

# ADLER POLLOCK & SHEEHAN

NEW DEVELOPMENTS IN ENVIRONMENTAL DUE  
DILIGENCE: PRE-ACQUISITION/POST-  
ACQUISITION STRATEGIES FOR INVOKING  
LIABILITY EXEMPTIONS UNDER STATE AND  
FEDERAL LAWS.

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May 17, 2012



# WHO IS LIABLE FOR POLLUTION? EVERYONE!

## CERCLA/SUPERFUND (42 U.S.C. §9607(a))

Subject to certain statutory defenses, the following categories of people are strictly, jointly and severally liable:

- A. Present owners and operators of a facility;
- B. Former owners and operators of a facility at the time of disposal;
- C. Any person who arranged for the disposal or treatment of “hazardous substances” at a facility (“generators”); and
- D. Any person who transported “hazardous substances” to a facility (“transporters”).

## RHODE ISLAND INDUSTRIAL PROPERTY REMEDIATION AND REUSE ACT (R.I. Gen. L. §23-19.14-6)

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- A. Present owners and operators of a facility;
- B. Former owners and operators of a facility at the time of disposal;
- C. Any person who arranged for the disposal or treatment of “hazardous materials” at a site (“generators”); and
- D. Any person who transported “hazardous materials” to a facility (“transporters”).



# WHAT LIABILITY EXEMPTIONS ARE AVAILABLE?



<u>CERCLA/SUPERFUND EXEMPTIONS</u>	<u>PRE-REQUISITES</u>
<p><b>Bona Fide Prospective Purchaser</b> 42 U.S.C. §9601(40)</p>	<p>A person or tenant of a person who acquires ownership after 1/11/02 and establishes the following by a preponderance of the evidence:</p> <ol style="list-style-type: none"><li>1. All disposal of hazardous substances occurred pre-acquisition;</li><li>2. Person made “all appropriate inquiry” in the prior ownership and uses of the property (i.e. Phase I Environmental Site Assessment under ASTM E1527-05);</li></ol>

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<p><b>Bona Fide Prospective Purchaser</b> <b>42 U.S.C. §9601(40)</b></p>	<ol style="list-style-type: none"><li><b>3. If hazardous substances are discovered or released, the person provided all legally required notices (i.e. release notification to agencies);</b></li><li><b>4. Person took reasonable steps to stop continuing releases, prevent threatened future releases and limit human, environmental or natural resource exposure to hazardous substances previously released;</b></li><li><b>5. Person provides full cooperation, assistance and access to those performing the cleanup;</b></li><li><b>6. Person complies with and does not interfere with any institutional controls/land use restrictions (cap and ELUR);</b></li><li><b>7. Person complies with any EPA requests for information or subpoenas; and</b></li><li><b>8. Person is not affiliated with any other responsible person (PRP) through (i) a direct/indirect familial relationship; (ii) any contractual relationship <i>except a contractual relationship to convey title or for financing</i>; and (iii) corporate reorganization of a PRP.</b></li></ol>



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<u>CERCLA/SUPERFUND EXEMPTIONS</u>	<u>PRE-REQUISITES</u>
<p><b>Innocent Landowner</b> <b>42 U.S.C. §9601(35)(A)</b></p>	<p><b>No liability will attach, provided the following conditions are met:</b></p> <ol style="list-style-type: none"><li><b>1. At the time the person acquired the property, he or she did not know or have reason to know of the contamination;</b></li><li><b>2. Property is acquired after the disposal or placement of hazardous substances occurred;</b></li><li><b>3. Person conducted “all appropriate inquiry” in prior ownership and uses at the site before taking title;</b></li><li><b>3. Person exercised due care with respect to the hazardous substances;</b></li><li><b>4. Person took precautions against the foreseeable acts or omissions of third parties;</b></li><li><b>5. Person provides full cooperation, assistance and access to those performing the cleanup;</b></li><li><b>6. Person complies with and does not interfere with any institutional controls/land use restrictions (cap and ELUR); and</b></li><li><b>7. Person took reasonable steps to stop continuing releases, prevent threatened future releases and limit human, environmental or natural resource exposure to hazardous substances previously released.</b></li></ol>

