business/maine-earnings-growth-ranks-worst-among-states-incomes-lowest-in-region/?ref=videos>). According to the article, Maine had the lowest rate of income growth in the country in 2011. Interestingly, the article concluded by explaining that those states with the highest income growth in 2011 were states with a strong mining industry. This information was particularly compelling during the mining debate.

Of course, any kind of large-scale legislative change such as this requires a touch of the purely political. The politics of this matter made for a successful revision of Maine's metallic mineral mining laws. The bill to reform Maine's mining laws and regulations was introduced by Representative John Martin, a Democrat, who represents parts of Aroostook County. 2012 marked Representative Martin's 46th year in the Maine legislature, with 20 of those years being served as speaker of the Maine House. Representative Martin is an institution, unmatched in his understanding of legislative procedures. He was joined by a number of sponsors on his bill, including Senator Troy Jackson, a Democrat who also represents parts of The County. Together, they had the legislative muscle and the sincere concern for the people of their districts to help advance this proposal.

Republican personalities were also instrumental in making this legislative change. In 2010, both chambers of the Maine legislature switched control to the Republicans; this had not happened in 36 years. That election also ushered in a Republican governor. Maine's new governor, Paul LePage, was very supportive of the mining bill. Moreover, so were legislative leaders. The Republican legislator who was perhaps the most instrumental in guiding this bill through the process was Senator Tom Saviello, chair of the committee with jurisdiction over this bill. The mining bill was not introduced through regular channels and came in late in the session, which was set to adjourn about six weeks after the bill was introduced. Senator Saviello, however, was committed to holding an unprecedented number of work sessions on the bill—ultimately nine in all—and two public hearings. The transparent and exhaustive way that the legislation was handled in committee limited the effect of opponents claiming this was "rushed through the process" or "passed in the dead of night." Timing assisted Senator Saviello, as the legislature ran well over the statutory adjournment date, creating additional time for his committee to do its extensive work.

Ultimately, this confluence of economic and political factors worked in the bill's favor and the new law was enacted.

Factors Limiting Change in Approach to Metallic Mineral Mining

Although a number of factors broke in favor of proponents of mining reform, it is not as if there were no headwinds facing proponents during this effort. As a traditionally liberal northeast state, Maine has a particularly active environmental community. Activists from Trout Unlimited, Maine Rivers, Environment Maine, the Natural Resources Council of Maine, Maine Audubon Society, The Nature Conservancy, and Maine Conservation Voters, just to name a few organizations, all turned out in opposition to the reform of mining laws and regulations. These organizations worked hard to mobilize their membership, focusing their arguments on the potential for groundwater and ultimately surface water contamination.

The environmental lobby has traditionally been very influential with Maine's Democratic-dominated legislature. That could have been the case this year, but Republican control and the fact that two of the mining bill's biggest supporters were Democrats helped ensure passage of this reform. Bipartisan support, however, did not mean that industry had a free hand to write the bill. During the legislative process a number of compromises were struck to attempt to satisfy environmental concerns, though these groups still maintain their opposition to mining reform.

The Change Enacted

After determining that Maine's mining laws and regulations from 1991 were confusing, complex, and extremely difficult, if not impossible, to meet, we were asked to help draft legislation that would rectify this situation. Though what was adopted varied in several ways from what was introduced, many of our most important provisions were enacted into the new law, and the mining bill is a significant improvement over the status quo.

One of the biggest problems with existing law is that mining operations can be subject to two permitting authorities based on where they are located. Many remote unincorporated areas of Maine are overseen by a statewide land-use regulatory agency, which currently

acts as a permitting authority. The state's Department of Environmental Protection (DEP) also holds permitting authority over mining operations throughout the state. This new law changes that situation by driving all permitting authority to DEP, while the land-use planning authority maintains minimal zoning authority over mining in unincorporated areas of the state.

This is not, however, the only permitting improvement over existing law. Mining operations will not be required to seek a number of other permits that were mandated in the past, including a Site Law permit, a Solid Waste Management Act permit, and a state storm water permit. Permits that are required must be processed by DEP in a consolidated fashion. Additionally, mining permits have no term limit, meaning they are not subject to a costly and time-consuming permit renewal process.

Groundwater issues dominated the debate over the legislation. This new law, however, manages to relax restrictions affecting groundwater in important ways, while still protecting groundwater resources. In particular, discharges to groundwater may occur within a "mining area," which is defined more broadly than prior law. "Mining area" includes groundwater and surface water treatment systems, extending the compliance boundary beyond these systems. Also, regulations under this law are to be performance based. To the extent regulations are not performance based, permittees can propose alternative, performance-based compliance mechanisms.

