

Table of Contents

PART A. INTRODUCTORY

CHAPTER 1. STRUCTURE AND USE OF THIS BOOK

- § 1:1 Overview
- § 1:2 Table of abbreviations
- § 1:3 A comment on case citations
- § 1:4 A comment on coverage of updates

PART B. SOURCES OF ENVIRONMENTAL LIABILITY

CHAPTER 2. CLEAN WATER ACT AND WATER ISSUES

I. INTRODUCTION

- § 2:1 Overview

II. PRIMARY RESPONSIBILITIES AND WATER-RELATED LIABILITY

- § 2:2 Overview

A. PERMIT REQUIREMENTS

- § 2:3 Generally
- § 2:4 Scope and coverage
- § 2:5 Key definitions
- § 2:6 Specific requirements for new and existing “point sources” of discharge
- § 2:7 Political controversies relevant to CWA implementation
- § 2:8 Bases for permit decision-making: Effluent limits and water quality
- § 2:9 Setting effluent limits
- § 2:10 Performance standards for new and existing point sources
- § 2:11 Applicability of new source performance standards to facilities under construction
- § 2:12 Water-quality-based controls—Discharge limits and toxic controls

B. INDIRECT DISCHARGE PERMITS (POTWS)

- § 2:13 Generally
- § 2:14 General and categorical pretreatment standards
- § 2:15 Interference, pass-through and removal credit
- § 2:16 Application of other federal permit requirements

C. STORMWATER PERMITS

- § 2:17 Generally
- § 2:18 Relevance of stormwater regulations to transactions
- § 2:19 Basic stormwater permitting requirements

D. WATER TRANSFERS

- § 2:20 In general
- § 2:21 Water transfer as a regulated activity

E. “SECTION 404” (DREDGE-AND-FILL) PERMITS

- § 2:22 Generally
- § 2:23 “Waters of the United States” and “navigable waters”—In general
- § 2:24 A Word About Nationwide Injunctions and Environmental Transactions
- § 2:25 Definitions of “waters of the United States” and “navigable waters”
- § 2:26 Current and proposed political developments regarding “waters of the United States”
- § 2:27 “Fill material”
- § 2:28 The dredge-and-fill permit authority
- § 2:29 “No net loss of wetlands” and wetlands mitigation banking
- § 2:30 Nationwide permits
- § 2:31 Compliance monitoring and reporting
- § 2:32 Exemptions from Section 404 permit requirements

F. PERMIT TERMS

- § 2:33 Generally
- § 2:34 Variances and anti-backsliding restrictions in basic CWA permits
- § 2:35 “Fundamental difference” variances
- § 2:36 Variances in best available technology
- § 2:37 The relevance of cost-benefit analysis
- § 2:38 Anti-backsliding provisions

G. PERMIT TRANSFER, MODIFICATION, OR REVOCATION

- § 2:39 Generally
- § 2:40 Statutory rights and restrictions on actions that may affect transfer

III. CONTROL OF POLLUTION FROM NONPOINT SOURCES

- § 2:41 Generally
- § 2:42 The program to regulate nonpoint sources
- § 2:43 State management programs
- § 2:44 Federal grant assistance

IV. LIABILITY AND ENFORCEMENT FRAMEWORK

- § 2:45 Overview

A. LIABILITY

- § 2:46 In general
- § 2:47 Individual and entity liability

B. ENFORCEMENT AUTHORITY

- § 2:48 Generally
- § 2:49 Authorized enforcers
- § 2:50 Citizen action

TABLE OF CONTENTS

- § 2:51 Administrative orders and civil actions: Strict liability
- § 2:52 Defenses to civil liability
- § 2:53 Primary liability provisions
- § 2:54 Criminal liability standards
- § 2:55 Knowing or negligent violations of discharge limits or permit conditions
- § 2:56 Knowing false statements
- § 2:57 Knowing or negligent
- § 2:58 “Knowing endangerment”
- § 2:59 Knowing, unauthorized disclosure of trade secrets

C. PROCEDURES AND PENALTIES

- § 2:60 In general
- § 2:61 Inspection authority and record availability
- § 2:62 Administrative orders and penalties
- § 2:63 Federally assumed enforcement
- § 2:64 Emergency enforcement (imminent and substantial danger)
- § 2:65 Administrative penalties
- § 2:66 Governmental civil penalties
- § 2:67 Citizen suits and private remedies
- § 2:68 Criminal penalties
- § 2:69 List of violating facilities (“blacklist”)

D. REPORTING & RESPONSE OBLIGATIONS IN THE CASE OF “SPILLS” (UNPERMITTED DISCHARGES)

- § 2:70 Overview
- § 2:71 Obligation to report
- § 2:72 Reportable spills
- § 2:73 Who must report and when
- § 2:74 “Whistle-blowers” and other private actors
- § 2:75 Statutory removal fund
- § 2:76 National contingency plan for spill response
- § 2:77 Obligation to prepare a Spill Prevention Control and Countermeasures Plan

E. LIABILITY AND ENFORCEMENT RELATING TO “SPILLS”

- § 2:78 Overview
- § 2:79 Removal costs and private remedies
- § 2:80 Defenses to cost recovery liability
- § 2:81 Application of the third-party conduct defense
- § 2:82 Standards of penalty assessment and other liability
- § 2:83 Abatement of imminent and substantial threat
- § 2:84 Penalties

CHAPTER 3. CLEAN AIR ACT

I. IN GENERAL

A. OVERVIEW

- § 3:1 Introduction

B. INSTITUTIONAL ARRANGEMENTS

- § 3:2 Allocation of authority between EPA and the states
- § 3:3 Air quality control regions
- § 3:4 Goals of SIP and permit programs

II. EPA'S NATIONAL AIR QUALITY STANDARDS AND EMISSION LIMITS

A. IN GENERAL

- § 3:5 In general

B. NATIONAL AMBIENT AIR QUALITY STANDARDS

- § 3:6 Overview
- § 3:7 Identifying criteria pollutants
- § 3:8 Primary and secondary standards
- § 3:9 NAAQS attainment program
- § 3:10 Area/pollutant classifications: ozone, carbon monoxide, particulates
- § 3:11 Political issues relating to the atmospheric ozone NAAQS
- § 3:12 Use of offsets in NAAQS
- § 3:13 SIPs, NAAQS attainment deadlines and SIP revision
- § 3:14 Applying the federal implementation plan in cases of state failure

C. NEW SOURCE PERFORMANCE STANDARDS

- § 3:15 Overview
- § 3:16 Political issues regarding the new source review process
- § 3:17 Identifying industry categories
- § 3:18 Setting emission limits
- § 3:19 Later-adopted standards

D. NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

- § 3:20 Overview
- § 3:21 Current political issues regarding regulation of hazardous air pollutants
- § 3:22 Identifying hazardous air pollutants
- § 3:23 Identifying industry categories
- § 3:24 Setting emission limits
- § 3:25 Duty to prevent, respond to and report accidental releases

E. PREVENTION OF SIGNIFICANT DETERIORATION

- § 3:26 Overview
- § 3:27 Comparing PSD and new source review
- § 3:28 “Clean-air areas”

F. OTHER SUBSTANCES: OZONE-DEPLETING CHEMICALS AND GREENHOUSE GASES

- § 3:29 Generally
- § 3:30 Protection of stratospheric ozone layer
- § 3:31 “Greenhouse gasses,” climate change and the Clean Air Act

TABLE OF CONTENTS

§ 3:32 Acid rain (sulfur dioxide) control

G. STATE/DISTRICT RESPONSIBILITIES

§ 3:33 In General

§ 3:34 State implementation responsibilities—Monitoring

§ 3:35 Exceptional events

III. THE PERMITTING PROCESSES

A. IN GENERAL

§ 3:36 In general

B. CONSTRUCTION AND MODIFICATION PERMIT REQUIREMENTS

§ 3:37 Overview

§ 3:38 Sources subject to the Act's permit requirements: New sources and modifications

§ 3:39 Major sources

§ 3:40 Determining which sources are “major”

§ 3:41 The permit process—Linking new source, “nonattainment” and PSD provisions and efforts at revision

§ 3:42 “Affected units” under the acid rain program

C. OPERATIONAL PERMITS

§ 3:43 In general

§ 3:44 Permits for construction of “new” sources

D. “AREA SOURCES”

§ 3:45 Area sources, in general

§ 3:46 “Area source” designation and the “once in, always in” policy

§ 3:47 Policy Changes

§ 3:48 Defining “area source”

§ 3:49 Applying area-source standards

E. PERMIT APPLICATION AND DECISION

§ 3:50 Generally

§ 3:51 Permit: modifications

§ 3:52 Timing issues: date of first compliance

§ 3:53 Application of MACT and area-permit requirements

§ 3:54 Basic application requirement

§ 3:55 Public availability

§ 3:56 EPA's veto authority; Citizen petitions

F. THE PERMIT: BASIC CONDITIONS

§ 3:57 Generally

§ 3:58 Mandatory provisions

§ 3:59 Permit shield

§ 3:60 General permits

- § 3:61 Specific permit provisions
- § 3:62 Facilities requiring other federal permits
- § 3:63 Basic risk management requirement
- § 3:64 Applicability
- § 3:65 Substantive requirements—In general
- § 3:66 Hazard assessment
- § 3:67 Prevention
- § 3:68 Emergency response
- § 3:69 Documentation and submission of a plan
- § 3:70 Public access to RMP information

G. PERMIT TRANSFER

- § 3:71 Generally
- § 3:72 Direct and indirect changes in ownership of permitted facility

IV. ENFORCEMENT

- § 3:73 Overview

A. POTENTIALLY LIABLE PERSONS

- § 3:74 Generally
- § 3:75 Liabilities that may attach to “any person”

B. STANDARDS OF LIABILITY, DEFENSES AND ADMINISTRATIVE SOLUTIONS

- § 3:76 Generally
- § 3:77 Administrative orders and civil actions
- § 3:78 Liability for negligent or knowing release (“Criminal endangerment”)
- § 3:79 Other criminal conduct under the Act
- § 3:80 Defenses to knowing criminal endangerment

C. EPA’S ENFORCEMENT PROCEDURES AND OPTIONS

- § 3:81 Generally
- § 3:82 Investigative powers—In general
- § 3:83 Inspection, monitoring, and subpoena authority
- § 3:84 Rewards for information
- § 3:85 Orders to compel compliance
- § 3:86 Opportunity to confer in connection with an order
- § 3:87 Compliance schedule
- § 3:88 Enforcement against states or air quality regions—EPA enforcement and construction ban

D. PENALTIES

- § 3:89 Generally
- § 3:90 Civil administrative penalties
- § 3:91 Field citations
- § 3:92 Noncompliance and nonpayment penalties
- § 3:93 Judicial review of administrative penalties
- § 3:94 Remedy violations while continuing to operate and/or transferring the facility