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<u>CERCLA/SUPERFUND EXEMPTIONS</u>	<u>PRE-REQUISITES</u>
<p><b>Contiguous Property Owners</b> <b>42 U.S.C. §107(q)</b></p>	<p><b>A person who owns property that is contiguous to a contaminated site owned by another person that becomes contaminated solely by reason of that contiguous site and establishes that:</b></p> <ol style="list-style-type: none"><li><b>1. Person did not cause, contribute or consent to the release;</b></li><li><b>2. At the time of the person acquired the impacted property, he or she did not know or have reason to know that the property could become contaminated from the contiguous property;</b></li><li><b>3. Person made all “appropriate inquiry” at time that the impacted property was acquired;</b></li><li><b>4. If hazardous substances are discovered or released, the person provided all legally required notices (i.e. release notification to agencies);</b></li><li><b>5. Person took reasonable steps to stop continuing releases, prevent threatened future releases and limit human, environmental or natural resource exposure to hazardous substances previously released;</b></li></ol>



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# WHAT LIABILITY EXEMPTIONS ARE AVAILABLE?

<u>RHODE ISLAND EXEMPTIONS</u>	<u>PRE-REQUISITES</u>
<p><b>Bonafide Prospective Purchaser</b> R.I. Gen. L. §23-19.14-3 and -7)</p>	<p><b>A person who acquires a contaminated site will not be held liable as an “owner”, provided that he or she:</b></p> <ol style="list-style-type: none"><li><b>1. Certifies/documents their intent to purchase the contaminated property and status as a BFPP to RIDEM;</b></li><li><b>2. Receives an acknowledgement letter from RIDEM;</b></li><li><b>3. Offers to pay fair market value for the property in its contaminated state;</b></li><li><b>4. Does not have more than a 10% equitable or other legal interest in the site or the operations related to the contamination; and</b></li><li><b>5. Has obtained (i) a remedial decision letter from RIDEM and is actively implementing the cleanup; (ii) a RIDEM letter of compliance confirming that the cleanup is done; or (iii) a settlement agreement with RIDEM.</b></li></ol> <p><b>*BFPP status lasts one year following the acquisition and can be renewed one year at a time</b></p>



# WHAT LIABILITY EXEMPTIONS ARE AVAILABLE?

<u>RHODE ISLAND EXEMPTIONS</u>	<u>PRE-REQUISITES</u>
<b>Third-Party Defense</b>	<p>Person who can establish that they are an innocent landowner and the release was caused solely by an act/omission of a third party other than an employer or agent of the defendant, or whose act or omission occurs in connection with a contractual relationship, provided that the person established that he or she:</p> <ol style="list-style-type: none"><li data-bbox="894 862 1877 943">1. Exercised due diligence in acquiring the site at the time of purchase;</li><li data-bbox="894 951 1877 1032">2. Exercised due care with respect to the hazardous material under the facts and circumstances; and</li><li data-bbox="894 1040 1877 1122">3. Took precautions against the foreseeable acts or omissions of third parties.</li></ol>



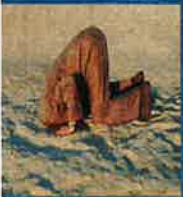
# TAKING STEPS TO PERFECT EXEMPTIONS TO LIABILITY BEFORE CLOSING THE DEAL

## 1. AGENCY APPROVAL/ACKNOWLEDGEMENT

- ✓ CERCLA exemptions are self-implementing and EPA will not generally send comfort/status letters
- ✓ RIDEM's BFPP exemption requires an acknowledgement letter

## 2. All Appropriate Inquiry ("AAI") (40 C.F.R. Part 312)

- ✓ AAI must be done or updated within one year before acquisition occurs
- ✓ Certain components of the investigation are only valid if performed within 180 days of the acquisition (personal interviews, recorded lien research, on-site visual inspections and the declaration of the environmental professional)
- ✓ Phase I Environmental Site Assessment performed in accordance with ASTM E1527-05 is designed to satisfy the AAI standard in most cases
- ✓ Tailor your due diligence to the site conditions. ASTM E1527-05 does not cover asbestos, wetlands, lead paint, PCBs, mold, indoor air/vapor intrusion, radon or worker health and safety, but circumstances may warrant investigating these items
- ✓ State law BFPP exemption does not expressly require "all appropriate inquiry" but doing a Phase I ESA under ASTM E1527-05 would be part of ordinary due diligence
- ✓ State law third party defense "due diligence" requirement should be satisfied by doing a Phase I ESA under ASTM E1527-05



What, Me Worry?





# MAINTAINING EXEMPTIONS TO LIABILITY AFTER THE CLOSING: “CONTINUING OBLIGATIONS”



## 1. Comply with Land Use Restrictions/No Impediment to Institutional Controls

- ✓ CERCLA does not define the universe of “land use restrictions” or “institutional controls” that exist
- ✓ Language may require compliance with restrictions and controls not in place at the time of acquisition, but that become necessary as cleanup progresses
- ✓ Obligations may include both affirmative action (cap maintenance) and refraining from certain conduct (ban on using groundwater for drinking water)
- ✓ CERCLA does not foreclose landowners from seeking modification to or relief from restrictions
- ✓ What conduct constitutes impeding the effectiveness of an institutional control?  
Affirmative conduct vs. mere inaction?