The new law also adds flexibility to financial assurance requirements. Previously, financial assurance requirements for operation, reclamation, closure, and post-closure care could be met only through a trust, tying up assets in a very concrete manner. Under the new law, financial assurance requirements can be met through surety bond, escrow, cash, trust, irrevocable letter of credit, or other equivalent security, subject to DEP approval.

In all, these changes work together to make metallic mineral mining in Maine a possibility. It is worth noting that while this legislation was advanced by the owner of Bald Mountain and much of the debate over this bill

focused on that one site, this rewrite of Maine law applies to the entire state, including already identified deposits and those yet to be discovered.

More Work Lies Ahead

With the legislature's action this year, statutory changes have been enacted. The final legal landscape regarding mining in Maine, however, has not yet been determined and will not be determined for a few years. The new law relies heavily on the two regulatory agencies with oversight over mining to flesh out many details of the law through the regulatory rulemaking process.

For example, the agency with oversight over land use planning in the unincorporated areas of the state must amend its rules regarding zoning by January 15, 2013. This same agency must also adopt rules related to certification of permit applications by January 10, 2014, with these rules requiring legislative approval. DEP must also adopt rules by January 10, 2014 that require legislative approval—these new rules will implement the bulk of this new law. These agencies are also required to jointly develop rules regarding permitting of exploration of deposits.

While the primary battle has been fought and won, this issue will not be completely resolved until regulations are adopted and actual sites are permitted. The regulatory process is not free of politics, particularly because some rules require legislative approval. The environmental community is certain to try to limit the legislative changes adopted this year by advocating for restrictive regulations. That is why it is vitally important that the mining industry is strongly represented as this process enters the next phase. Moreover, once this process advances to the point of permitting for individual sites, applicants will need to negotiate a complicated gauntlet of new laws and rules, and success will require an intimate knowledge of those laws and rules and their background and genesis, as well as the Maine regulatory and permitting landscape.

What Conclusions Can Be Drawn?

What does this dramatic change of events in Maine in 2012 mean for the mining industry in general?

Obviously, a victory in a traditionally blue state in a blue region of the nation is a noteworthy development, but what does it mean elsewhere? It is difficult to draw many conclusions from this legislative battle, but here are a few thoughts:

- Obviously, economics is a key driver in all of this. Without high metal prices, there would likely have been little interest in developing this resource, as dealing with the environmental community in Maine leads to high transaction costs. Further, without economic potential, the primary landowner leading this effort would have had little incentive to pursue a legislative and regulatory overhaul that will end up benefiting sites across the state. Finally, without the promise of jobs and prosperity, lawmakers would likely have shied away from this proposal.
- The mining industry now has an additional jurisdiction for growth. With legal barriers all but prohibiting mining in Maine, this was a state where industry essentially could not expand. Now, this jurisdiction is open for investment and development.
- The mining industry has the potential to gain additional allies in the U.S. Congress. Maine is known for its moderate delegation, including Senator Olympia Snowe and Senator Susan Collins. Prior to this reform, they had very few incentives to support the mining industry at the federal level because they did not represent a mining state. Should the mining industry grow in Maine, there may be an opportunity to cultivate a relationship with Maine's federal delegation.



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3-POINT PLAY SAVES SITE

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Rarely can a single technology efficiently and effectively tackle the complexity of remediating brownfields, especially when dealing with the constraints of expedited property transactions and construction deadlines. The city of Orlando unveiled the design for the Orlando Events Center in 2007 as a new home for local professional sports teams and to help revitalize downtown Orlando. Due diligence by the city of Orlando identified a groundwater tetrachloroethene (PCE) plume with a source area located beneath the proposed arena footprint. The maximum PCE concentration found in the source area groundwater was 14,600 µg/L, which exceeded the Florida Cleanup Target Level (CTL) of 3 µg/L. Trichloroethene (TCE; maximum concentration of 57 µg/L) and cis-1,2-dichloroethene (DCE; maximum concentration of 98 µg/L) were also detected at concentrations exceeding their CTLs of 3 µg/L and 70 µg/L, respectively. Shallow soil (2–4 feet below grade) was also impacted in two discrete areas. The maximum soil PCE concentration was approximately 0.49 mg/kg, which exceeded the Florida CTL for leachability of 0.03 mg/kg.

On August 30, 2007, the city of Orlando issued a request for proposal for a performance-based contract involving a source area remedy. Construction of the events center was scheduled to begin in late summer 2008, thus a very rapid and aggressive remedial plan was required to prevent any construction delay. Geo-Cleanse International, Inc., and MACTEC Engineering and Consulting, Inc., agreed to partner for the project and developed a three-phase remediation plan:

- (1) The first phase consisted of in situ chemical oxidation (ISCO) with catalyzed hydrogen

peroxide (CHP) to target the concentrated source area.

