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Environmental Issues in the Landlord-Tenant Relationship

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I. [9.1] INTRODUCTION

Environmental issues are inherently complex, both technically and legally. They also tend to be costly to address. Few attorneys with a commercial leasing practice have not heard at least one environmental horror story in which an unsuspecting landlord was presented with a polluting tenant's six-figure cleanup bill. As a consequence, the proper management of environmental issues arising in connection with a commercial lease is of considerable importance to both the landlord and the tenant.

The goal of this chapter is to provide attorneys with guidance for dealing with common environmental issues that arise in commercial leasing. As this chapter demonstrates, traditional risk recognition, assessment, and allocation techniques can be used successfully by both the landlord and the tenant to manage troublesome environmental issues.

II. [9.2] ADDRESSING ENVIRONMENTAL ASPECTS OF LEASE

Successful management of environmental issues under a commercial lease necessarily begins at lease inception. It is a three-part exercise for both the landlord and the tenant.

First is *risk recognition*. Both parties to the lease — but particularly the landlord — must recognize the potential risks created by the tenancy under applicable environmental laws.

Second is *risk assessment*. Although the tenancy may have the potential to result in the imposition of liability under applicable environmental laws, the risk that such liabilities will ever be imposed must be assessed.

Last is *risk allocation*. Once the environmental liabilities associated with the tenancy are sufficiently established and evaluated, the lease must be fashioned to allocate those risks between the parties.

Each of these steps is discussed more fully in §§9.3 – 9.24 below.

A. [9.3] Recognition of Risk

Generally, both a landlord and a tenant face exposure to liability under federal and state environmental laws for activities conducted at the leased premises because many environmental statutes impose liability on both “owners” and “operators” of a site. Some of the more significant environmental laws affecting the landlord-tenant relationship are briefly discussed in §§9.4 – 9.9 below.

1. [9.4] CERCLA and Its Illinois Analog

Perhaps the best-known environmental law among attorneys is the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.* CERCLA and its state analog (found in §22.2(f) of the Illinois Environmental

Protection Act (Illinois Act), 415 ILCS 5/1, *et seq.*) impose liability on the “owner and operator” of a facility for costs incurred by the government to address a release, or threatened release, of a hazardous substance. (Private parties also have a cause of action under CERCLA to recover their costs of response. However, the Illinois statute imposes liability only for costs incurred by the state or a unit of local government.)

It is well settled that CERCLA liability is strict, joint, and several. Accordingly, if a tenant — as “operator” — engages in activities that result in a release, or threatened release, of hazardous substances at the leased premises, the landlord — as “owner” — is jointly, strictly, and severally liable for the costs incurred by the government or a third party to respond. *See, e.g., South Florida Water Management District v. Montalvo*, No. 88-8038-CIV-DAVIS, 1989 U.S. Dist. LEXIS 17555 (S.D.Fla. Feb. 14, 1989), *aff’d*, 84 F.3d 402 (11th Cir. 1996). Similarly, some cases suggest that a tenant who leases contaminated property may be liable under CERCLA for the costs to clean up the leased premises based solely on its status as the facility “operator” regardless of whether it contributed in any way to the contamination (*United States v. 175 Inwood Associates LLP*, 330 F.Supp.2d 213 (E.D.N.Y. 2004)) despite the “well-settled rule” that CERCLA “operator” liability attaches only if there is some nexus between the contamination and the person against whom liability is sought (*Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 928 (5th Cir. 2000), quoting *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992)). However, under the Illinois proportionate share liability statute, 415 ILCS 5/58.9, no liability is imposed on either a landlord or a tenant for costs to clean up contamination that the party did not cause or contribute to in any material respect. *See also* 35 Ill.Admin. Code pt. 741. In addition, there is a specific liability exemption under the Illinois proportionate share liability statute for a landlord that “did not know, and could not have reasonably known, of the acts or omissions of a tenant that caused or contributed to, or were likely to have caused or contributed to, a release of regulated substances that resulted in the performance of remedial action at the site.” 415 ILCS 5/58.9(a)(2)(B).