# MAINTAINING EXEMPTIONS TO LIABILITY AFTER THE CLOSING: “CONTINUING OBLIGATIONS”

## 2. Take “Reasonable Steps” to Stop Continuing Releases, Prevent Threatened Future Releases and Limit Human, Environmental or Natural Resource Exposure to Hazardous Substances Previously Released

- ✓ CERCLA does not define “reasonable steps”
- ✓ EPA does not believe that the “reasonable steps” requirement was intended to create the same types of response obligations as would exist for a CERCLA liable party (i.e. groundwater remediation for an off-site source not likely required)
- ✓ EPA guidance suggests that the reasonable steps a party needs to take to preserve the exemption will be less than would be expected of a liable party
- ✓ *3000 E. Imperial, L.L.C. v. Robertshaw Controls, Co.*, 2010 WL 5464296 (C.D. Cal. 2010) (party took “reasonable steps” enough to preserve BFPP defense when it emptied out USTs one month after receiving test results showing TCE in the contents)
- ✓ *Walnut Creek Manor, LLC v. Mayhew Center, LLC*, 622 F.Supp. 2d 918 (N.D. Cal. 2009) (party did not take reasonable steps where it knew of data gaps and limitations in environmental assessment and did not take any action to fill those gaps or otherwise try to stop the migration of PCE in soil and groundwater)



# MAINTAINING EXEMPTIONS TO LIABILITY AFTER THE CLOSING: “CONTINUING OBLIGATIONS”

- ✓ *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F.Supp.2d 431 (D.S.C. 2011) (BFPP exemption did not apply where party (1) failed to cap, fill or remove sumps when it demolished building; (2) neither investigated nor removed debris pile for over one year after discovery of it and (3) failed to adequately maintain the cap on the site.)

## 3. Provide Full Cooperation, Assistance and Access to Those Performing the Cleanup

- ✓ Access is generally the key issue and EPA can order it if it is not provided
- ✓ Access agreements can protect your interests and prevent business interference if a third party is doing the cleanup on your property

## 4. Compliance with Information Requests and Subpoenas

- ✓ Must timely and fully respond to EPA Section 104(e) requests for information or administrative subpoenas

## 5. Providing Legally Required Notices

- ✓ Refers to obligations under federal or state environmental laws to notify appropriate entities in the event of a (new) release



# MAINTAINING EXEMPTIONS TO LIABILITY AFTER THE CLOSING: “CONTINUING OBLIGATIONS”

## 6. ASTM’s New “Continuing Obligations” Standard (E 2790-11)

- ✓ Standard is voluntary, but may evolve into a standard of care
- ✓ Standard is a useful tool for courts in cases where performance of continuing obligations is at issue
- ✓ Only addresses three of the continuing obligations (complying with land use restrictions, not impeding institutional controls and taking “reasonable steps”)
- ✓ Almost too general to be useful
- ✓ Sets forth a 4-step framework for evaluating whether there are any continuing obligations at a site and setting forth a plan to comply with them
  - A. Determine whether there are any “continuing obligations” for the site
    - Review Phase I report for RECs, land use restrictions or institutional controls
    - If report does not identify any recognized environmental conditions (RECs), or RECs exist but do not require further action, there may not be any continuing obligations.
    - If you conclude that there are no “continuing obligations” at a site, document it in writing.
    - If RECs exist, proceed to Step B.
  - B. Analyze RECs and re-assess whether continuing obligations exist
    - If continuing obligations exist, proceed to Step C.



# MAINTAINING EXEMPTIONS TO LIABILITY AFTER THE CLOSING: “CONTINUING OBLIGATIONS”

- C. Identify and perform initial (short-term) continuing obligations for the property (Continuing Obligations Plan)
- Enlist the aid of a qualified environmental professional and an attorney
  - Keep the plan in draft form and maintain the confidential/privileged nature of it until final changes have been made
  - Plan can serve as “evidence” that you met the “continuing obligations”
  - Plan is evidence against you if you do not follow it
  - Make sure that agents, consultants and other third parties (tenants) are aware of the obligations
- D. Identify and perform ongoing (long term) continuing obligations
- Conduct periodic inspections/reporting and document ongoing compliance