TABLE OF CONTENTS

- § 3:95 Civil enforcement
- § 3:96 Judicial and administrative penalty assessment
- § 3:97 Criminal prosecution
- § 3:98 Emergency enforcement: imminent and substantial endangerment
- § 3:99 “Blacklist” of violating facilities
- § 3:100 Sentencing Guidelines

E. CITIZEN SUITS

- § 3:101 Generally
- § 3:102 Requirements to bring citizen suits
- § 3:103 Citizen access to records
- § 3:104 Penalty fund
- § 3:105 Intervention by EPA

CHAPTER 4. HAZARDOUS WASTE MANAGEMENT: THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

I. IN GENERAL: THE RCRA PROCESS

- § 4:1 Overview of RCRA’s system

A. KEY DEFINITIONS AND CONCEPTS

- § 4:2 Overview: The definitional and conceptual framework
- § 4:3 “Solid waste”
- § 4:4 Identifying a waste as “hazardous”
- § 4:5 Special substances: petroleum products
- § 4:6 Other special substances
- § 4:7 Application of the “derived from” rule in identifying hazardous waste
- § 4:8 Application of the “mixture rule” in identifying hazardous waste
- § 4:9 Controversies regarding the derived-from and mixture rules
- § 4:10 Date on which responsibility attaches for newly listed wastes
- § 4:11 “Disposal”
- § 4:12 The “facility”
- § 4:13 Facilities responsible for RCRA compliance
- § 4:14 “Generators”
- § 4:15 Special provisions for generators of small quantity of hazardous waste
- § 4:16 “Transporters”
- § 4:17 “Treatment, storage and disposal facility” (TSDF)

B. TSDF REGULATION

- § 4:18 Generally
- § 4:19 Current political issues relating to RCRA permitting
- § 4:20 International movement of hazardous waste for commercial purposes
- § 4:21 Coal ash management rule implementation
- § 4:22 “Existing” and “new” TSDFs
- § 4:23 Regulations applicable to all un-closed TSDFs
- § 4:24 Mandatory treatment of previously disposed wastes
- § 4:25 Operational concerns

C. TSDF PERMITS AND PERMIT TRANSFER

- § 4:26 Generally
- § 4:27 Constructing/permitting “new” TSDFs
- § 4:28 Land disposal ban
- § 4:29 Permit transfer and modification
- § 4:30 Corrective action
- § 4:31 Crossovers—Application of other environmental permit processes to landfills

D. INCLUSION OF SPECIFIC “NON-WASTES”

- § 4:32 Generally
- § 4:33 Recycled oil and other recycled hazardous waste used as fuel
- § 4:34 Underground storage tanks
- § 4:35 Underground storage of “regulated substances”
- § 4:36 Regulatory requirements imposed on owners and operators of an underground storage tank
- § 4:37 Cleanup of underground petroleum releases

E. DISPOSAL OF “SOLID WASTE” (NONHAZARDOUS)

- § 4:38 Generally
- § 4:39 State solid waste management plans
- § 4:40 Prohibition on open dumping

II. THE RCRA CLEANUP: RESPONSE TO HAZARDOUS CONTAMINATION

- § 4:41 Generally

A. GENERAL PROCESS AND REQUIREMENTS

- § 4:42 Voluntary or “accelerated” cleanup of contaminated sites
- § 4:43 Mandatory cleanup and other hazard remediation
- § 4:44 Procedures for government compelled cleanup
- § 4:45 Pre-existing land-disposed wastes

B. CIVIL AND CRIMINAL LIABILITY

- § 4:46 In general: Assertion of liability
- § 4:47 Standard for RCRA enforcement procedures
- § 4:48 Standard of liability
- § 4:49 Actual endangerment
- § 4:50 Persons liable
- § 4:51 Administrative orders and civil actions
- § 4:52 Relief available (injunctive relief)
- § 4:53 RCRA criminal liability
- § 4:54 “Knowing endangerment” as an element of liability
- § 4:55 Penalties
- § 4:56 Conspiracy
- § 4:57 Defenses to RCRA criminal liability
- § 4:58 “Whistleblower” protection

C. ENFORCEMENT

- § 4:59 Generally

TABLE OF CONTENTS

- § 4:60 Inspection authority
- § 4:61 Administrative orders
- § 4:62 Hazardous waste management compliance orders
- § 4:63 Monitoring, testing, and reporting
- § 4:64 Underground tank compliance orders
- § 4:65 Corrective action orders
- § 4:66 Government suits (civil action)
- § 4:67 Compliance measures and agreements
- § 4:68 Citizen suits
- § 4:69 Emergency enforcement

III. DATABASES AND RESEARCH TOOLS (SUMMARY)

- § 4:70 General summary of RCRA databases and research tools

IV. TRANSACTIONAL ISSUES (SUMMARY)

- § 4:71 Summary of transactional concerns regarding RCRA

Appendix 4–A. Federal Regulation of asbestos

Appendix 4–B. Federal Regulation of polychlorinated biphenyls (PCBs)

CHAPTER 4A. CLEANUP OF CONTAMINATION: THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERCLA)

I. IN GENERAL: BASIC ELEMENTS OF CERCLA'S CLEANUP REGIME

- § 4A:1 Overview: Components of CERCLA's liability and responsibility framework
- § 4A:2 The Nature, extent and constitutionality of CERCLA's cleanup mandate

II. THE NATIONAL CONTINGENCY PLAN (NCP), NATIONAL PRIORITIES LIST (NPL) AND OTHER MEANS OF SITE IDENTIFICATION

- § 4A:3 The National Contingency Plan and National Priorities List
- § 4A:4 The role of the NCP under CERCLA
- § 4A:5 Identification of cleanup sites—The National Priorities List and other mechanisms
- § 4A:6 Priority sites, state listing deferrals
- § 4A:7 Listing sites designated for action under other federal laws
- § 4A:8 The value and effect of the listing decision
- § 4A:9 Unlisted sites and removal from the list

III. CLEANUP FINANCE PROVISIONS

- § 4A:10 CERCLA's combination of public and private sources of cleanup funding
- § 4A:11 Public financing of cleanups—The Superfund
- § 4A:12 Compelled cleanups conducted at private cost—The “polluters (and others) pay”
- § 4A:13 Cleanup compelled or conducted by government
- § 4A:14 Private cleanup and compulsion

- § 4A:15 Finance elements of “voluntary” cleanup
- § 4A:16 “Necessary” costs

IV. BASIC COMPONENTS AND DEFINITIONS WITHIN THE CERCLA FRAMEWORK

- § 4A:17 An overview of the components of the cleanup framework

A. PHYSICAL ELEMENTS ACTIONS, SUBSTANCES AND SITES

- § 4A:18 “Remedy,” “removal” and “response action”
- § 4A:19 “Release,” “disposal” and use
- § 4A:20 Federally permitted releases and registered pesticides
- § 4A:21 Special exception for “ordinary use” of commercial products—“Releases” of asbestos and radon
- § 4A:22 Releases to municipal sewer systems
- § 4A:23 “Hazardous substance”
- § 4A:24 The “Petroleum exclusion”
- § 4A:25 “Pollutants and contaminants”
- § 4A:26 “Reportable quantities”
- § 4A:27 “Facility” and “site”
- § 4A:28 “Federal facilities”

B. PERSONS AND ENTITIES WHO ARE “POTENTIALLY RESPONSIBLE” FOR CLEANUP

- § 4A:29 “Covered persons” and the categories of “potentially responsible parties” (PRPs)
- § 4A:30 The current “owner/operator” as PRP
- § 4A:31 The “operator” as PRP
- § 4A:32 The “former owner” as PRP
- § 4A:33 Special rules for common carriers and passive governmental owners
- § 4A:34 The “holder of a security interest” as PRP
- § 4A:35 The owner of “contiguous property” as PRP
- § 4A:36 The “bona fide prospective purchaser” as PRP
- § 4A:37 Claiming the bona-fide prospective purchaser protection
- § 4A:38 The “Generator” as PRP
- § 4A:39 Exemption for de micromis PRPs
- § 4A:40 The “Transporter” as PRP
- § 4A:41 The “Arranger for Disposal” as PRP
- § 4A:42 Guarantor liability
- § 4A:43 Exclusion for response action contractors

C. DEFENSES FOR PRPS

- § 4A:44 The basic structure of CERCLA’s liability, in general
- § 4A:45 Inadmissible defenses: supervening causation
- § 4A:46 Causation in multi-site cases
- § 4A:47 Defenses alleging Acts of third parties
- § 4A:48 Defense for “innocent landowners”
- § 4A:49 Equitable defenses
- § 4A:50 Possible application of other statutory defenses
- § 4A:51 Inadvisability of delay in response to PRP letters

TABLE OF CONTENTS

- § 4A:52 Limiting the use of delay as defensive tactic—The restriction on “pre-enforcement review”
- § 4A:53 Special defense applicable to natural resource actions

V. COMPELLING AND PAYING FOR CERCLA CLEANUPS

- § 4A:54 Overview of CERCLA cleanup mandates and payment provisions
 - § 4A:55 Application of CERCLA to cleanups commenced under other federal statutes
- A. STANDARDS OF LIABILITY—BOTH JOINT AND SEVERAL AND STRICT**
- § 4A:56 Special characteristics of CERCLA liability
 - § 4A:57 Strict liability
 - § 4A:58 Joint and several liability and the divisibility of harm
 - § 4A:59 Distinguishing “divisibility” from “allocation” and “contribution”
 - § 4A:60 Allocation
 - § 4A:61 Evidentiary requirements
 - § 4A:62 Governmental liability, including the Federal Tort Claims Act
- B. COSTS AND DAMAGES FOR WHICH THE PRPS ARE RESPONSIBLE**
- § 4A:63 Generally: Actions and limitation of actions
 - § 4A:64 Statutes of limitation and CERCLA—Generally
 - § 4A:65 “Innocence,” PRP status and the CERCLA statute of limitations
 - § 4A:66 Basic elements of reimbursability—NCP consistency issues
 - § 4A:67 Non-recoverable costs—“Necessity”
 - § 4A:68 Nature of claims
 - § 4A:69 Types of response costs that can be recovered
 - § 4A:70 Natural resource damages that can be addressed under CERCLA
 - § 4A:71 CERCLA preclusion of other claims addressing the same contamination
- C. SETTLEMENTS, COST-SHARING AND OTHER AGREEMENTS**
- § 4A:72 Generally
 - § 4A:73 Imminent hazard settlements
 - § 4A:74 Cost-sharing agreements relying on the Superfund
 - § 4A:75 Settlements
 - § 4A:76 Effect of imminent hazard settlement on prps’ ability to seek contribution
 - § 4A:77 The rights and involvement of nonsettling and nonparticipating parties
 - § 4A:78 Effect of settlement on indemnitors, guarantors, and others
 - § 4A:79 Covenants not to sue PRPs
 - § 4A:80 Covenants not to sue prospective purchasers
 - § 4A:81 Public/State roles in enforcement via consent decrees
 - § 4A:82 Effect of state law settlement or state-based claim on CERCLA cost-recovery
 - § 4A:83 *De minimis* and *de micromis* settlements
 - § 4A:84 The process of cleanup: Overview of preliminary and final apportionments of liability
 - § 4A:85 Phase I: Nonbinding (preliminary) allocations of responsibility (NBAR)
 - § 4A:86 Phase II: final apportionment of responsibility