Under certain circumstances, a tenant may also qualify as a CERCLA “owner.” It has been held that a tenant that subleases property may be liable under CERCLA as an “owner” if the tenant possesses sufficient indicia of ownership. *Commander Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321 (2d Cir.), *cert. denied*, 121 S.Ct. 427 (2000).

2. [9.5] RCRA and Its Illinois Analog

The federal Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §6901, *et seq.*) and its Illinois counterpart (found at 35 Ill.Admin. Code pts. 720 – 729) regulate the generation, treatment, storage, and disposal of hazardous waste. In the landlord-tenant context, RCRA compliance is an issue if the tenant generates, or otherwise manages, hazardous waste for two main reasons. First, the landlord may find itself subject to RCRA if the tenant abandons hazardous waste at the leased premises; it is all too common for a landlord to find drums of hazardous waste left behind by a departing tenant. Second, §7002(a)(1)(B) of RCRA (the citizen suit provision) provides that any person may commence a civil action against any person

including any . . . past or present owner or operator of a treatment, storage, or disposal facility, who has contributed to or who is contributing to the past or present

handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. §6972(a)(1)(B).

It has been observed that RCRA liability may be imposed on a landlord under §7002(a)(1)(B) for gasoline contamination of its property without regard to fault. *Sachs v. Exxon Company, U.S.A.*, 9 Cal.App.4th 1491, 12 Cal.Rptr.2d 237, *modified*, 10 Cal.App.4th 1512b (1992).

Underground storage tanks (USTs) are regulated under RCRA at both the federal and state levels. 42 U.S.C. §6991; 40 C.F.R. pt. 280; 415 ILCS 5/57, *et seq.*; 35 Ill.Admin. Code pts. 731, 732, 734. Once again, liabilities are imposed on “owners” and “operators”:

a. In the case of an UST in use on November 8, 1984, or brought into use after that date, the “owner” is the person who owns the UST.

b. In the case of an UST no longer in use on November 8, 1984, the “owner” is the person who owned the UST immediately before the discontinuation of its use.

c. An “operator” is any person in control of, or having responsibility for, the daily operation of the UST.

Accordingly, although often a tenant is both the “owner” and “operator” of an UST, it is not uncommon for a landlord to “own” an UST that is “operated” by the tenant and therefore be equally responsible for compliance with federal and state operating and corrective action requirements.

3. [9.6] Clean Air Act and Asbestos NESHAP

A tenant conducting operations that result in air pollution emissions may well be regulated under the Clean Air Act (CAA), 42 U.S.C. §7401, *et seq.*, and regulations adopted by the Illinois Pollution Control Board (IPCB) under the Illinois Environmental Protection Act at 35 Ill.Admin. Code Subtitle B, Chapter I. See 415 ILCS 5/9. Generally, a landlord is not responsible for a tenant’s failure to comply with the CAA or regulations promulgated thereunder. However, there is a notable exception to this general rule in connection with asbestos abatements.

Regulations adopted by the United States Environmental Protection Agency (USEPA) under the CAA establish work practice standards for asbestos abatement in conjunction with certain building renovation or demolition activities. These regulations — known as the “asbestos NESHAP” (an acronym for the National Emission Standards for Hazardous Air Pollutants, which for asbestos are found at 40 C.F.R. pt. 61, Subpart M) — impose compliance obligations on “owners” and “operators.” At a demolition or renovation, an “owner” or “operator” is any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated, any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both. 40 C.F.R. §61.141. As a consequence, a tenant engaging in renovation activities that implicate the asbestos NESHAP exposes the landlord to liability for any violations of the asbestos NESHAP that may occur. *See, e.g., United States v. B & W Investment Properties*, 38 F.3d 362 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1998 (1995).

The asbestos NESHAP is enforceable not only by the USEPA, but also by the Illinois Environmental Protection Agency (IEPA) as a matter of state law.

