

CHECKLIST: IDENTIFYING ENVIRONMENTAL CLEANUP RISKS

Copyright © 2010, Daehnke Cruz Law Group, LLP

By: Kevin J. Daehnke (www.DaehnkeCruz.com)

Present property owners, present “operators”, and certain prior owners and operators, are all liable to the government (often jointly and severally) for site investigation and remediation costs associated with contaminated soil and groundwater. Additionally, when a property owner first conducts soil testing at a property, or otherwise discovers site contamination, the property owner is required by law to report the “release” to appropriate state and federal agencies, which in turn means that the property owner becomes forced (at some point) to fully test and remediate the contamination. If the contamination is deep in the soil or has gone to groundwater, the costs of remediation (which can involve the cleanup of offsite soil or groundwater plumes emanating from the site) may be astronomical.

The problem, quite simply, is that environmental cleanup liabilities attach to anyone who owns a contaminated property, is or has been a tenant or has otherwise “operated” at a contaminated property at any point in time during which a release of contamination has occurred or continues to occur, or has “arranged for disposal” of hazardous substances at a contaminated property. Moreover, if you own a contaminated property as an individual (including a sole proprietorship), general partnership, some form of joint tenancy or as a joint venturer, the government can often use its *joint and several* liability powers to come after you, personally, for the entire cost to clean up that property. Likewise, if you have ever leased contaminated property in such a “personal” capacity, you may be held liable, personally, for all the cleanup costs at that site.

The purpose of this Checklist is to help determine whether a particular property owner, business owner or estate beneficiary has a significant probability of future environmental cleanup liability. The likely extent of that liability and how best to deal with that environmental liability exposure are both outside the scope of this paper.

Liability can attach in numerous contexts, including each of the following:

- (1) A property owner that is presently contaminating a site (either personally or through the activities of a tenant);
- (2) A property owner that owns property that was previously contaminated (by either the existing property owner, a prior property owner, a tenant or prior tenant, or a third party);
- (3) A business owner that now “operates” or has previously “operated” a business that is or has caused contamination at a property;
- (4) A business owner/tenant that took over operations (or acquired the lease) at a property that has been contaminated by those prior operations;
- (5) A developer or tenant that conducted real estate development activities that constituted “operations” at a property that is contaminated, including real estate development activities which disturbed the soil at the site;

- (6) A business that acquired the stock or assets of an entity that has caused contamination at one or more sites where that business was operating;
- (7) A property owner whose property has been contaminated from certain activities (including illegal dumping) of a business or property owner at a contiguous property;
- (8) A business or property owner that generated contaminated “waste” that was disposed of at a landfill or other facility, including a recycling facility, where the landfill or recycling facility is later required to be remediated; and
- (9) The **heirs and beneficiaries** of any of the above.

In order to determine if an individual or entity has likely environmental cleanup liability exposure, certain questions must be asked and certain issues must be explored. The following is a good exemplar of questions to assist in making these determinations:

- If business operator/owner, what kind of business do you and your partners operate?
- How did you come to be operating this business?
- How did you acquire this business?
- What form of business organization is it? Partnership, sole proprietor, small corporation?
- What kind of land/property does the business operate on?
- Is the real property owned by the business, or is it leased?
- If leased, do you have a copy of the most recent lease?
- When was the land on which the business is located acquired, bought or leased?
- Has there ever been an environmental assessment performed for the property? If so, when?
- What were the results of the environmental assessment/s? Was any contamination found?

***The material contained in this paper is for informational purposes only and is not intended to be, nor should it be relied upon as, legal advice. The information is general in nature and is not intended to be applied to any particular fact pattern. Anyone seeking to use the contents of this paper to assist with any specific matter should first consult an attorney with specialized expertise in the subject matter area.**

By: Kevin J. Daehnke (www.DaehnkeCruz.com)

- If contamination was found was its presence reported to any government agency? If so, what agency and when?
- Have there ever been any accidents or incidents which resulted in a sudden release of pollutants or contaminants?
- If there were any such incidents were they reported to any government agency? If so, to what agency and when?
- Are you aware of any contamination or activity which could have caused the release of contaminants taking place on the property prior to your acquisition, leasing or the start of operation of your business on the property?
- Do you know what kind/kinds of business or industrial operations took place on the property prior to your involvement?
- Was the site ever involved in plating, machining or degreasing activities?
- Did the site ever contain sumps, drainage pits or clarifiers?
- Was there ever a gasoline service station or storage of liquid gasoline or petroleum products on the property?
- Were there ever any underground or above-ground tanks, containing petroleum, waste oil or any other substance?
- Was the site ever an auto repair shop or car lube facility?
- Was the site ever a car wash?
- Was the site ever a site for disposal of waste materials or debris, whether formally as a landfill or otherwise?
- Did the site, or the business operations at the site, ever generate “waste” materials that were transported to a landfill or recycling facility? If so, which facility was involved and do you have copies of the waste manifests?
- Was there ever an operating dry cleaners on the property?
- Does the business operate any equipment regulated by a government environmental agency and permitted by that agency? If so, what equipment?
- What are the land uses, and business or industrial operations, on land which **abuts** your property?

***The material contained in this paper is for informational purposes only and is not intended to be, nor should it be relied upon as, legal advice. The information is general in nature and is not intended to be applied to any particular fact pattern. Anyone seeking to use the contents of this paper to assist with any specific matter should first consult an attorney with specialized expertise in the subject matter area.**

By: Kevin J. Daehnke (www.DaehnkeCruz.com)

- If there is an onsite business or industrial operation, has it ever been inspected by any government environmental or safety agency? If so, do you have a copy of the inspection report? What were the results of the inspection?
- If there is an onsite business or industrial operation, has it ever been cited by a government environmental or safety agency alleging violation of any government regulation? If so, when and do you have a copy of the citation?
- If there is an onsite business or industrial operation, does it use or store any hazardous or toxic substances or materials? If so, has a “Business Plan” (AB 2688) been prepared and filed with the proper environmental, health and safety agencies? Do you have a copy of that plan?

Please note that this is not an exhaustive list of questions to ask in order to determine the potential environmental risk associated with a particular person, entity, business or property. Also, it should be noted, once again, that the **heirs or beneficiaries** of estates which contain contaminated real property, or of a person or business that is subject to environmental liability, are themselves subject to the same liabilities. The environmental liability of heirs and beneficiaries may be “personal” in nature and may survive the asset transfer process, or it may manifest itself solely as a claim on the assets of the estate or trust, or both.

***The material contained in this paper is for informational purposes only and is not intended to be, nor should it be relied upon as, legal advice. The information is general in nature and is not intended to be applied to any particular fact pattern. Anyone seeking to use the contents of this paper to assist with any specific matter should first consult an attorney with specialized expertise in the subject matter area.**