§ 4A:87 Putting it all together: Allocation and contribution in actions involving settling and non-settling PRPs

D. FEDERAL LIENS UNDER CERCLA

§ 4A:88 In general

§ 4A:89 Federal liens

§ 4A:90 Brownfields, tribal lands and natural resources of the U.S

VI. ACTIONS REQUIRED OR ORDERED UNDER CERCLA

§ 4A:91 Overview

A. REPORTING AND OTHER NON-CLEANUP DUTIES

§ 4A:92 Generally

§ 4A:93 Duty to report occurrences that cause or may cause contamination

B. ACTIONS FOR REMEDY OR REMOVAL OF CONTAMINATION

§ 4A:94 Generally

§ 4A:95 Governmental authority to act

§ 4A:96 Scope of EPA's response authority

§ 4A:97 Limitations on types of EPA's response authority

§ 4A:98 Delegation of EPA's cleanup authority to the states

§ 4A:99 Privately conducted or compelled cleanup

C. THE CERCLA CLEANUP PROCESS—SELECTING AND IMPLEMENTING A REMEDY

§ 4A:100 In general: remedy selection and planning

§ 4A:101 Remedial Investigations and Feasibility Studies (RI/FS)

§ 4A:102 Access, inspection and condemnation

§ 4A:103 Data collection

§ 4A:104 Powers of entry

§ 4A:105 Eminent domain

§ 4A:106 Remedy selection

§ 4A:107 Preference for on-site treatment

§ 4A:108 Legally Applicable or Relevant and Appropriate Requirements

§ 4A:109 Cost-effectiveness as an element of remedy selection

§ 4A:110 Waivers based on ARAR standards

§ 4A:111 Involvement of other agencies in remedy selection

§ 4A:112 Statutory cleanup schedules

§ 4A:113 "Imminent Hazard" cleanup orders

§ 4A:114 Presumptions and evidentiary concerns regarding NCP consistency

§ 4A:115 Special provisions regarding contamination of native American lands and natural resources of the U.S

VII. SUITS, COSTS, CLAIMS, CONTRIBUTION AND SECURITY

§ 4A:116 Recovering expenditures, in general

§ 4A:117 Considering the relationship: Contribution and cost recovery

§ 4A:118 Contribution

§ 4A:119 Cost recovery

TABLE OF CONTENTS

- § 4A:120 Timing Restrictions on CERCLA contribution and cost recovery actions
- § 4A:121 Establishing consistency with the NCP in cost recovery actions
- § 4A:122 Statute of limitations and CERCLA's "virtually endless" risk of liability for past contamination
- § 4A:123 CERCLA's impact on the statutes of limitations governing state-law claims based on hazardous substance contamination
- § 4A:124 Site Investigation—Pro and con
- § 4A:125 Damages vs. cost recovery in the context of natural resources of the U.S

VIII. SPECIAL GUIDANCE AND SETTLEMENT

- § 4A:126 In General
- § 4A:127 Administrative interpretation—EPA guidance
- § 4A:128 Administrative arbitration and small Superfund claims
- § 4A:129 Seeking reimbursement from the Superfund

IX. ENFORCEMENT

- § 4A:130 Generally—Integration of CERCLA with other statutory recovery concepts
- § 4A:131 Citizen suits to compel governmental action under CERCLA
- § 4A:132 Civil actions and administrative penalties
- § 4A:133 Criminal penalties
- § 4A:134 Judicial review
- § 4A:135 Jurisdiction and venue
- § 4A:136 Judicial review of cleanup actions of orders
- § 4A:137 Response selection—Standard of review
- § 4A:138 Intervention
- § 4A:139 Nationwide service of process

CHAPTER 5. EMERGENCY PLANNING, HAZARD COMMUNICATION AND ENVIRONMENTAL ASSESSMENT/DECISIONMAKING LAWS

I. IN GENERAL

- § 5:1 Introduction
- § 5:2 Relevance to real estate and business transactions

II. OSHA'S RIGHT-TO-KNOW STANDARD

- § 5:3 Generally
- § 5:4 Basic "hazard communication" requirement and objective
- § 5:5 Obligations imposed on chemical manufacturers, importers, and distributors
- § 5:6 Obligations imposed on employers
- § 5:7 Exemptions
- § 5:8 Preemption of state and local laws
- § 5:9 Enforcement, inspection, penalties and prosecution
- § 5:10 Other important standards
- § 5:11 Standards relevant to hazardous waste operations and emergency response rule

III. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW

- § 5:12 Generally

- § 5:13 Requirements for facilities
- § 5:14 Recent developments regarding EPCRA reporting
- § 5:15 Persons or entities responsible under EPCRA
- § 5:16 Imposition of responsibilities on owners and operators
- § 5:17 Application to federal contractors
- § 5:18 Governmental units and emergency planning
- § 5:19 Regulations affecting privately owned and operated facilities—Emergency planning and notification
 - Community right-to-know
- § 5:21 Scope of regulations affecting privately owned and operated facilities
- § 5:22 Trade secret provisions
- § 5:23 Administrative orders and penalties
- § 5:24 Civil actions and criminal prosecutions
- § 5:25 Citizen suits
- § 5:26 Disease registry

IV. OTHER HAZARD DISCLOSURE AND PLANNING PROVISIONS

- § 5:27 Overview
- § 5:28 The Toxic Substances Control Act (TSCA), and the Residential Lead-Based Paint Hazard Reduction Act (RLPHRA)
- § 5:29 Emergency planning provisions in the federal environmental statutes
- § 5:30 State-level provisions: Release response plans
- § 5:31 California's Safe Drinking Water and Toxic Enforcement Act of 1986

V. ENVIRONMENTAL IMPACT ASSESSMENT AS HAZARDOUS SUBSTANCE PLANNING

- § 5:32 Generally
- § 5:33 Environmental impact assessment and hazardous substance decision-making

VI. MISCELLANEOUS ISSUES

- § 5:34 Overview: Environmental equity and environmental justice
- § 5:35 Environmental equity/environmental justice

CHAPTER 6. STATE ENVIRONMENTAL LAW ISSUES: PROPERTY-BASED LIABILITY AND RESPONSIBILITY PROVISIONS

I. IN GENERAL

- § 6:1 Introduction

II. STATE VERSIONS OF ENVIRONMENTAL RESPONSIBILITY

- § 6:2 Overview

A. STATE LEVEL PRP RESPONSIBILITY LEGISLATION

- § 6:3 In general
- § 6:4 California's Environmental Responsibility Acceptance Act (ERAA)
- § 6:5 ERAA innovation: the “commitment statement”

TABLE OF CONTENTS

§ 6:6 Remedial improvements under the ERAA

B. STATE ADOPTION OF “CERCLA-TYPE” LAWS

- § 6:7 In general
- § 6:8 State laws on PRP liability (“State-level CERCLA-type Laws”)
- § 6:9 Connecticut
- § 6:10 Montana
- § 6:11 In general
- § 6:12 Primary liability provisions in Oregon’s Superfund law
- § 6:13 Ohio’s Voluntary Action Program
- § 6:14 Texas’s Solid Waste Disposal Act

C. ENVIRONMENTAL LIENS AND SUPERLIENS

- § 6:15 Generally
- § 6:16 Connecticut’s superlien
- § 6:17 Massachusetts’ superlien
- § 6:18 New Jersey’s superlien
- § 6:19 New Hampshire’s superlien
- § 6:20 Ohio’s cleanup lien
- § 6:21 Oregon’s cleanup lien
- § 6:22 Arkansas’ cleanup lien
- § 6:23 Tennessee’s cleanup lien
- § 6:24 Texas’ cleanup lien
- § 6:25 Forfeiture and guarantee laws

III. PRE-TRANSFER CLEANUP AND DISCLOSURE LAWS

- § 6:26 Overview
- § 6:27 Federal pre-transfer disclosure requirements

A. NEW JERSEY’S INDUSTRIAL SITE RECOVERY ACT (“ISRA”); SPILL COMPENSATION AND CONTROL ACT (“SPILL ACT”) AND OTHER LAWS WITH PROPERTY-OWNERSHIP-BASED LIABILITY

- § 6:28 New Jersey’s Industrial Site Recovery Act (“ISRA”); Spill Compensation and Control Act (“Spill Act”) and other laws with property-ownership-based liability; Generally
- § 6:29 ISRA’s requirements
- § 6:30 ISRA implementation
- § 6:31 Noncompliance penalties
- § 6:32 The Spill Act
- § 6:33 New Jersey Sanitary Landfill Facility Closure Act and Contingency Fund (Closure Act)

B. CONNECTICUT’S TRANSFER ACT

- § 6:34 Generally
- § 6:35 Pre-transfer requirements
- § 6:36 Noncompliance penalties

C. INDIANA’S RESPONSIBLE PROPERTY TRANSFER LAW

- § 6:37 Generally

- § 6:38 Pre-transfer requirements
- § 6:39 Noncompliance penalties

D. STATE AND LOCAL DISCLOSURE REQUIREMENTS AND DEED RESTRICTIONS

- § 6:40 Generally
- § 6:41 California
- § 6:42 West Virginia
- § 6:43 Pennsylvania
- § 6:44 Minnesota
- § 6:45 Illinois
- § 6:46 Oregon
- § 6:47 Local ordinances
- § 6:48 Adjusting accepted transactional standards

IV. OTHER STATE ENVIRONMENTAL LAWS POTENTIALLY RELEVANT TO TRANSACTIONS INVOLVING HAZARDOUS MATERIALS

- § 6:49 In general
- § 6:50 Other liabilities arising from cleanup
- § 6:51 Extending and clarifying the application of federal water law
- § 6:52 Integrating state and federal permit approvals
- § 6:53 Activity-specific provisions and other direct legislation solutions

CHAPTER 7. TOXIC TORTS

I. GENERAL

- § 7:1 Overview of chapter on toxic torts

II. LIABILITY THEORIES

- § 7:2 Applicable recovery theories
- § 7:3 Relationship between toxic torts and statutory obligations relating to hazardous materials

A. NEGLIGENCE

- § 7:4 Overview of negligence in contamination cases
- § 7:5 Negligence *per se*
- § 7:6 “Loss of property value” as damage caused by negligence or negligence *per se*

B. STRICT LIABILITY

- § 7:7 Application of strict liability in hazardous waste situations
- § 7:8 Abnormally dangerous activity
- § 7:9 Product liability
- § 7:10 Punitive damages