4. [9.7] Illinois Environmental Protection Act

The Illinois Environmental Protection Act proscribes certain activities that adversely impact the environment. For example:

a. 415 ILCS 5/9(a) provides, inter alia, that no person shall “[c]ause or threaten or allow the discharge of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois.”

b. 415 ILCS 5/12(a) provides, inter alia, that no person shall “[c]ause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois.”

c. 415 ILCS 5/21(a) provides, inter alia, that no person shall “[c]ause or allow the open dumping of any waste.”

A landlord who permits a tenant to engage in polluting activities may be alleged to be in violation of the Illinois Act by “allowing” the proscribed activity. However, under the Illinois proportionate share liability statute, a landlord will not be liable for cleanup costs to the extent the tenant’s activities occur without the landlord’s knowledge. 415 ILCS 5/58.9(a)(2)(B).

5. [9.8] Metropolitan Water Reclamation District Act, Etc.

Laws governing sanitary districts in Illinois also have the potential to affect the landlord-tenant relationship. For example, the Metropolitan Water Reclamation District Act, 70 ILCS 2605/1, *et seq.*, provides that delinquent user charges, industrial waste surcharges, or industrial cost recovery charges “shall be liens against the real estate which receives the service or benefit for which the charges are being imposed.” 70 ILCS 2605/7. Accordingly, a landlord with a commercial tenant served by the Metropolitan Water Reclamation District of Greater Chicago (MWRDGC) runs the risk of having its property encumbered by a lien for its tenant’s unpaid user charges. A lien may also arise if civil penalties assessed by the MWRDGC for violations of its Sewage and Waste Control Ordinance are not paid. 70 ILCS §2605/7a(d)(11); Sewage and Waste Control Ordinance, art. V, §10; art. VI, §3 (as amended Nov. 16, 2006). Unlike the lien imposed for unpaid user charges, however, the lien for unpaid civil penalties attaches only to the property of the violator.

6. [9.9] Trespass and Nuisance

Whereas liability under statutory schemes usually is to the government (with certain notable exceptions, such as private cost recovery/contribution actions under CERCLA and citizen suits brought under various federal statutes and the Illinois Environmental Protection Act), the liability of a landlord and/or tenant under common law usually arises in the context of an action brought by a third party to address pollution emanating from the leased premises. The traditional

common-law theories of trespass and nuisance have been used successfully by third parties who have suffered injury as a result of pollution emanating from nearby properties. *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 857 F.Supp. 838 (D.N.M. 1994) (migration of contaminated groundwater onto adjacent property constitutes trespass); *O'Neill v. Carolina Freight Carriers Corp.*, 156 Conn. 613, 244 A.2d 372 (1968) (noise as nuisance); *Ramik v. Darling International, Inc.*, 60 F.Supp.2d 680 (E.D.Mich. 1999) (odor as nuisance). In Illinois, maintaining a nuisance may also constitute a violation of the Illinois Act. See the definitions of “air pollution” and “water pollution” found at 415 ILCS 5/3.115 and 5/3.545, respectively.

B. [9.10] Assessment of Risk

Clearly, both the landlord and the tenant face potential liability under federal and Illinois environmental laws to the government and third parties for the environmental impact of the tenant’s operations and for the condition of the leased premises. Once the potential risks and liabilities associated with the tenancy have been recognized, it becomes necessary for the parties to the lease to assess those risks. See §§9.11 – 9.12 below.

1. [9.11] Environmental Site Assessments

Performance of an environmental site assessment may prove useful to create a baseline for the environmental condition of the property prior to the commencement of the lease. It may also be advantageous for the tenant to conduct an environmental assessment of the property at the end of the lease to establish its environmental condition at that time.

Environmental site assessments are becoming increasingly common for tenants with long-term ground leases. If the purpose of the environmental site assessment is merely to establish baseline environmental conditions, an environmental assessment short of a Phase I environmental assessment under the federal “all appropriate inquiries” standard (40 C.F.R. pt. 312) or ASTM International’s *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, E1527-05, may be adequate. An environmental assessment performed for the landlord or its lender may also suffice, provided that it is current or otherwise updated to reflect environmental conditions at the commencement of the lease.