- (2) The second phase consisted of additional ISCO using RemOx[®] L ISCO reagent (40 percent sodium permanganate) provided by Carus Corporation to target residual contaminants potentially remaining after the first treatment phase was completed.
- (3) The third phase consisted of removal with off-site disposal of impacted shallow soil.

For the treatment design program, 72 injection wells were installed in three depth zones between 10 and 40 feet below grade, in an 80-foot by 130-foot area. All preconstruction permitting, regulatory approval, and fieldwork to achieve the cleanup levels in all media, including drilling, injection, soil removal, and backfill, were completed by March 7, 2008, approximately 4.5 months after contract execution.

The first phase (catalyzed hydrogen peroxide treatment) was completed in 23 days and included injection of 85,000 gallons of peroxide solution and catalyst. One week was allowed for reaction of the peroxide before beginning the second phase of treatment (permanganate injection). The permanganate treatment was completed in seven days and included injection of 21,000 gallons of 4 percent solution. The third remedial phase (soil removal) was completed in two days and included a four-foot-deep excavation and off-site disposal of 94 tons of soil.

Four post-remedial groundwater sampling events were completed through August 2008. The chlorinated volatile organic compound concentrations were reduced from a maximum of 14,645 µg/L (summed PCE, TCE, and cis-DCE concentrations) before treatment to nondetectable (<2 µg/L) at all locations in the treatment area after the phased remediation was completed.

The combination of catalyzed hydrogen peroxide with sodium permanganate provided a one-two ISCO punch to rapidly eliminate a concentrated PCE source area and reduce the dissolved concentrations of PCE and related contaminants below regulatory standards. The total time required from contract execution to

injection well abandonment was 286 calendar days (about nine months). The field remediation component (drilling, injection, and soil removal) required 101 calendar days; the remainder was taken up with regulatory review and post-remediation monitoring. This time frame was also made possible with the cooperation of the Florida Department of Environmental Protection, which provided expedited approvals and brownfields grant funding. The total remediation cost (excluding post-remediation groundwater sampling conducted by another contractor) was \$584,299. The injection and monitoring wells were then abandoned in accordance with Florida regulations by August 8, 2008. Construction was not delayed, and the Orlando Events Center opened as planned in the fall of 2010.

One of the novel components of the team's approach was the sequential application of different oxidants to achieve CTLs. ISCO technology continues to advance with development of new oxidant and catalyst systems, novel application methods, and detailed study of the underlying chemistry. ISCO can provide rapid reduction in contaminant concentrations, and is commonly coupled with other technologies such as bioremediation, extraction, or air sparge/soil vapor extraction to provide complete plume management systems.



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This award will recognize people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of environmental justice and/or a commitment to gender, racial, and ethnic diversity in the environment, energy, and natural resources legal area. Accomplishments in promoting access to environment/energy/resources rule of law and to justice can also be recognized via this award.

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This award recognizes individuals or organizations who have distinguished themselves in environmental law and policy, contributing significant leadership in improving the substance, process or understanding of environmental protection and sustainable development.

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Nomination deadlines: May 13, 2013.

These Awards will be presented at the ABA Annual Meeting in San Francisco in August 2013.

For further details about these awards, please visit the Section Web site at

www.ambar.org/EnvironAwards

10 FUNDAMENTAL THINGS YOU SHOULD KNOW ABOUT VAPOR INTRUSION HEALTH RISK ASSESSMENT

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Vapor intrusion, the intrusion of chemical vapors from soil or groundwater into buildings, seems to be in the news constantly in recent years. Vapor intrusion poses potential health risks to building occupants through the inhalation of chemical vapors that have entered the indoor environment. However, despite all the recent media attention, some fundamental aspects of health risk assessment related to vapor intrusion are not often discussed and are frequently misunderstood. A clear understanding of some of these fundamental points will help attorneys and their clients better address a potential vapor intrusion issue at a site and prepare a vapor intrusion risk assessment (VIRA), should one be required. The following discussion provides some general guidance on some of these key issues. However, it is important to note that different states vary in their specific requirements and approach to VIRA, and individual state guidance on this issue should always be consulted prior to developing a strategy for dealing with vapor intrusion at a particular site.

1. When Is a Vapor Intrusion Risk Assessment (VIRA) Indicated?

There is a potential for vapor intrusion at a site whenever soil, soil gas, or groundwater sampling data indicate the presence of volatile chemicals (volatile organic compounds or VOCs). Examples of common VOCs include the chemical components of motor fuels, such as benzene, toluene, ethylbenzene, and xylene (BTEX); industrial solvents, such as trichloroethene (TCE); or the dry cleaning solvent tetrachloroethene (PCE). In most cases it should be assumed that vapor intrusion can occur at a site if these types of chemicals are present. Usually a regulatory agency will require a VIRA if VOCs are present on a site. In cases where a regulatory agency is not yet involved at a site the site owner or responsible party

may opt to conduct a VIRA voluntarily to ascertain potential liabilities and determine mitigative measures if necessary.