C. NUISANCE

- § 7:11 Application of nuisance liability in hazardous waste situations

TABLE OF CONTENTS

- § 7:12 "Ordinary" nuisance
- § 7:13 Public nuisance
- § 7:14 Application of Public & Private Nuisance Law to contamination liability

D. TRESPASS

- § 7:15 Application of trespass liability in hazardous waste situations
- § 7:16 Trespass by or involving hazardous substances

E. OTHER TORTS AND GENERAL CONCEPTS

- § 7:17 Other torts and concepts relevant to hazardous claims
- § 7:18 Claims based on *res ipsa loquitur*
- § 7:19 The application of other tort theories to cleanup liability situations, in general
- § 7:20 Declaratory claims and Intentional Torts
- § 7:21 Fraud, constructive fraud, misrepresentation, concealment, or nondisclosure of material facts
- § 7:22 Civil conspiracy
- § 7:23 Trespass on land
- § 7:24 Interference with business or economic relationship
- § 7:25 Exception to exclusivity of workers' compensation

III. DEFENSES

- § 7:26 Affirmative defenses in hazardous waste-related toxic tort actions
- § 7:27 Statute of limitations
- § 7:28 Date of discovery
- § 7:29 Contributory or comparative negligence
- § 7:30 Compliance with applicable law
- § 7:31 Assumption of the risk
- § 7:32 State of the art
- § 7:33 Knowing employer
- § 7:34 CERCLA and other federal statutory preemption
- § 7:35 Duplicating federal efforts or recoveries
- § 7:36 Coming to the nuisance

B. FAILURE TO PROVE THE CAUSE OF ACTION

- § 7:37 Relevance of the failure to plead and prove in hazardous materials cases
- § 7:38 Obstacles to proof of causation
- § 7:39 Key concepts: exposure, dose, and response

IV. MULTIPLE DEFENDANTS

- § 7:40 Challenges of multiple defendants in hazardous materials cases

A. APPORTIONMENT OF LIABILITY

- § 7:41 Apportionment of environmental contamination liability
- § 7:42 Alternative liability
- § 7:43 Concert of action
- § 7:44 Enterprise liability
- § 7:45 Market share

B. CONTRIBUTION AND INDEMNITY

- § 7:46 Contribution and indemnity issues in hazardous materials cases
- § 7:47 Offensive collateral estoppel

PART C. APPLICATION TO PARTIES IN TRANSACTIONS

CHAPTER 8. ENVIRONMENTAL CONCERNS OF PROPERTY OWNERS

I. INTRODUCTION

- § 8:1 Overview of the environmental/cleanup liability risks of property ownership

II. APPLYING STATUTORY HAZARDOUS RELEASE LIABILITY TO CONCEPT OF PROPERTY OWNERSHIP

A. IN GENERAL

- § 8:2 Overview of ownership-based liability concepts discussed in the following sections

B. PROPERTY INTERESTS SUBJECT TO LIABILITY

- § 8:3 Theoretical bases for ownership-based liability
- § 8:4 Common law definitions of “owner” and “possessor”
- § 8:5 Ownership terms under federal environmental statutes
- § 8:6 Claiming the bona-fide prospective purchaser (or other) exception from CERCLA liability
- § 8:7 “Owner” vs. “Operator”—The landowner as a “person in charge”
- § 8:8 Owner’s criminal liability

C. OWNERSHIP OF ABANDONED PROPERTY, EQUIPMENT OR HAZARDOUS MATERIALS

- § 8:9 The effectiveness of abandoning property to avoid liability
- § 8:10 Abandonment of real property
- § 8:11 Abandonment of personalty and fixtures
- § 8:12 Common law principles governing abandonment of personalty and fixtures
- § 8:13 Abandonment of fixtures
- § 8:14 Effect of separate ownership

D. OWNERSHIP-BASED FINANCIAL LIABILITY

- § 8:15 Extent (Allocation) of Liability based solely on (present/past) ownership
- § 8:16 Effect of Sale Price, Value addition and other Commercial factors on CERCLA Liability based on (present/past) ownership

E. OTHER BASES OF OWNER LIABILITY

- § 8:17 Landowner as “operator”

TABLE OF CONTENTS

III. ENVIRONMENTAL LIMITATIONS AFFECTING THE RIGHTS OF LANDOWNERS

A. IN GENERAL

§ 8:18 Overview

B. RESTRICTIONS ON LANDOWNER'S ACTIVITIES

§ 8:19 Generally
§ 8:20 Site investigation
§ 8:21 Statutory duties (actual and effective)
§ 8:22 Site investigation as a practical method of liability avoidance
§ 8:23 Mitigation of damages caused by contamination
§ 8:24 Government rights of entry

C. PROTECTING AGAINST FUTURE LIABILITY

§ 8:25 Minimizing the environmental harm of the acts of third parties on landowner's property
§ 8:26 Insurance and financial responsibility

IV. CONCERNS FOR OWNERS OF CONTAMINATED PROPERTY

A. IN GENERAL

§ 8:27 Overview

B. POTENTIAL FOR DAMAGES OTHER THAN CLEANUP COSTS

§ 8:28 Generally
§ 8:29 Adjoining owners and other neighbors and exposed persons
§ 8:30 Constitutional issues
§ 8:31 Other Bases of Liability—Ozone Depletion
§ 8:32 Public nuisance and natural resource liability as additional theories for governmental recovery in hazardous substance contamination cases
§ 8:33 Duty of prevention; Actions causing or affecting contamination
§ 8:34 Special protection governing damage to natural resources and Native American lands
§ 8:35 Practical and transactional significance of natural resources liability
§ 8:36 *[Reserved]*
§ 8:37 Application of CERCLA to natural resource damage wholly incurred prior to 1981
§ 8:38 Natural Resources in CERCLA civil proceedings and claims against the Superfund
§ 8:39 Citizen actions to force exercise of CERCLA's natural resource provisions
§ 8:40 State limitations relating to natural resource damage

C. PRACTICAL AND CONCEPTUAL BASES OF LANDOWNER'S RESPONSIBILITY FOR HAZARDOUS CONDITIONS

§ 8:41 Generally
§ 8:42 Environmental reporting obligations generally
§ 8:43 Landowner's knowledge
§ 8:44 Duty to test or investigate

- § 8:45 Mechanics of reporting
- § 8:46 Timing and manner of reporting or responding to agency requests for information
- § 8:47 Responsibility to conduct, and/or pay for, cleanup, generally
- § 8:48 Voluntary cleanup
- § 8:49 Distinctions between CERCLA other federal statutes requiring environmental response
- § 8:50 Practical concerns—Mandatory cleanup and joint and several liability
- § 8:51 Scope of cleanup
- § 8:52 Recovery of costs, in general
- § 8:53 Availability of private remedy
- § 8:54 Limitations on recovery—Reimbursable costs
- § 8:55 Other liability issues: Citizens' suits and public involvement
- § 8:56 Defenses and statutory protections available to landowner, generally
- § 8:57 Exclusivity of defenses
- § 8:58 CERCLA's "third party" and "innocent landowner" defenses
- § 8:59 Settlement with innocent landowners, "bona fide new purchasers," owners of "contiguous parcels" *de micromis, de micromis* and other low-level contributors
- § 8:60 Apportioning responsibility/liability and contribution, in general
- § 8:61 Restrictions on pre-enforcement review
- § 8:62 Apportionment of responsibility to pay cleanup costs
- § 8:63 Agencies' role in determining apportionment among PRPs
- § 8:64 Statutory treatment of allocation issues
- § 8:65 Substance-specific legislation
- § 8:66 Statutory provisions relating to asbestos
- § 8:67 Effect of substance-specific legislation on property ownership

D. SPECIAL LIABILITY ISSUES FOR GOVERNMENT "LANDOWNERS" AND CLEANUP AND OTHER PROPERTY TRANSACTIONS INVOLVING GOVERNMENT

- § 8:68 Generally
- § 8:69 Defenses relating to the acquisition of property or other activities in the exercise of sovereign powers
- § 8:70 Property acquired by exercise of government power, without "voluntary" action
- § 8:71 Properties voluntarily acquired by government
- § 8:72 Special provisions relating to municipal sewer systems
- § 8:73 Judicial construction of other liabilities and defenses of governmental units acquiring property
- § 8:74 Contamination-related liabilities arising from government activities
- § 8:75 Governmental liability for regulatory activities on contamination sites
- § 8:76 Government liability for contamination on publicly-owned natural resources
- § 8:77 Other governmental operations potentially subject to hazardous-substance liabilities
- § 8:78 Constitutional torts
- § 8:79 Special protections for certain government lands and resources

E. CRIMINAL, ADMINISTRATIVE, AND CIVIL PENALTIES

- § 8:80 Generally

TABLE OF CONTENTS

- § 8:81 Civil penalties
- § 8:82 Landowner's knowledge
- § 8:83 Effect of defenses on contamination-based penalties
- § 8:84 Post-violation remediation
- § 8:85 Reporting as self-incrimination
- § 8:86 Effect of nonparticipation in creation of the hazardous condition on penalty assessments
- § 8:87 Criminal penalties
- § 8:88 Penalties for delay

CHAPTER 9. PURCHASE AND SALE TRANSACTIONS

I. INTRODUCTION

- § 9:1 Overview of the environmental liability risks for purchasers and sellers of property
- § 9:2 Purchaser's Risk

II. TEMPORAL OWNERSHIP AS BASIS OF PURCHASER'S AND SELLER'S RISKS AND LIABILITY

A. IN GENERAL

- § 9:3 Temporal factors affecting ownership-based liability, in general

B. PURCHASER'S LIABILITY

- § 9:4 Transfer of ownership, generally
- § 9:5 Timing questions—When does ownership-based liability attach? And when does it end?
- § 9:6 The option-holder as "owner"
- § 9:7 Use of alternative transactions to avoid acquisition of ownership

C. SELLER'S LIABILITY

- § 9:8 The liabilities remaining with the seller, in general
- § 9:9 Continuing ("virtually unending") potential liability of former owner for contamination on the property
- § 9:10 Post-transaction liability of transferor—Former ownership as a basis of liability
- § 9:11 Seller's ongoing tort liability after sale
- § 9:12 Seller's post-transaction statutory liability for cleanup
- § 9:13 Sale of the property to avoid liability
- § 9:14 "Time of disposal"
- § 9:15 The need for disclosure of known conditions, at the time of sale
- § 9:16 Sale of contaminated property to avoid liability—"Current" versus "former" owner status
- § 9:17 Other potential sources of post-sale liability for seller
- § 9:18 Transactional liabilities of seller and purchaser
- § 9:19 Other bases for seller's continuing liability