2. [9.12] Evaluation of Prospective Tenant Operations

For the commercial landlord, having some idea of the possible environmental impacts of a prospective tenant’s business before the lease is signed is essential. Although the environmental risks associated with some businesses (such as gas stations and dry cleaners) are obvious, many are not. Therefore, some initial investigation into the environmental aspects of the tenant’s operations should be conducted. Methods for obtaining this environmental information may include the tenant’s completion of a compliance questionnaire and a review of readily available federal and state computerized databases. Although these efforts may yield useful information about the regulatory and compliance status of the tenant, the landlord must be cognizant of the limitations inherent in these approaches. However, some information, no matter how meager, is preferable to no information at all. At the very least, it may identify an area for further inquiry.

In addition to knowing the potential environmental impact of the prospective tenant's operations, it is also useful for the prospective landlord to know whether the tenant has any significant off-site Superfund liability. A tenant with a spotless environmental record may nonetheless be liable as an "arranger" for costs to investigate and remediate a site where its wastes were disposed. Liability under CERCLA and its state analog that is not subject to insurance coverage or a reserve may be significant and impair the tenant's ability to maintain environmental compliance or satisfy other lease covenants.

C. [9.13] Allocation of Risk

Once the environmental risks associated with the proposed tenancy are recognized and satisfactorily assessed, the next task is to allocate those risks between the landlord and the tenant in the lease. Although the nature and scope of provisions allocating environmental risk will vary from lease to lease, some general observations can be made. See §§9.14 – 9.24 below.

1. [9.14] Warranties and Representations

At a minimum, the landlord should require the tenant to warrant that its operations at the leased premises will not adversely impact the environmental condition of the property and that all operations conducted at the property shall comply with all applicable state, federal, and local environmental laws. Any material breach of these representations and warranties should constitute an event of default. The tenant should require the landlord to represent and warrant that no "hazardous materials" (or other similar term, as defined in the lease) have been disposed of at the property prior to the tenancy and that the operations of its previous tenants have complied with all applicable environmental laws.

For the tenant, the fewer representations, the better. The tenant should beware of the use of environmental terms of art. For example, "hazardous substances" under CERCLA, "hazardous wastes" under RCRA, and "hazardous chemicals" under the Occupational Safety and Health Act of 1970, mean different things. The tenant should be particularly wary of making a blanket warranty that it will not "use," "store," or "handle" hazardous substances at the property because this may effectively prohibit it from conducting its business.

2. [9.15] Indemnifications

The goal should be for both of the parties to the lease to indemnify the other for claims arising in connection with the use of the leased premises. Accordingly, the landlord should require the tenant to defend and indemnify it from and against any and all claims, expenses, and losses incurred in connection with the tenant's use of the property during its tenancy, and the landlord should indemnify the tenant from and against any and all claims, expenses, and losses incurred that are unrelated to the tenant's use of the property. For example, if a third-party claim is brought against a tenant based on events at the property that transpired before the tenancy, the landlord should indemnify the tenant from and against any liability associated with that third-party claim. However, in order for such an indemnification to be effective, it is imperative that the environmental condition of leased property be established prior to the commencement of the

lease. Without an “environmental baseline,” allocation of risk using a temporal concept may be difficult, particularly if the tenant intends to use the same chemicals in its business as did a prior occupant.

Indemnifications relating to environmental liabilities should be expressly stated so as to reflect the parties’ clear and unequivocal intent to transfer such liabilities. There are some cases that hold that a general indemnity that does not make express reference to environmental liabilities is ineffective to transfer them.

The parties to the lease should also be aware that courts have found attempts to shift liability arising under certain environmental statutes through contractual indemnities to be violative of public policy and void. See *United States v. J & D Enterprises of Duluth*, 955 F.Supp. 1153 (D.Minn. 1997) (public policy prohibits indemnification of penalties for violations of asbestos National Emission Standards for Hazardous Air Pollutants).