2. Is a VIRA Typically Required Even If There Are No Buildings on the Site?

Although vapor intrusion is by definition an indoor phenomenon, a VIRA will typically still be required for a site with no current buildings as long as there is a potential for the construction of buildings on the site in the future. In such a case the VIRA is based on the future hypothetical presence of a building and the future land use (e.g., residential or commercial/industrial). The only way a VIRA could usually be avoided at a site which currently has no buildings would be if an institutional control were established for the property that would prevent any future construction of buildings on the property. This might apply, for example, if the property were going to be used as a parking lot or park with no structures. However, if the future use of the property is expected to be residential housing, commercial office buildings, or an industrial warehouse for example, a VIRA would be required to ensure the safety of future occupants of these buildings. A site could not be closed (i.e., given a status of “no further remedial action required”) until the potential vapor intrusion risks based on the future land use were evaluated and mitigated if necessary.

3. How Is a Vapor Intrusion Risk Assessment (VIRA) Done?

The most common method for evaluating vapor intrusion risks is to collect soil gas data, derive a representative concentration for each VOC detected, and enter that concentration in a fate and transport model called the Johnson-Ettinger model. The model calculates the expected indoor air concentration of the VOC based on numerous physical and chemical properties, including site-specific soil properties, and combines it with toxicity criteria developed by the U.S. Environmental Protection Agency (EPA) to calculate non-cancer and cancer risk estimates. The risk estimates depend on the particular land use assumed for the property, for example, residential or

commercial. Both current and probable future use must be known before conducting the VIRA.

4. VIRAs Should Be Based on Soil Gas Measurements

EPA and most states' risk guidance documents now maintain that VIRAs, whether involving an initial comparison to screening levels or Johnson-Ettinger modeling, should be based on soil gas measurements rather than soil concentrations or groundwater concentrations. This avoids the additional significant uncertainties and errors related to converting soil or groundwater concentrations to corresponding soil gas concentrations. An additional advantage of using soil gas measurements is that they reflect the combined contributions of both contaminated soil and groundwater in the case where both soil and groundwater contain VOCs. Soil gas measurements should not be collected less than five feet below the ground surface as doing so risks dilution of the soil gas sample with ambient air.

5. Ensure Adequate Detection Limits for Soil Gas Measurements

It is essential that the detection limits for soil gas measurements used as the basis of a VIRA be sensitive (low enough) to adequately characterize risks for the current and future land use. Some states have developed soil gas screening concentrations such that if soil gas measurements show levels below those concentrations vapor intrusion risks are considered to be negligible. However, applying such screening levels requires that detection limits for volatile chemicals be below the screening levels. Soil gas screening levels for residential use will be lower (more stringent) relative to commercial or industrial use, and thus will require lower detection limits to verify compliance. High detection limits that result in nondetected chemicals will often lead to the regulator requesting resampling, or requiring that the VIRA be based on the actual high detection limit concentration. The latter option is conservative, but likely to result in an inaccurate characterization of vapor intrusion risks and potentially excessive mitigation costs.

6. Soil Type and Soil Moisture Heavily Influence VIRA Results

Apart from the land use, probably the most important factor affecting the outcome of a VIRA is the soil type (clay, sand, loam, etc.). Because this is such an influential factor, the site soil type should be determined by a qualified geologist based on adequate site-specific information such as boring logs. The goal is to determine the soil type across the site that is most representative of the soil layer between the deepest soil gas sample and the ground surface. The vapor intrusion models allow up to three soil layers to be characterized at a site if necessary. Soil property testing may also be done in cases where the soil type characterization is not clear. These tests cost about \$500–\$600 per sample but are helpful in obtaining an objective determination of the soil type. After soil type, soil moisture is the next most influential factor affecting vapor intrusion risks. High soil moisture greatly reduces vapor intrusion. Soil gas samples should therefore not be collected right after it has rained. Soil moisture is typically measured as part of the soil property testing.

7. Take into Account Cumulative Health Risks

Even those states that have established risk-based soil gas screening levels typically expect a VIRA to take into account the cumulative health risks from all the chemicals detected in soil gas at a site. In the case of cancer-causing chemicals, cumulative risk is calculated by summing the cancer risks for each cancer-causing chemical detected in the soil gas. Cumulative cancer risks equal to or less than $1E-06$ (one in a million) are widely accepted to be negligible. For chemicals which are not considered to cause cancer, cumulative non-cancer risks are calculated by summing the Hazard Quotient (HQ) for each chemical to determine the Hazard Index (HI). If the HI is equal to or less than 1, cumulative non-cancer risks are considered to be negligible.