D. DISCLOSURE OBLIGATIONS

- § 9:20 Common law and statutory disclosure obligations

- § 9:21 Common law duties of disclosure
- § 9:22 Determining the materiality of information to be disclosed
- § 9:23 Seller's knowledge concerning the site
- § 9:24 Effect of "obviousness" on duty to disclose
- § 9:25 Contractual provisions requiring disclosure
- § 9:26 Statutory disclosure requirements
- § 9:27 Statutes mandating disclosures in transactions
- § 9:28 Disclosure mandates implicit in other statutes
- § 9:29 Radon and other naturally occurring substances and building materials

E. BUYER'S DUTIES AND CONCERNS

- § 9:30 In general—Buyer's interest in avoiding contamination liabilities and complications
- § 9:31 Common law duty of inquiry and investigation
- § 9:32 Statutory gloss on buyer's pre-purchase obligations
- § 9:33 Duty to report or disclose the results of investigation
- § 9:34 Active fraud, misrepresentation, and implied warranty concerning the property

F. ALLOCATION OF ENVIRONMENTAL LIABILITY

- § 9:35 Risk of loss
- § 9:36 Indemnification and contribution

G. EFFECT OF DEFENSES AND SETTLEMENT ON LIABILITY OF PURCHASER AND SELLER

- § 9:37 Overview
- § 9:38 Statutory defenses and exclusions
- § 9:39 Statutes of Limitations
- § 9:40 Exclusions from PRP Status
- § 9:41 Statutory defenses addressing acts or omissions of third parties
- § 9:42 Statutory defense for "innocent purchasers"
- § 9:43 Common requirements for third party and innocent landowner defenses
- § 9:44 The "innocent" landowner or other exempt party as seller
- § 9:45 The "innocent landowner" or "owner of contiguous property" as purchaser
- § 9:46 Settlements, particularly with "innocent" landowners and other *de minimis* contributors
- § 9:47 General *De Minimis* settlement authority
- § 9:48 Statutory authority for settlement with *de minimis* contributors
- § 9:49 Utilising EPA guidance on *de micromis* settlement
- § 9:50 Settlements between EPA and potential purchasers of contaminated property

III. TRANSFERRING PROPERTY WITH KNOWN OR POSSIBLE CONTAMINATION

A. VALUE ISSUES

- § 9:51 Contamination and value—In general
- § 9:52 Valuation and incentives: Protecting green fields by re-using "brownfields"
- § 9:53 Legal Mechanisms Relating to Transferring Contaminated Property for Reuse

TABLE OF CONTENTS

B. ENVIRONMENTALLY DERIVED TRANSACTIONAL RESTRICTIONS

- § 9:54 Transfers of property subject to environmental permits
- § 9:55 Direct regulation of the use and/or transfer of contaminated or industrial property
- § 9:56 Deed restrictions
- § 9:57 Specific statutory prerequisites of transfer
- § 9:58 Transactional and common law restraints on transfer
- § 9:59 Cleanup related consent orders affecting real property to be acquired
- § 9:60 General provisions of cleanup orders affecting real property
- § 9:61 Certainty in cleanup orders affecting real property

C. ASSESSING THE ENVIRONMENTAL RISK/DETERMINING WHETHER THE TRANSACTION CAN GO FORWARD

- § 9:62 Generally
- § 9:63 Environmental risk assessment
- § 9:64 Other regulatory factors affecting transactions in contaminated lands
- § 9:65 Brownfield redevelopment and the brownfields national partnership
- § 9:66 Other legislative assistance to transactions in contaminated property

IV. TRANSACTIONAL AND BUSINESS RESPONSES TO POTENTIAL LIABILITY

A. CONTRACTUAL ALLOCATION

- § 9:67 In general
- § 9:68 Contractual allocation of responsibility for future claims of third parties
- § 9:69 Direct contractual commitment to cleanup
- § 9:70 Contractual Preservation of Claims

B. STRUCTURE OF THE PURCHASE TRANSACTION

- § 9:71 Generally
- § 9:72 Lot splits and sale of partial property interests
- § 9:73 Sales involving fixtures and personal property
- § 9:74 Foreclosure, bankruptcy, and estate sales
- § 9:75 Gifts and bequests

C. OTHER ACTIONS

- § 9:76 Basic prerequisites for protection of any seller and buyer
- § 9:77 Testing and inspection
- § 9:78 Price adjustments
- § 9:79 Reassessment
- § 9:80 Contractual provisions governing post-transaction activities
- § 9:81 Contractual provisions governing pre-existing cleanup-related obligations
- § 9:82 Effect of Sale Price, Value addition, Disclosure issues and other Commercial factors on CERCLA Liability based on (present/past) ownership
- § 9:83 Long-term covenants
- § 9:84 Enforcing environmental covenants against buyer
- § 9:85 Remedies against buyer and remote purchasers

- § 9:86 Retention of an ownership interest
- § 9:87 Securing performance with mortgage, deed of trust or other pledge
- § 9:88 Deed restrictions and repurchase options
- § 9:89 Title insurance
- § 9:90 Environmental opinion letters

CHAPTER 10. SECURED FINANCING AND LENDER LIABILITY

I. INTRODUCTION

- § 10:1 Generally

II. BASES OF LENDER LIABILITY

A. IN GENERAL

- § 10:2 Lender as “owner” under statutory and common law theories

B. WHERE BORROWER IS NOT IN DEFAULT

- § 10:3 Generally
- § 10:4 Exemption for holders of security interests
- § 10:5 Limitation on exemption: lender involvement in operations
- § 10:6 —Judicial interpretation
- § 10:7 —Administrative clarification—The “final rule”
- § 10:8 —1996 revisions
- § 10:9 Purpose of the lender’s interest as “security”
- § 10:10 Personal and intangible property as security
- § 10:11 Government lenders, loan guarantors, and loan purchasers

C. UPON BORROWER’S DEFAULT

- § 10:12 In general
- § 10:13 Foreclosure
- § 10:14 Basic foreclosure issues
- § 10:15 Final rule regarding foreclosure in hazardous material liability cases
- § 10:16 Revisions of EPA’s final rule on foreclosures
- § 10:17 Other foreclosure issues
- § 10:18 Before foreclosure

D. STATUTORY EXEMPTION AND OTHER PROTECTION FOR LENDERS

- § 10:19 Status of secured creditor exemption
- § 10:20 Due diligence and site investigation

III. PRACTICAL EFFECTS OF ENVIRONMENTAL LAWS ON LOAN TRANSACTIONS

- § 10:21 Generally
- § 10:22 Financial condition of the borrower or guarantor
- § 10:23 Effects on the value of security
- § 10:24 Cleanup lien statutes

TABLE OF CONTENTS

- § 10:25 —Cleanup liens of “ordinary” priority
- § 10:26 —“Alternative” liens
- § 10:27 ——Special priority government liens
- § 10:28 ——Priority-altering “superliens”
- § 10:29 Effects on the enforcement of security

IV. USE OF ALTERNATIVE FINANCING TRANSACTIONS

- § 10:30 Generally
- § 10:31 Financing leases
- § 10:32 “Redevelopment” arrangements
- § 10:33 Applying the security interest exemption to “alternative” lending arrangements
- § 10:34 Alternatives to foreclosure
- § 10:35 Accession to full ownership
- § 10:36 Joint ventures

V. PROTECTING THE PARTIES TO A LOAN TRANSACTION

A. IN GENERAL

- § 10:37 Overview

B. STRUCTURE AND INVESTIGATION OF SECURED TRANSACTION

- § 10:38 Selection of funding vehicle and terms
- § 10:39 Investigation
- § 10:40 Valuation and appraisal
- § 10:41 Timing of lender’s site investigation—Prefunding investigation
- § 10:42 —Pre-foreclosure investigation

C. TRANSACTIONAL AND DOCUMENTARY PROTECTIONS

- § 10:43 Generally
- § 10:44 Revisions to the transaction
- § 10:45 —Substitute or additional security
- § 10:46 —Additional conditions or performance by borrower
- § 10:47 Documentary protections
- § 10:48 —Notification to lender of property condition or government or third party claims
- § 10:49 —Limitations on use of the property
- § 10:50 —Rights to enter and inspect
- § 10:51 —Right to require cleanup
- § 10:52 —Indemnity
- § 10:53 —Impounds

D. FINANCING THE ACQUISITION OF CONTAMINATED PROPERTY

- § 10:54 Generally
- § 10:55 Federal programs
- § 10:56 —Grants
- § 10:57 —Loans and guarantees

- § 10:58 —Special conveyances
- § 10:59 —Bonds
- § 10:60 State programs
- § 10:61 Local programs
- § 10:62 Nonprofit organizations

E. ESSENTIAL POST-FUNDING LOAN PROCEDURES

- § 10:63 Loan servicing practices
- § 10:64 Monitoring and transactional activities

CHAPTER 11. REAL ESTATE PROFESSIONALS— BROKERS, MANAGERS, ESCROW AND TITLES SERVICES, APPRAISERS, AND REAL ESTATE ATTORNEYS

I. INTRODUCTION

- § 11:1 Generally

II. REAL ESTATE BROKERS AND SALESMEN

A. IN GENERAL

- § 11:2 Overview

B. AGENCY CONCEPTS AND ENVIRONMENTAL LIABILITY

- § 11:3 Generally
- § 11:4 Basic agency provisions in real estate brokerage
- § 11:5 Duty of disclosure
- § 11:6 Undisclosed dual agency

C. ENVIRONMENTAL ISSUES AFFECTING A BROKER'S TORT AND OTHER LIABILITIES

- § 11:7 Generally
- § 11:8 Liabilities based on transactional duties
- § 11:9 Materiality of information known to broker
- § 11:10 Duty to investigate
- § 11:11 Matters outside the broker's expertise and experience
- § 11:12 Liability as an owner or operator of listed property or an arranger of hazardous waste disposal
- § 11:13 Liabilities based on statutory and regulatory disclosures
- § 11:14 Statutory provisions relating to specific substances
- § 11:15 Statutory provisions for pre-transfer inspection and reporting
- § 11:16 Other statutory bases of liability
- § 11:17 Impact on the agency relationship and the broker's right to commission
- § 11:18 Seller's liability for broker's activities
- § 11:19 Property management generally

D. PROFESSIONAL LICENSING STANDARDS

- § 11:20 Generally

TABLE OF CONTENTS

III. ESCROW, TITLE INSURANCE, AND TITLE SEARCH

- § 11:21 Generally
- § 11:22 Escrow holders, trustees, and other accommodating parties
- § 11:23 Title insurance coverage for potential environmental liens and other charges
- § 11:24 —Basic title operations
- § 11:25 —Title insurance and environmental liability
- § 11:26 Other contractual and tort liability for information provided in preliminary title reports and chain of title searches