3. [9.16] Financial Assurance

The most artfully crafted risk allocation provisions are worthless unless the party undertaking the risk has the financial ability to do so. Some of the more common mechanisms for financing environmental liabilities are discussed in §§9.17 – 9.24 below.

a. [9.17] Illinois UST Fund

The Illinois Underground Storage Tank Fund (UST Fund) (see 415 ILCS 5/57.8, *et seq.*) was established to satisfy financial assurance requirements imposed on UST owners and operators by federal RCRA regulations (40 C.F.R. pt. 280). The UST Fund provides financing (in excess of an applicable deductible) for certain corrective action costs incurred by an UST owner and operator in connection with a confirmed release of specific petroleum-type substances. Although a detailed discussion of the permutations of the Illinois UST program and the operation of the UST Fund by the IEPA is far beyond the scope of this chapter, certain aspects of the program are worth noting:

1. Not all USTs are covered by the UST Fund. Nonpetroleum USTs are excluded, as are USTs containing petroleum-type substances not listed in the statute. See 415 ILCS 5/57.9(a)(3).
2. The deductible is established by the date the tank was registered. See 415 ILCS 5/57.9(b). If the UST was not timely registered, the deductible is \$100,000. *Id.*
3. Only “eligible” corrective action costs are reimbursable. See 35 Ill.Admin. Code §§732.605 (for releases reported from Sept. 23, 1994, through June 23, 2002), 734.625 (for releases reported on and after June 24, 2002). For example, costs to remove an UST are not reimbursable from the UST Fund unless the UST was removed as part of corrective action taken in response to a reported petroleum release.
4. Normally, only the owner or operator of the UST is eligible to access the UST Fund. However, a landlord that is neither an owner nor an operator of a tenant’s UST may elect to take

over the tenant's ongoing remediation project, obtain a no further remediation (NFR) letter from the IEPA, and obtain reimbursement from the UST Fund for its eligible corrective action costs. 415 ILCS 5/57.2. By electing to proceed in this fashion, the landlord steps into the tenant's shoes and becomes the UST owner in eyes of the IEPA.

Any situation involving reimbursement from the Illinois UST Fund requires handling by an experienced environmental professional because the program contains many traps for the unwary. If a lease implicates UST issues, neither party should blithely assume that the state UST Fund will provide a source of financing for UST removal and corrective action costs.

b. [9.18] Drycleaner Trust Fund

Historically, dry-cleaning establishments have been a source of chlorinated solvent contamination. It is not uncommon to find chlorinated solvents — particularly perchloroethylene (perc) and its degradation compounds — in the soil and groundwater in the vicinity of active or former dry cleaners. The cost to remediate contamination in soil and groundwater at such facilities may be significant. To assist owners and operators with the costs of investigating and remediating such sites, Illinois established the Drycleaner Environmental Trust Fund. The Drycleaner Environmental Trust Fund Act, 415 ILCS 135/1, *et seq.*, creates two accounts that may be accessed to finance the investigation and cleanup of dry-cleaning sites in Illinois — the remedial action account (to address past releases) and the insurance account (to address future releases). See §§9.19 – 9.20 below.

(1) [9.19] Remedial action account

The remedial action account provides funds to finance the investigation and cleanup of dry-cleaning sites where releases of dry-cleaning solvents were discovered on or after July 1, 1997, but before July 1, 2006. Maximum reimbursement amounts and site deductibles vary, depending on the operating status of the dry-cleaning facility (active or inactive) and the nature of the costs incurred:

Type of Facility	Investigative Cost Deductible	Cleanup Cost Deductible	Maximum Reimbursement Amounts
Active	\$ 5,000	\$10,000	\$300,000
Inactive	\$10,000	\$10,000	\$ 50,000

See 415 ILCS 135/40(e), 135/40(f). Remedial action fund eligibility requirements are extensive. See 415 ILCS 135/40(c).