8. What Should a VIRA Report Include?

Although the contents and coverage of a VIRA report may vary depending on state-specific requirements, the following information should generally be included, usually in the form of a concise letter report:

- A short summary of the site background/history focusing on the likely source of the VOC contamination.
- General site location map.
- A short narrative describing how the soil gas samples were collected and analyzed.
- Tabulation of all the soil gas data used in the report along with detection limits (placed in an attachment or appendix).
- A map showing the soil gas sampling locations on the site.
- A short summary of the soil gas sampling results.
- A description of the modeling approach and assumptions used. This should reference a table indicating any site-specific parameters used in the Johnson-Ettinger modeling and should be sure to include a description of how representative soil gas concentrations were developed for the site.
- Summary table of the representative soil gas concentrations used as the basis for the Johnson-Ettinger modeling, including a comparison to any screening benchmarks if available.
- Table showing the non-cancer and cancer risks for each VOC detected, as well as cumulative risks.
- Representative Johnson-Ettinger model output for at least the chemical contributing the most to site health risks (placed in an attachment or appendix).

9. What Is the Role of Indoor Air Testing When Assessing Vapor Intrusion Risks?

In most states there is a hierarchy of methods for the evaluation of vapor intrusion risks. In some states the first step involves comparison of soil gas or groundwater measurements to conservative vapor intrusion-based screening benchmarks. If such measurements are below those benchmarks potential vapor intrusion health risks are assumed to be negligible. If there is an exceedance of one or more benchmarks, a site-specific VIRA is typically conducted using the Johnson-Ettinger model as described above. If the site-specific Johnson-Ettinger modeling indicates that health risks are negligible no further evaluation is usually necessary. However, if the Johnson-Ettinger modeling shows significant risks then

indoor air testing can be done to confirm the model predictions. In some states, using the Johnson-Ettinger model to demonstrate the absence of significant vapor intrusion risks is not sufficient, and indoor air sampling is required for confirmation. In short, in most states, indoor air testing is assumed to be the final arbiter of the existence, or lack, of vapor intrusion health risks.

10. What Should I Know About Indoor Air Testing When Evaluating Vapor Intrusion Risks?

Because indoor air sampling is the final arbiter of vapor intrusion health risks, it is critical that it be done right. Indoor air sampling is most commonly done using Summa™ canisters with the samples analyzed using EPA Method TO-15. Because low detection limits are required for indoor air testing it is essential that each canister be individually clean-certified to avoid any possible contamination of the sample from the canister itself. For residential indoor air testing, the flow controller on the Summa canister should be set to collect air over a 24-hour period. For commercial or industrial buildings, an eight-hour sampling period is used. At least one, and preferably two, outdoor or ambient air samples should be collected during the same time as the indoor samples to allow evaluation of the possible contribution of outdoor air sources to indoor air. Prior to conducting the indoor air sampling the building premises should be surveyed to determine if there are other possible sources of volatile chemicals in the building that could complicate interpretation of the indoor air results. Other nearby outdoor sources of VOCs should also be noted. Ventilation conditions during the indoor air sampling should be typical for the season and time of day.

Summary

Vapor intrusion is one of the most sensitive drivers of site cleanups in many cases. It is also one of the most commonly occurring issues at contaminated properties. Although specific requirements for addressing potential vapor intrusion can vary somewhat from state to state, a clear understanding of some of the fundamental technical factors affecting the outcome of vapor intrusion risk assessments will help attorneys and their clients direct and interpret these assessments more effectively.

SELLING “AS IS” IN A CONTAMINATED WORLD

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“Darling, I have always told you some version of the truth.”

Jack Nicholson to Diane Keaton in *Something’s Gotta Give* (2003).

Commercial or industrial property is generally sold today in a marketplace of sophisticated sellers and buyers. Businesses conducted at these properties are often highly regulated, through local ordinances, state regulation, and federal laws. These properties are the subject of detailed building codes and permits, public inspection, and possibly licensing, monitoring, and reporting. Even in this market the knowledge that sellers have about their property can vary tremendously. Sellers may have detailed knowledge of the operational history of their property during their ownership or if the facility has been recently constructed. As to older facilities, sellers may not have actual knowledge of prior uses and practices at the facility. Around the buying and selling of these properties, there is a well-developed industry of property inspectors, consultants, and engineers, which may be employed to inspect and investigate properties being purchased. This article reviews the evolving public policy and legal practice that courts, legislative bodies, and practitioners have employed to allocate the risk of remediation costs between sellers and buyers.

