

# **Environmental Due Diligence Issues Update: 2010**

**Presentation to the  
ACC Real Estate Committee**

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## CERCLA Liability

- CERCLA imposes strict liability on current property owner for pre-existing environmental contamination
- Exemption to CERCLA Liability:
  - Conduct All Appropriate Inquiries, and
  - Comply with all Continuing Obligations



## Conduct All Appropriate Inquiries

- EPA All Appropriate Inquires Rule
  - Evaluation of previous ownership, uses and environmental conditions of a property by environmental professional
  - Recognizes use of ASTM E1527-05 and ASTM E2247-06
  - Must be conducted within 1 year prior to acquisition, and certain provisions (site visit, record review) must be conducted within 180 days prior to acquisition
- Provides defense as an innocent landowner, contiguous property owner, bona fide prospective purchaser
- Recent due diligence issues include soil vapor intrusion, stormwater management, extent of on-site environmental contamination, and off-site contamination



## Comply with all Continuing Obligations

- Provide all legally required notices for known and discovered contamination
- Exercise appropriate care with respect to known and discovered contamination
- Provide full cooperation to responsible parties and agencies
- Comply with land use restrictions
- Comply with information requests/subpoenas



## Emerging Due Diligence Issues

- Energy Efficiency / GHG Emissions
- Environmental Non-Compliance
- PCBs in Window Caulking



## Energy Efficiency/GHG Emissions

- Emerging requirement for commercial building owners to provide information on energy efficiency of properties to prospective buyers, tenants and/or lenders (CA AB 1103) or disclose energy usage (D.C., NYC)
- Proposed ASTM WK24707 (Guide for Building Energy Disclosure)
  - “all appropriate disclosure regarding energy efficiency and sustainability performance of the property consistent with prevailing industry standards and applicable local regulations
- GHG evaluation during environmental review process
  - Massachusetts GHG Policy and Protocol (evaluation and reduction)
  - NEPA (proposed CEQ guidance – evaluation only)
- Emerging state and national energy efficient building codes



## Environmental Non-Compliance

- New facility owner liability for prior noncompliance
  - “Corporate successor” liability for noncompliance before purchase
  - Liability for continuation of noncompliance after purchase
- EPA Interim Approach to Applying the Audit Policy to New Owners
  - “New Owner” test: not responsible for prior noncompliance, noncompliance originated prior to acquisition, new and prior owner not affiliates
  - Disclosure must occur within 9 months following transaction, either pursuant to individual disclosures (within 30 days of discovery) or under audit agreement
  - EPA waives gravity portion of penalty, but can still seek to recover “economic benefit”
  - Must satisfy traditional Audit Policy requirements (systematic and voluntary discovery, prompt disclosure, prompt correct, prevent recurrence, no repeat violations, cooperation, etc.)



## PCBs in Window Caulking

- PCBs present in window caulking (up to 30%) in buildings constructed or renovated from 1950 to 1978
- EPA guidance
  - Caulking  $\geq 50$  ppm must be removed and treated as PCB bulk product waste
  - Building material contaminated by caulk  $\geq 50$  ppm must be remediated (treated as PCB remediation waste)





## Questions?

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