(2) [9.20] Insurance account

The insurance account provides up to \$500,000 in insurance coverage for owners and operators of dry-cleaning facilities. Coverage is limited to remedial action costs (including third-party claims) associated with soil and groundwater contamination resulting from a release of dry-cleaning solvents occurring after the date of coverage. In order to purchase insurance from this account, the prospective insured must conduct a site investigation to identify whether a release of

dry-cleaning solvents to the environment has occurred and meet all the requirements established by the Drycleaner Environmental Response Trust Fund Council, the body responsible for administering the Drycleaner Environmental Response Trust Fund. Beginning July 2003, yearly premiums are actuarially established. The actuarially established premium is currently \$1,400. The deductible is \$10,000. 415 ILCS 135/45(g).

c. [9.21] *Environmental Insurance*

One factor that must be taken into account in determining whether the party undertaking the environmental risk has the financial wherewithal to do so is whether coverage may be available under conventional insurance policies. Although an extensive discussion of environmental claims coverage is beyond the scope of this chapter, certain observations may be made. See §§9.22 – 9.23 below.

(1) [9.22] *Older CGL policies*

The first question that must be answered in determining whether insurance coverage may be available for an environmental claim is whether coverage is being sought under an older policy containing a pollution exclusion. Most commercial general liability (CGL) policies issued from the mid-1970s through the mid-to-late 1980s contain a pollution exclusion that excludes coverage for claims relating to pollution unless the pollution is “sudden and accidental.” Because many coverage claims relate to contamination that occurred gradually, the “sudden and accidental” exception to the pollution exclusion engendered a tremendous amount of litigation nationwide. Some courts ascribed a temporal meaning to the term “sudden and accidental,” effectively precluding policyholder claims for coverage in cases involving pollution-causing events that occurred over time. Other courts, however, interpreted the term “sudden and accidental” to mean “unexpected and unintended,” an interpretation more favorable to insureds. This is the interpretation given to the “sudden and accidental” exception to the pollution exclusion by the Illinois Supreme Court in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 169 Ill.2d 570, 675 N.E.2d 634, 221 Ill.Dec. 439 (1996).

Because of the unfavorable interpretation given by some courts to the “sudden and accidental” pollution exclusion exception, by 1987 the insurance industry began to replace the existing pollution exclusion with the “absolute pollution exclusion.” By eliminating the “sudden and accidental” exception, the insurance industry hoped that the new absolute pollution exclusion would eliminate any controversy over coverage for environmental claims. However, the insurance industry has found the results of litigation over the scope of the absolute pollution exclusion to be mixed. In Illinois, for example, courts have found the absolute pollution exclusion to apply only to claims involving environmental pollution. It does not bar coverage for claims relating to lead-based paint (*Insurance Company of Illinois v. Stringfield*, 292 Ill.App.3d 471, 685 N.E.2d 980, 226 Ill.Dec. 525 (1st Dist. 1997)) or bodily injury claims relating to carbon monoxide poisoning (*American States Insurance Co. v. Koloms*, 177 Ill.2d 473, 687 N.E.2d 72, 227 Ill.Dec. 149 (1997)).

In short, although Illinois decisions generally favor policyholders, neither party to a lease should assume that coverage for an environmental claim will be available under an older CGL

policy. Coverage for an environmental claim under an older CGL policy is dependent on a wide variety of factors, including the nature of the exclusion contained in the policy, the nature of the claim, and the forum in which any coverage dispute will be litigated. *See, e.g., Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill.2d 141, 821 N.E.2d 206, 290 Ill.Dec. 155 (2004) (insurer required to indemnify insured for cleanup costs under policy providing excess coverage for claims insured was “legally obligated” to pay when insured undertook cleanup in response to tacit threat by IEPA to bring enforcement action).

(2) [9.23] Pollution legal liability policies

Until about 1995, few carriers offered any products specifically insuring against environmental risks, and the premiums charged for such coverage were expensive. However, the marketplace has changed, and a number of large insurance companies now offer policies providing coverage for environmental claims. As of this writing, the following insurance companies are active in the environmental insurance market:

- a. AIG Environmental;
- b. XL Environmental Insurance Company;
- c. Zurich Insurance Company;
- d. ACE USA;
- e. Liberty Mutual Insurance Company; and
- f. the Chubb Group of Insurance Companies.