Caveat Emptor

Historically, sellers were protected against claims after sale from buyers who became disgruntled as to the condition of property they purchased by the common law doctrine of *caveat emptor* (buyer beware). This common law doctrine is supported by the public policy favoring freedom of contract. Over time, the harshness of this historical doctrine has been tempered by courts’ and legislatures’ adoption of consumer protection public policies: the recognition of the existence of

common law torts of negligent misrepresentation and fraud in the inducement; the enactment of statutory prohibitions of fraud and deceptive trade practices; and the creation of court-made implied warranties of habitability and suitability of real property for an intended use. These implied warranties have generally not been extended to protect purchasers of commercial and industrial properties, but have in some jurisdictions been recognized in commercial and industrial leases.

Allocation of Remediation Costs by Environmental Protection Laws

Buyers failing to undertake adequate inquiry prior to purchasing a property run the risk of acquiring contaminated property, and being liable for significant remediation costs. Federal laws, *e.g.*, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), and corresponding state statutes can impose liability on persons identified by such legislation as “responsible parties” because of their status with respect to these properties. Under these laws a “responsible party” may be 100 percent liable for the cost of remediation of contaminated property even though it did not cause or contribute to the contamination. CERCLA and many of these corresponding state environmental protection laws grant to a purchaser a statutory right to obtain contribution from a prior responsible party for the costs it incurs in remediating contamination existing at the time of purchase.

Selling “As Is”

Reacting to these public policies, sellers and their counsel have sought to contractually allocate the responsibility for remediating property to buyers by selling property “as is.” The use of “as is” provisions is derived from the UCC-recognized concept of an as-is disclaimer of implied warranties in the sale of goods between merchants. But, despite the presence of an as-is disclaimer, even the UCC does not preclude causes of action based on fraud. U.C.C. § 2-316. The as-is disclaimer is sometimes worded as a sale of property “in its present condition,” *e.g.*, contract forms

promulgated by the Texas Real Estate Commission do not use the as-is terminology but state that the property is sold “in its present condition.” This same present-condition terminology is used in real estate contract forms promulgated by real estate broker regulatory commissions of a number of states and has its genesis in the plain English movement.

“Free Looks,” Disclaimers, Waiver of Reliance, Sole Agreement, and Merger Clauses

Sales contracts may contain other provisions that are similar to and that supplement an as-is clause. Examples include the following provisions: a “free look” period to permit a buyer the opportunity to inspect the property and to conduct investigations as to its condition; contractual disclaimers of express or implied warranties; acknowledgments by buyers that they are relying solely upon the results of their inspections and investigations and not upon any statements or disclosures by the seller or its agents; clauses stating that the written contract between seller and buyer contains the entire agreement of the parties; and clauses which provide that all agreements are merged into and do not survive delivery of the conveyance to the buyer. Merger clauses have been held not to override fraud. *See, e.g., Italian Cowboy Partners, Ltd. v. The Prudential Ins. Co. of America*, 341 S.W.3d 323 (Tex. 2011).

Questions Clients Ask

Sellers often ask their counsel for advice on a variety of questions, like the following:

“Do I have a duty to speak, to disclose what I know about the property, even if I am not asked?”

A duty of disclosure may hinge on whether the condition is readily discoverable. This duty is heightened by a seller’s misleading statements. *See e.g., Florida: Billian v. Mobil Corp.*, 710 So. 2d 984 (Fla. Dist. Ct. App. 1998)—negligent nondisclosure of a material defect does not require that the seller have intended to defraud buyer; Kansas: *McWilliams v.*

Barnes, 242 P.2d 1063 (Kan. 1952)—negligent representation that drain pipes were connected to city sewer system; and Illinois: *Chapman v. Hosek*, 475 N.E.2d 593 (Ill. App. Ct. 1985)—negligent misrepresentation as to necessity of flood insurance and weather conditions. For further discussion of a seller’s disclosure duty, see 36 AM. JUR. PROOF OF FACTS 3d, *Buyer’s Claims Against Seller Who Fails to Disclose Environmental Condition of Property* 471 (2012); DRAPER, 12 A.L.R. 5th, *Vendor’s Obligation to Disclose to Purchaser of Land Presence of Contamination from Hazardous Substances or Wastes* 630; and Mattox, *Common Law Approaches to Non-Disclosure/Limited Disclosure of Environmental Liabilities*, PRACTICAL REAL ESTATE LAW. (Jan. 2010); also see RESTATEMENT (SECOND) OF TORTS § 552. Such niceties of language and circumstance have led some legislatures to enact environmental condition disclosure laws, e.g., New Jersey’s Industrial Sites Recovery Act.

“What if one of my employees knows something I do not know?”

Some courts have found that a person is charged with constructive knowledge of all material facts that its agent or officer receives while acting within the course and scope of his employment. *See, e.g., Apollo Fuel Oil v. U.S.*, 195 F.3d 74 (2d Cir. 1999).