IV. INSPECTION AND APPRAISAL SERVICES

- § 11:27 Overview of inspection and appraisal discussion
- § 11:28 Appraisal, in general
- § 11:29 Determining property value
- § 11:30 The valuation process
- § 11:31 Contamination and other liability factors affecting valuation
- § 11:32 Other environmental issues affecting valuation
- § 11:33 Valuation of property for hazardous-substance related litigation or negotiation
- § 11:34 Licensing and certification of appraisers
- § 11:35 Utilization of and reliance on appraisal data
- § 11:36 Appraisal for tax assessment
- § 11:37 Inspection

V. ATTORNEYS

- § 11:38 Liability for the actions taken by client or upon the attorney's advice
- § 11:39 Legal opinions regarding environmental liability in transactions
- § 11:40 Scope of other services provided
- § 11:41 Reporting obligations for lawyers: privilege and other concerns
- § 11:42 Brokers and other parties preparing documents and performing other services

CHAPTER 12. INTERNATIONAL TRANSACTIONS AND ENVIRONMENTAL LIABILITIES

I. INTRODUCTION

- § 12:1 Generally

II. “INTERNATIONAL” LAW

- § 12:2 Basic definitions
- § 12:3 Effect of international law
- § 12:4 Complying with international environmental law
- § 12:5 Utilizing international law of the environment

III. DOMESTIC LAW OF FOREIGN COUNTRIES

- § 12:6 Generally
- § 12:7 Regulatory approach and uncertainty
- § 12:8 Due diligence requirements

- § 12:9 Environmental impact assessment
- § 12:10 Utilization of local counsel and experts
- § 12:11 Finding and evaluating the law
- § 12:12 Future changes

IV. “PRIVATE” LAW

- § 12:13 Generally

V. TRADE LAW AND TRADE BARRIERS

- § 12:14 Generally
- § 12:15 Terminology
- § 12:16 Environment-based barriers to trade

VI. FOREIGN INVESTMENT IN UNITED STATES PROPERTY

A. IN GENERAL

- § 12:17 Overview

B. LIABILITY ISSUES IN TRANSACTIONS INVOLVING FOREIGN INVESTORS

- § 12:18 Generally
- § 12:19 The effect of environmental laws on foreign investors
- § 12:20 Transacting business with foreign investors
- § 12:21 “Offshore” investing
- § 12:22 Qualification to do business in state jurisdictions and other state legislation

C. DISCLOSURE REQUIREMENTS AFFECTING FOREIGN INVESTORS IN U.S. PROPERTY AND BUSINESSES

- § 12:23 Generally
- § 12:24 Basic disclosure requirements
- § 12:25 —Agricultural Foreign Investment Disclosure Act
- § 12:26 —International Investment and Trade in Services Survey Act
- § 12:27 —Property-related tax legislation
- § 12:28 —Other statutes
- § 12:29 Persons obligated to disclose
- § 12:30 Specific information disclosed and confidentiality matters

VII. POSTSCRIPT: US STATUTORY LIABILITY OUTSIDE THE US

- § 12:31 General notes regarding applying the US statutory cleanup liability beyond the US

CHAPTER 13. ISSUES AFFECTING SECURITIES AND SYNDICATED INVESTMENTS

I. INTRODUCTION

- § 13:1 Generally

TABLE OF CONTENTS

II. DISCLOSURE OF ENVIRONMENTAL LIABILITIES AND RISKS

A. IN GENERAL

§ 13:2 Overview

B. PENDING OR THREATENED LITIGATION OR PROCEEDINGS

§ 13:3 Generally

§ 13:4 SEC interpretation

§ 13:5 “Proceeding”

§ 13:6 “Incidental to the issuer’s business”

§ 13:7 “Material”

C. MATERIAL ISSUES AFFECTING INVESTORS’ PROFITABILITY OR EXPECTATIONS

§ 13:8 Generally

§ 13:9 Material risk

§ 13:10 Practical concerns in disclosing environmental risks

§ 13:11 Statutory adjustment—The Sarbanes-Oxley Act

D. ENVIRONMENTAL DISCLOSURE IN AUDIT LETTERS

§ 13:12 Generally

§ 13:13 Loss contingency

§ 13:14 Disclosure of non-litigation matters

E. VALUATION OF CONTAMINATED OR POSSIBLY CONTAMINATED ASSETS

§ 13:15 Generally

III. SECURITIES LAW ASPECTS OF POST-FORMATION ENVIRONMENTAL LIABILITY

§ 13:16 Generally

§ 13:17 New investors

§ 13:18 Existing investors

§ 13:19 —Assessment

§ 13:20 —Loans by investors and dealing in mortgage-backed securities

IV. ENVIRONMENTAL PROTECTIONS IN SYNDICATED INVESTMENT PROGRAMS

§ 13:21 Generally

§ 13:22 Investigation by the issuer

§ 13:23 Mechanics of disclosure

§ 13:24 Timing of investigation in the context of offerings of securities

§ 13:25 Investor diligence

§ 13:26 Disclosure vs. availability

CHAPTER 14. CORPORATE LIABILITY AND THE LIABILITY OF BUSINESS ENTITIES, TRUSTEES, AND FIDUCIARIES

I. INTRODUCTION

- § 14:1 Generally
- § 14:2 Corporate Lifespans

II. LIABILITY OF SHAREHOLDERS, PARENT CORPORATIONS, AND OTHER BENEFICIAL OWNERS

- § 14:3 Generally
- § 14:4 Statutory obligations imposed directly on majority shareholders
- § 14:5 Indirectly imposed obligations—Derivative liability and “operator” liability
- § 14:6 —Derivative liability
- § 14:7 Corporate Identity and “Doing Business As”
- § 14:8 Shareholder liability for corporate actions—“Piercing the corporate veil”
- § 14:9 The veil between parent and subsidiary corporations
- § 14:10 Indirectly imposed obligations—Derivative liability—Other state law bases for derivative-type liability
- § 14:11 Direct liability as an “operator” of the corporation’s facilities
- § 14:12 Liability of the corporation due to knowledge of harmful conditions
- § 14:13 Government information-gathering powers
- § 14:14 Obtaining Compensation for Cleanup
- § 14:15 The corporation’s, officers’ or issuer’s liability to shareholders

III. LIABILITY OF CORPORATE AND INDIVIDUAL SUCCESSORS

- § 14:16 Generally
- § 14:17 Stock purchases, mergers, and consolidations
- § 14:18 Asset purchase
- § 14:19 Asset transfers, dissolutions, and other transactional pitfalls
- § 14:20 Bulk sales laws
- § 14:21 Fraudulent conveyances
- § 14:22 Corporate dissolution
- § 14:23 Partnerships

IV. ACTS OF DIRECTORS, OFFICERS, AND EMPLOYEES

A. IN GENERAL

- § 14:24 Overview

B. INDIVIDUAL LIABILITY

- § 14:25 Bases of asserting civil and criminal liability against corporate actors
- § 14:26 Civil Environmental Liability
- § 14:27 Individual criminal environmental liability
- § 14:28 Individual liability for corporate transactions
- § 14:29 Indemnification of corporate officers
- § 14:30 Directors’ liability
- § 14:31 Liability to partners

TABLE OF CONTENTS

C. CORPORATE LIABILITY FOR UNAUTHORIZED ACTS OF DIRECTORS, OFFICERS AND EMPLOYEES

- § 14:32 Civil liability
- § 14:33 Criminal liability
- § 14:34 Corporate “knowledge” based on individual knowledge or intent
- § 14:35 Due diligence as a defense to criminal or civil liability for the acts of corporate employees
- § 14:36 Whistleblower violations and other situations involving employees

V. TRUSTS, FIDUCIARIES, HEIRS AND BENEFICIARIES

- § 14:37 Generally
- § 14:38 Fiduciary’s liabilities
- § 14:39 Liability of the trust
- § 14:40 Beneficiary liability
- § 14:41 EPA’s interpretation of the trust liability

VI. TRANSACTIONAL PROTECTIONS FOR BUSINESS ENTITIES, THEIR EMPLOYEES, AND SUCCESSORS

- § 14:42 Generally

A. PARTICULAR TRANSACTIONAL PROVISIONS

- § 14:43 Generally
- § 14:44 Warranties
- § 14:45 Limiting the scope of corporate acquisitions

B. LONGER-TERM MEASURES

- § 14:46 Corporate compliance plans and other environmental procedures and protocols
- § 14:47 General statutory provisions affecting compliance programs
- § 14:48 Environmental provisions affecting compliance programs
- § 14:49 Disclosure by corporations
- § 14:50 Maintenance of the corporate structure
- § 14:51 Retention and destruction of corporate records

VII. CORPORATE SELF-AUDITING AND THE “SELF-AUDITING PRIVILEGE”

A. IN GENERAL

- § 14:52 Overview

B. NON-MANDATORY INCENTIVES FOR CORPORATE AUDITING

- § 14:53 Incentives (corporate and individual) to broaden corporate auditing
- § 14:54 Balancing the risks of auditing
- § 14:55 —“Good commercial and business practices”—A change in standards
- § 14:56 —Brownfields: a change in incentives

C. TOWARD AN “ENVIRONMENTAL AUDIT PRIVILEGE”

- § 14:57 Generally

- § 14:58 EPA's "audit policy"
- § 14:59 Benefits offered under the audit policy
- § 14:60 "Audit" and "due diligence"
- § 14:61 Non-privileged incentives (protections and benefits) for environmental auditing
- § 14:62 Limitations on incentive provisions
- § 14:63 Conditions of qualification for incentives
- § 14:64 On discovery
- § 14:65 In the course of correcting the situation
- § 14:66 Other conditions—Limitations on the availability of the policy
- § 14:67 Information "privilege"
- § 14:68 State environmental audit privilege legislation
- § 14:69 Audit privilege concepts under state law

CHAPTER 15. CONCERNS OF LANDLORDS AND TENANTS

I. INTRODUCTION

- § 15:1 Generally

II. LANDLORD AND TENANT AS OWNERS, OPERATORS, POSSESSORS, OR PERSONS IN CHARGE

- § 15:2 Generally
- § 15:3 Landlords
- § 15:4 Tenants
- § 15:5 Subleases
- § 15:6 Special kinds of lease relationships

III. COMMON LAW DUTIES AND LIABILITIES OF LANDLORD AND TENANT

- § 15:7 Generally
- § 15:8 Use restrictions
- § 15:9 Tort liability, in general
- § 15:10 Landlord's responsibility for hazardous conditions
- § 15:11 Waste
- § 15:12 Liabilities and lease provisions regarding indoor-air pollution

IV. ENVIRONMENTAL STATUTES GOVERNING LEASE TRANSACTIONS

- § 15:13 Generally
- § 15:14 Disclosure provisions, in general
- § 15:15 Notice of tenant's activities and discoveries
- § 15:16 Landlord's disclosures
- § 15:17 Pre-transfer requirements
- § 15:18 Use restrictions

V. LIABILITY PROTECTIONS FOR LANDLORD AND TENANT

- § 15:19 Generally

TABLE OF CONTENTS

- § 15:20 Lease provisions as liability protections, in general
- § 15:21 Allocating environmental obligations
- § 15:22 Revisions and new indemnification/liability provisions in light of environmental obligations
- § 15:23 Other lease terms affected by environmental issues
- § 15:24 Rental adjustments and other provisions tied to lease valuation
- § 15:25 Abandonment and unilateral termination
- § 15:26 Property management practices

CHAPTER 16. CONSTRUCTION, DEVELOPMENT AND OTHER ACTIVITIES

I. INTRODUCTION

- § 16:1 Applying hazardous substance liabilities and responsibilities to construction and other contractors

II. LAND USE RESTRICTIONS

- § 16:2 Interaction of hazardous substance liability with the land-use and permitting processes

A. LAND USE RESTRICTIONS INVOLVING CONTAMINATION OR HAZARDOUS WASTE

- § 16:3 How hazardous materials and contamination arise in land-use processes
- § 16:4 Hazardous substance decision-making: Siting of hazardous waste facilities
- § 16:5 Proposals regarding use of contaminated lands
- § 16:6 Regulation of specific activities or properties to protect lands, species or land uses
- § 16:7 Projects requiring permits under community and area land-use planning
- § 16:8 Projects in areas subject to federal wetlands protection
- § 16:9 Floodplain restrictions
- § 16:10 Stormwater runoff
- § 16:11 General legislation requiring consideration of environmental impacts
- § 16:12 Relationship between environmental permits and general land use legislation
- § 16:13 Less direct statutory restrictions—Endangered Species Act

B. THE LAND USE DECISION

- § 16:14 Cleanup as an exaction or condition of development approval
- § 16:15 Particular uses—Agriculture
- § 16:16 Environmental justice and environmental equity

C. HAZARDOUS-SUBSTANCE PERMITS AS TAKINGS

- § 16:17 CERCLA orders and other environmental permits as constitutional “takings”

III. LIABILITY OF PARTIES TO A CONSTRUCTION CONTRACT

- § 16:18 Contractors’ and developers’ need to determine responsibility for contamination issues

- § 16:19 Contractor as “owner” or “possessor”
- § 16:20 Owner’s liability for acts of contracting parties
- § 16:21 Governmental contracting and oversight authority
- § 16:22 Environmental impact statements: Consideration of the possible environmental consequences of construction activities

IV. HAZARDOUS SUBSTANCE LIABILITY BASED ON CONSTRUCTION ACTIVITIES

A. IN GENERAL

- § 16:23 Primary sources of hazardous substance liability based on construction activities
- § 16:24 Risks and liabilities that may arise when contractor does not intend to use or interact with hazardous substances

B. UPON DISCOVERY OF HAZARDOUS SUBSTANCES

- § 16:25 Primary obligations when construction or other work uncovers contamination
- § 16:26 Obligation to stop work
- § 16:27 Reporting obligations
- § 16:28 Disclosure to third parties

C. CONSTRUCTION OR CLEANUP WORK AFTER AWARENESS OF HAZARDOUS SUBSTANCES

- § 16:29 The legal climate associated with cleanup or other activities on contaminated sites
- § 16:30 Necessity of cleanup
- § 16:31 Remedy selection and justification
- § 16:32 Implementing construction activities after discovery—The risk of “exacerbating” the situation
- § 16:33 The contractor as “transporter” of waste or “arranger” of waste disposal
- § 16:34 Statutory requirements applicable to the contractor as “transporter” or “arranger”
- § 16:35 Cross-media pollution concerns in transporting waste and/or arranging for disposal
- § 16:36 Worker safety
- § 16:37 Potential CERCLA liability
- § 16:38 Practical impact of environmental compliance
- § 16:39 Contractor’s cleanup activities—In general
- § 16:40 Potential for contractor’s cleanup costs and activities to be reimbursable
- § 16:41 Inspection and testing contractors
- § 16:42 Payment issues in cleanup contracts
- § 16:43 Faulty cleanups
- § 16:44 Powers, exemptions and indemnities of “response action contractors”
- § 16:45 Regulation of government agreements with cleanup contractors

D. USE OF HAZARDOUS SUBSTANCES IN CONSTRUCTION

- § 16:46 Overview of liability issues addressed in the following sections
- § 16:47 Hazardous waste
- § 16:48 Emissions from hazardous building materials

TABLE OF CONTENTS

- § 16:49 Products liability
- § 16:50 Spills and other accidental releases
- § 16:51 Hazardous materials brought to, used on, or removed from site by contractor

E. OTHER ENVIRONMENTAL PERMITS

- § 16:52 Other environmental permits may be needed

V. SPECIAL PROBLEMS FACING DESIGN PROFESSIONALS

- § 16:53 Hazardous material concerns of project design

VI. SPECIAL PROBLEMS FACING ENVIRONMENTAL INSPECTORS AND CONSULTANTS

- § 16:54 Inspector/consultant responsibility for hazardous materials
- § 16:55 Inspectors
- § 16:56 Environmental consultants' liabilities and business risks
- § 16:57 Environmental consultants—Reporting issues
- § 16:58 —Authorization to act
- § 16:59 Liability impacts of the utilization of environmental reports

VII. TRANSACTIONAL PROTECTIONS IN DEVELOPMENT-RELATED ACTIVITIES

- § 16:60 Addressing hazardous substance liabilities transactionally
- § 16:61 Documentary provisions
- § 16:62 Negotiation with environmental consultants and other experts
- § 16:63 Communication of risks, hazards, and discoveries

CHAPTER 17. TAX-RELATED CONSIDERATIONS IN ENVIRONMENTAL ACTIONS AND REMEDIES

I. INTRODUCTION

- § 17:1 Generally

II. PROPERTY DAMAGE AND OTHER LOSSES AND EXPENSES

- § 17:2 Generally
- § 17:3 Casualty loss
- § 17:4 Involuntary conversion
- § 17:5 Abandonment
- § 17:6 Special tax provisions affecting environmentally detrimental activities

III. COSTS OF ENVIRONMENTAL INVESTIGATION, CLEANUP, AND POLLUTION CONTROL

- § 17:7 Generally
- § 17:8 Characterization of remedial expenditures and litigation costs
- § 17:9 Special treatment of pollution control expenditures
- § 17:10 Timing of deductions: “Economic performance”
- § 17:11 Money payments

- § 17:12 Obligation to provide services or property
- § 17:13 Application to CERCLA cleanups
- § 17:14 Use of other entities for cleanup
- § 17:15 [Reserved]
- § 17:16 Deductibility of fines, penalties, fees, costs, and assessments

IV. TAX IMPLICATIONS OF CERCLA SETTLEMENTS

A. IN GENERAL

- § 17:17 Background
- § 17:18 Overview
- § 17:19 “Economic performance”: The need for settlement fund arrangements
- § 17:20 CERCLA settlements and economic performance
- § 17:21 DSFs and QSFs and the distinction between them
- § 17:22 Operation of DSF/QSF mechanism
- § 17:23 Tax effects of the use of settlement funds
- § 17:24 The elements of DSFs and QSFs
- § 17:25 —Designated settlement funds (DSFs)
- § 17:26 —Qualified settlement funds (QSFs)

B. SPECIFIC REQUIREMENTS OF THE FUND

- § 17:27 Generally
- § 17:28 Establishment
- § 17:29 —Nature of authority establishing the fund
- § 17:30 —Continuing jurisdiction
- § 17:31 Claims covered
- § 17:32 The resolve or satisfy requirement
- § 17:33 Code and regulatory requirements
- § 17:34 CERCLA settlements and “finality”
- § 17:35 “Current claim”
- § 17:36 Language in settlement agreements
- § 17:37 Future discoveries as “remote obligations”
- § 17:38 Date of establishment/date of economic performance
- § 17:39 Purpose of the fund
- § 17:40 Acceptance of non-qualified payments
- § 17:41 Acceptance of partial interests in transferred property
- § 17:42 Separate administration
- § 17:43 Segregation of funds
- § 17:44 Election

C. “QUALIFIED PAYMENTS”

- § 17:45 Generally
- § 17:46 Basic requirements
- § 17:47 Specific requirements compared
- § 17:48 “Transferor”
- § 17:49 “Related person”
- § 17:50 “Pursuant to court order”
- § 17:51 Irrevocability
- § 17:52 Use of stock and debt
- § 17:53 Provisions affecting the deductibility of qualified payments

TABLE OF CONTENTS

- § 17:54 Use of excluded insurance proceeds in qualified transfer
- § 17:55 Basis of property transferred

D. SETTING UP A QSF

- § 17:56 Checklist of settlement fund requirements

E. OTHER SETTLEMENT MECHANISMS

- § 17:57 Settlements utilizing other types of mechanisms and entities
- § 17:58 Funding contested liabilities
- § 17:59 Asserted liability
- § 17:60 Property transferred
- § 17:61 Existence of a dispute
- § 17:62 Current deduction

V. TAX PROVISIONS RELATING TO SOLID WASTE DISPOSAL SITE CLOSURE

- § 17:63 Generally

VI. PROPERTY TAX MATTERS

- § 17:64 Generally
- § 17:65 Taxation of brownfields redevelopment activities

VII. TAXATION OF INSURANCE PROCEEDS

- § 17:66 Generally
- § 17:67 Tax benefit rule
- § 17:68 Damages
- § 17:69 Reimbursement
- § 17:70 Payor, recipient and “conduit”
- § 17:71 Allocation of recovery
- § 17:72 Deemed distributions
- § 17:73 Effect of insurance provisions of QSF regulation

VIII. MISCELLANEOUS TAX-RELATED POINTS

- § 17:74 Liability of purchaser in a tax sale

PART D. METHODS OF LIMITING LIABILITY IN REAL ESTATE AND BUSINESS TRANSACTIONS

CHAPTER 18. PRE-TRANSACTIONAL ENVIRONMENTAL RISK ASSESSMENT, AUDITING, AND DUE DILIGENCE INVESTIGATION

I. INTRODUCTION

- § 18:1 Overview of assessment, auditing and due diligence
- § 18:2 Post-2016 “Regulatory Rollbacks” relevant to environmental issues in transactions

II. FEDERAL AND ASTM VOLUNTARY STANDARDS FOR PRE-TRANSACTION INQUIRY

§ 18:3 In general

A. FEDERAL AND STATE LEGISLATION

§ 18:4 Generally

B. INDUSTRY PRACTICES PRIOR TO 2005

§ 18:5 Generally

C. THE EPA RULE AND ASTM STANDARDS

§ 18:6 Background

§ 18:7 Transaction screen

§ 18:8 Environmental site assessment under the ASTM standard—In general

§ 18:9 Phase I: Record review

§ 18:10 Phase I: Site reconnaissance

§ 18:11 Phase I: Owner/occupant interviews

§ 18:12 Gaps in the assessment data

§ 18:13 Preparation/evaluation of the site assessment report

III. ISSUES AND CONCERNs REGARDING DUE DILIGENCE AND AAI

§ 18:14 Due diligence and AAI

§ 18:15 Potential liability risks from the conduct of an investigation

§ 18:16 The possibility of, or need for, additional inquiry

§ 18:17 Timing issues

§ 18:18 Information issues—Official and unofficial sources

§ 18:19 Privacy

§ 18:20 On-line sources

IV. KNOWLEDGE FACTORS AND INDICATORS

§ 18:21 Generally

§ 18:22 Means and indicators of assumption of the risk

§ 18:23 Involved parties and their interests

§ 18:24 Indirectly involved “parties”