“How good does my memory have to be?”

In cases of seller-forgotten contamination, the issue may revolve around intent to defraud. The RESTATEMENT (SECOND) OF AGENCY, § 272 contains the following comment as to forgotten knowledge:

Matters once known may be forgotten when the event occurs to which notice or the lack of it is legally material. In some of such cases, as, for instance when the legal standard is “good faith” in the subjective sense, the forgetting is material; the law does not charge the party with the knowledge he no longer has. In other situations, forgetting does not help him; the law holds him bound by the notice or knowledge he once had, whether or not he has it now. In neither case is it material whether

he originally got the knowledge or notice himself or was charged with it because his agent had it. Cmt. e, Duration of Knowledge.

Statutorily Created Reimbursement Obligations

Under some states' laws, there is a statutorily created reimbursement obligation that further limits the effectiveness of as-is and similar provisions. The case of *Bonnie Blue, Inc. v. Reichenstein*, 127 S.W.3d 366, 368 (Tex. App.—Dallas 2004, no petition) is instructive. In *Bonnie Blue*, the buyer did not seek damages based on misrepresentations or a failure to disclose, but instead sought statutory contribution for environmental cleanup costs under the Texas Solid Waste Disposal Act (SWDA), as well as common law contribution and indemnity. The defendant, the Reichensteins, had operated a wood-preserving business on the property until 1982, when they sold to T.D. Corporation. The sales contract included the following provision:

Purchaser acknowledges that he has inspected all buildings and improvements situated on the property and is thoroughly familiar with their condition, and Purchaser hereby accepts the property and the buildings and improvements situated thereon, in their present condition, with such changes therein as may hereafter be caused by reasonable deterioration.

T.D. Corp. then sold to Rex-Tex Equipment Company. In 1991, Bonnie Blue, Inc., bought the property. Eight years later, in 1999, after discovering contamination, Bonnie Blue entered the property into the state's voluntary cleanup program and began cleanup. Bonnie Blue then filed this cost recovery action. The trial court granted summary judgment for the sellers, the Reichensteins, on all claims. The appeals court disagreed. Noting that "no Texas case specifically addresses the effect of an 'as is' provision on a contribution claim under the SWDA," the court examined the broad remedial purpose of the SWDA, and the express statutory scheme that sets forth factors for the trial court to take into account in apportioning cleanup liability. The court noted that unlike CERCLA,

the SWDA did not include a provision permitting parties to enter contracts affirmatively to insure or to indemnify against CERCLA liability (42 U.S.C.A. 9607(e)).

Use of a Three Contractual Provisions to Allocate Remediation Costs

It may be possible for a seller to contractually allocate remediation costs to a buyer by employing the following three contractual provisions: (1) an as-is clause coupled with a disclaimer of reliance by the buyer; (2) a specific release of claims, including statutorily granted contribution rights; and (3) a specific indemnity as to claims by third parties. These provisions must be entered into knowingly and voluntarily. See, e.g., Illinois: *Century Display Mfg. v. D.R. Wagner*, 376 N.E.2d 993 (Ill. 1978)—buyer informed of prior use of property sufficiently to alert as to hazardous condition; Michigan: *Niecko v. Emro Marketing Co.*, 769 F. Supp. 973 (E.D. Mich. 1991), *aff'd*, 973 F.2d 1296 (6th Cir. 1992)—buyer expressly assumed risk of unknown soil contamination; New York: *Long v. Fitzgerald*, 659 N.Y.S.2d 544 (N.Y. App. Div. 1977)—buyer's acknowledgment that it had inspected premises and was acquainted with the property barred claim of fraudulent inducement; Texas: *Trinity Industries, Inc. v. Ashland, Inc.*, 53 S.W.3d 852 (Tex. App.—Austin 2001, petition denied)—failure to mention fraud and negligent misrepresentation in release of cleanup liability precluded release of fraudulent inducement claim. Also see, Slavich and Goldman, *Allocating Environmental Liabilities and Risks by Contract and Making That Stick*, 33rd Annual Advanced Real Estate Law Course, State Bar of Texas, 2011; 34 AM. JUR. PROOF OF FACTS 3d, *Validity and Applicability of Contractual Allocations of Environmental Risk* 465; and 1 FED. ENVTL. REG. REAL EST. § 2:95, *Private Party Cost Recovery-Contractual Allocations of Liability* (2012). Texas courts have used the public policy of freedom of contract to uphold a party's contractual waiver of reliance, even in the face of fraud, if the parties are knowledgeable in business matters; represented by legal counsel; have specifically discussed the issue which became the topic of subsequent dispute; and the release language is clear.