§ 18:25 Site value

A. THE REGULATORY RECORD

§ 18:26 Regulatory status of the target site

§ 18:27 Regulatory status of NPL sites

§ 18:28 Regulatory status of federal facilities

§ 18:29 Regulatory status of department of defense facilities

§ 18:30 Regulatory status of department of energy sites

§ 18:31 Brownfield programs

§ 18:32 Extending the investigation to property and facility management practices

§ 18:33 Extending the investigation to enforcement actions and tort lawsuits

§ 18:34 Use of questionnaires to facilitate data collection

TABLE OF CONTENTS

- § 18:35 Special sources of information—Securities and Exchange Commission (“SEC”)
- § 18:36 —Department of Transportation (“DOT”)
- § 18:37 Other possible federal agency sources

B. QUESTIONS REGARDING “GOOD COMMERCIAL PRACTICE” IN PRELIMINARY INVESTIGATIONS

- § 18:38 Generally
- § 18:39 Review of compliance records
- § 18:40 Document review—Enforcement proceedings and damages litigation

V. FOLLOW-UP AND MONITORING

- § 18:41 Follow-up inspection and soil and groundwater sampling and analysis (“Phase II”)
- § 18:42 Dealing with the data
- § 18:43 Environmental audits and transactions

APPENDIX 18-A. Principal EPA Offices

APPENDIX 18-B. Sample FOIA Letter

APPENDIX 18-C. A Sampler of Internet Sites Useful to Environmental Professionals

CHAPTER 19. STRUCTURE OF TRANSACTION: DOCUMENTARY PROTECTIONS AND SETTLEMENTS

I. INTRODUCTION

- § 19:1 Introduction

II. REVISIONS TO THE TRANSACTION

- § 19:2 Revisions to the transaction: In general
- § 19:3 Reformatting the transaction
- § 19:4 Scope of acquisition or obligation
- § 19:5 Limiting the transaction to personal property
- § 19:6 Property interests acquired—Real property
- § 19:7 Acquisition of lesser interests
- § 19:8 Services performed

III. SPECIFYING THE RIGHTS AND DUTIES OF THE PARTIES

A. IN GENERAL

- § 19:9 Specifying the rights and duties of the parties: In general

B. ALLOCATION OF DUTIES AND COSTS OF REMEDIAL MEASURES

- § 19:10 Prevention of hazardous conditions
- § 19:11 Allocating remedial costs
- § 19:12 Allocation mechanisms
- § 19:13 Definition of “costs” allocated
- § 19:14 Risk allocation provisions

§ 19:15 “Federal common law” standards for liability apportionment

C. VERIFICATION OF PERFORMANCE

§ 19:16 Verification of performance: Generally

§ 19:17 Standards

§ 19:18 Methods of verification

§ 19:19 Other factors

IV. PROTECTIONS AGAINST DEFAULT OR TERMINATION

A. IN GENERAL

§ 19:20 Protections against default or termination: Overview

B. ISSUES COMMON TO ALL PROTECTIVE MEASURES

§ 19:21 Common issues: In general

§ 19:22 Duration

§ 19:23 Representations and warranties

C. RIGHTS OF INSPECTION AND “AS-IS” CLAUSES

§ 19:24 Inspection and “as-is” clauses: Generally

§ 19:25 Attempting to avoid statutory reporting obligation

§ 19:26 Contractual treatment of the parties’ obligation to report

D. BREACH, TERMINATION AND REMEDIES

§ 19:27 Breach, termination and remedies: Generally

§ 19:28 Option to terminate

§ 19:29 Remedial options, generally

§ 19:30 Keeping the contract in force

E. INDEMNITIES AND OTHER GUARANTEES

§ 19:31 Indemnities and guarantees: Generally

§ 19:32 Drafting issues

§ 19:33 Full indemnity

§ 19:34 Inclusion and trigger

§ 19:35 Cautionary example

§ 19:36 Structure of payment obligations

§ 19:37 Escrow arrangements, contractually required insurance and “institutional guarantors”

§ 19:38 Effect of indemnification arrangements on liability

§ 19:39 Enforcement of indemnities between their parties

§ 19:40 Value of indemnification arrangements in the environmental context

§ 19:41 Releases

§ 19:42 Release specificity

§ 19:43 Effect of releases on non-parties

V. JUDICIAL AND ADMINISTRATIVE SETTLEMENTS AND REOPENERS

§ 19:44 Judicial and administrative settlements and reopeners: Overview

TABLE OF CONTENTS

- § 19:45 Settlement authority in general
- § 19:46 Discretionary covenants not to sue
- § 19:47 EPA “assurances”
- § 19:48 Specific requirements of natural-resource-related covenants
- § 19:49 Challenges to settlement

CHAPTER 20. POST-TRANSACTION LIABILITY REDUCTION: INSURANCE; PLANNING; AUDITING; BANKRUPTCY; ABANDONMENT; DISSOLUTION; COMPELLING CLEANUP

I. INTRODUCTION

- § 20:1 Overview of post-transaction efforts such as insurance, auditing, bankruptcy, management planning, and other measures

II. INSURANCE AGAINST ENVIRONMENTAL LIABILITY

- § 20:2 The role of insurance in environmental liability situations, in general
- § 20:3 Coverage issues
- § 20:4 The insured
- § 20:5 Damages and their discovery
- § 20:6 Punitive damages
- § 20:7 Deductibles, policy limits and the duty to defend
- § 20:8 Limitations on environmental liability insurance coverage
- § 20:9 Limitations in pollution coverage
- § 20:10 “Absolute” pollution exclusion
- § 20:11 Use of insurance proceeds in settlement of CERCLA cases
- § 20:12 “Occurrence,” “incident,” and subrogation of claims against the superfund
- § 20:13 Brownfield redevelopment insurance concerns

III. MANAGEMENT PRACTICES

A. IN GENERAL

- § 20:14 Overview
- § 20:15 Extending the breadth of environmental management to non-industrial facilities

B. ENVIRONMENTAL AUDITING

- § 20:16 Generally
- § 20:17 Basic resources and guidance on audits and audit decision-making
- § 20:18 Initial consideration—The need to audit
- § 20:19 Setting—The scope of the audit
- § 20:20 Procedures and confidentiality: The move toward an “audit privilege”
- § 20:21 Responding to the audit
- § 20:22 Inspection process
- § 20:23 Basic steps taken upon discovery of contamination
- § 20:24 Step 1—Information gathering
- § 20:25 Step 2—Response selection
- § 20:26 Step 3—Warnings to nearby persons
- § 20:27 Step 4—Physical response activities

- § 20:28 Step 5—Inclusion of other PRPs in the remedial process
- § 20:29 Step 6—Agency approval
- § 20:30 Other environmental liabilities arising out of cleanup

C. BUSINESS POLICIES AND PRACTICES

- § 20:31 In general
- § 20:32 Environmental policies and protocols
- § 20:33 Employee-related policies and practices—Whistleblowers and other discontented insiders

IV. ABANDONMENT, BANKRUPTCY, AND CORPORATE DISSOLUTION

A. IN GENERAL

- § 20:34 Overview
- § 20:35 Abandonment

B. BANKRUPTCY

- § 20:36 Generally
- § 20:37 Initiating bankruptcy when faced with environmental liability
- § 20:38 Environmental claimants: assertion of environmental claims against the bankrupt estate
- § 20:39 After discharge: the bankrupt as environmental claimant
- § 20:40 Priority and the automatic stay with regard to environmental claims
- § 20:41 Basic rules of dischargeability of environmental liabilities
- § 20:42 Other dischargeability issues
- § 20:43 Exemptions from discharge
- § 20:44 Dischargeability of environmental penalties
- § 20:45 Special issues regarding discharging environmental debts in Chapter 11 reorganizations
- § 20:46 Notice as a prerequisite of discharge
- § 20:47 Environmental issues in the marshalling and disposition of estate assets
- § 20:48 Environmental permits as assets of the estate
- § 20:49 Abandonment of contaminated property
- § 20:50 Transactions involving bankrupt estates
- § 20:51 “Responsive” Bankruptcy—CERCLA settlement involving a Chapter 11 Debtor
- § 20:52 Potential liability of the bankruptcy trustee
- § 20:53 Priority of payment of creditors of the estate
- § 20:54 Code provisions regarding priority
- § 20:55 “Administrative priority”
- § 20:56 Effect of contamination liability on secured-lien priority
- § 20:57 Federal priority outside of the Bankruptcy Act
- § 20:58 CERCLA settlements and reimbursements in bankruptcy settings

C. DISCARDING THE CORPORATE ENTITY

- § 20:59 Generally
- § 20:60 Primary bases for ignoring corporate dissolution in hazardous substance liability cases
- § 20:61 Instances in which corporate dissolution may still provide protection

TABLE OF CONTENTS

§ 20:62 Practical application of *Distler*

V. CO-LIABILITY AND THE PURSUIT OF RESPONSIBLE PARTIES

- § 20:63 Generally
- § 20:64 Negotiation of consent decrees
- § 20:65 Natural resource reopeners
- § 20:66 Unknown information

PART E. SAMPLE PROVISIONS

CHAPTER 21. INTRODUCTION TO SAMPLE PROVISIONS

- § 21:1 Introduction
- § 21:2 Other documentary concerns
- § 21:3 Parties to the transaction
- § 21:4 Level of detail and specificity
- § 21:5 Addressing the prospect of changes in the law
- § 21:6 Governing law
- § 21:7 Specific documentary drafting objectives
- § 21:8 Specific documentary objectives—Attributes of Ownership

APPENDIX 21-A. Sample Provisions Group 1: Basic Environmental Provisions in Transfers Involving Real Property (Sales, Leases, Corporate Acquisitions/Mergers)

APPENDIX 21-B. Sample Provisions Group 2: Provisions Relating to Ongoing Obligations (Leases and Post-Closing Covenants)

APPENDIX 21-C. Sample Provisions Group 3: Special Provisions for Secured and Unsecured Financing Transactions

APPENDIX 21-D. Sample Provisions Group 4: Access to Property for Purposes of Environmental Response, Monitoring or Investigation

APPENDIX 21-E. Sample Provisions Group 5: Environmental Audits

Table of Laws and Rules

Table of Cases

Index