The Texas Supreme Court in *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997) upheld release language despite claims by the releasing party that it had been fraudulently induced by the fraudulent representations and non-disclosures of the released party. Subsequent to the *Schlumberger* decision, the Texas Supreme Court in *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008) held that a “waiver of reliance” clause precluded a fraudulent inducement claim by a settling party (McAllen). McAllen unsuccessfully argued that he was not barred by the “waiver of reliance” clause from establishing that he was fraudulently induced into agreeing to arbitrate environmental claims he had specifically excluded from the scope of the release he signed at a mediated settlement. McAllen argued that there was no “meeting of the minds” regarding the arbitration of potential environmental claims because Forest Oil knew all along of the potential for environmental claims while simultaneously assuring McAllen “there [were] no issues having to do with the surface.” The court concludes with the following admonishments:

After-the-fact protests of misrepresentation are easily lodged, and parties who contractually promise not to rely on extra-contractual statements—*more than that, promise that they have in fact not relied upon such statements*—should be held to their word. Parties should not sign contracts while crossing their fingers behind their backs. . . . It is not asking too much that parties not rely on extra-contractual statements that they contract not to rely on (or else set forth the relied-upon representations in the contract or except them from the disclaimer). If disclaimers of reliance cannot ensure finality and preclude post-deal claims for fraudulent inducement, then freedom of contract, even among the most knowledgeable parties advised by the most knowledgeable legal counsel, is grievously impaired. . . .

None of McAllen’s arguments materially distinguishes our holding in *Schlumberger*: “a release that clearly expresses the parties’ intent to waive fraudulent inducement claims, or one that

disclaims reliance on representations about specific matters in dispute, can preclude a claim of fraudulent inducement.” . . . Today’s holding should not be construed to mean that a mere disclaimer standing alone will forgive intentional lies regardless of context. We decline to adopt a *per se* rule that a disclaimer automatically precludes a fraudulent-inducement claim, but we hold today, as in *Schlumberger*, that “on this record,” the disclaimer of reliance refutes the required element of reliance.

Facts and Circumstances Supporting Effective Contractual Allocations

The following facts and circumstances support upholding an allocation of responsibilities through the use of these risk allocation provisions: knowledgeable parties; parties represented by counsel; a specifically negotiated result; the issue being discussed and disclosed; a recognition that these provisions are not boilerplate; and no state-specific legislation on topic. Further, there must be an absence of interference with the buyer’s investigation.

Facts and Circumstances Undermining an Effective Contractual Allocation

Even the best-worded as-is clause coupled with an otherwise enforceable waiver of reliance clause does not overcome impairment, obstruction, or interference with the buyer’s inspection. See, e.g., *Warehouse Associates Corporate Centre II, Inc. v. Celotex Corp.*, 192 S.W.3d 225 (Tex. App.—Houston [14th Dist.] 2006, review denied). The appeals court in *Warehouse Associates Corporate Centre II, Inc.* upheld the trial court’s finding that a genuine issue of fact existed as to whether Warehouse Associates was induced to enter into an industrial site purchase contract by Celotex’s alleged active concealment of buried asbestos, despite the presence of the following “as is” and waiver of reliance clauses:

Other than the warranties of title contained in the deed, Purchaser acknowledges that Seller has not made, does not make and specifically disclaims any representations, warranties, promises, covenants, agreements or guaranties of any kind or

character whatsoever, whether express or implied, oral or written, past, present or future, of, as to, concerning or with respect to (a) the nature, quality or condition of the Property, including without limitation, the water, soil and geology, (b) the income to be derived from the Property, (c) the suitability of the Property for any and all activities and uses which Purchaser may conduct thereon, (d) the compliance of or by the property or its operation with any laws, rules, ordinances or regulations of any applicable governmental authority or body . . . (e) the habitability, merchantability or fitness for a particular purpose of the Property, or (f) any other matter with respect to the Property, and specifically that Seller has not made, and does not make and specifically disclaims any representations regarding solid waste, as defined by the U. S. Environmental Protection Agency regulations at 40 C.F.R., Part 261, or the disposal or existence, in or on the Property, of any hazardous substance, as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, and applicable state laws, and

regulations promulgated thereunder. Purchaser further acknowledges and agrees that having been given the opportunity to inspect the Property, Purchaser is relying solely on its own investigation of the Property and not on any information provided or to be provided by the Seller. Purchaser further acknowledges and agrees that any information provided or to be provided with respect to the Property was obtained from a variety of sources and that Seller has not made any independent investigation or verification of such information. Purchaser further acknowledges and agrees that the sale of the Property at closing shall be made on an “as is, where is” condition and basis “with all faults.”

Concluding Advice

When confronted with advising your client on selling property known to be contaminated, disclosure is the best policy, but reliance on a craftily worded as-is clause is not. Care in disclosure is required, as once the seller decides to speak about an issue, courts require that a full and accurate disclosure be made.