One type of policy offered by all these carriers is called a “pollution legal liability” (PLL) policy. Although PLL policy terms are site-specific, some common PLL policy coverages include

- a. cleanup costs incurred as a result of both on-site and off-site pollution conditions;
- b. third-party bodily injury claims (including mental anguish and emotional distress) arising from pollution conditions;
- c. third-party property damage claims arising from on-site and off-site pollution conditions, including third-party business interruption and property devaluation claims;
- d. costs of defense;
- e. first-party business interruption losses;
- f. first-party claims of diminution in property value; and
- g. natural resources damages.

Cleanup costs coverage insures against remediation costs associated with contamination at the property, including contamination that has migrated onto the property from an off-site source. The PLL policy may afford coverage for both known and unknown site conditions. However, the scope of coverage provided by a particular policy depends on a variety of site-specific factors, including the nature of the contamination, the degree to which the property has been investigated, previous use of the property, and the surrounding area. The experience of the insurance broker also plays a role. Due to an unanticipated number of claims, insurers' PLL underwriting practices have become more conservative, especially with respect to known contamination.

Coverage under PLL policies has been underwritten for up to \$400 million. Deductibles can be as low as \$5,000 per incident. Coverage is generally available on a claims-made basis only. The policy term is generally one to ten years, although longer terms are available.

d. [9.24] Other Mechanisms

Other financial assurance mechanisms that may be used to provide a source of funding for environmental costs include personal guarantees and letters of credit. Establishment of an environmental escrow is also worth considering, although its use in connection with a commercial lease is not common.

III. SOME RECURRING ISSUES THAT REQUIRE SPECIAL ATTENTION

A. [9.25] Underground Storage Tanks

The presence of underground storage tanks at the leased premises requires special attention by both the landlord and the tenant. Ideally, if an UST located at the premises is no longer in use, or will not be used by the tenant, it should be removed or abandoned in place prior to the commencement of the tenancy. UST removal requirements are contained in the regulations of the Illinois State Fire Marshal (OSFM) at 41 Ill.Admin. Code pt. 170. In the City of Chicago, OSFM tank removal/abandonment regulations are enforced by the Department of Environment (DOE). All UST removal and abandonment activities require a permit issued by either the OSFM or the Chicago DOE.

The key word in the foregoing paragraph is "ideally." Not all out-of-service USTs are required to be removed. In particular, USTs used to store heating oil for use on-site and tanks taken out of service before January 2, 1974 (known as "pre-74" tanks) need not be removed in the absence of a written removal order from the OSFM (or in Chicago, from the DOE). However, simply because the law does not require the removal or abandonment of an out-of-service UST does not mean that removal or abandonment may not be prudent.

Before anyone applies for a permit to remove or abandon an UST, legal responsibility for the UST should be determined. As discussed in §9.5 above, state and federal UST laws impose obligations on the "owner" and the "operator" of the UST. The current owner of the property and the owner of the UST under state and federal UST laws may not be the same. If the UST has been out of service since November 8, 1984, the owner of the UST is the person who owned it

immediately before the discontinuation of its use. Ownership of an UST under state and federal UST laws is governed not by the mere fact of an UST's existence, but rather by whether one falls within the statutory definitions of "owner" and "operator." Although circumstances may dictate that the owner of the property undertake UST activities even though it is not the "owner" of the UST, this point should not be overlooked.

Although the statutory definition of UST "owner" — in the case of an UST in use on, or brought into use after, November 8, 1984, "any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances" (42 U.S.C. §6991(3)(A); see also 415 ILCS 5/57.2) — would seem to refer to only the current owner, at least one Illinois court has held that previous UST owners are also liable under §57.12(a) of the Illinois Environmental Protection Act for corrective action costs. 415 ILCS 5/57.12(a); *State Oil Co. v. People*, 352 Ill.App.3d 813, 822 N.E.2d 876, 291 Ill.Dec. 1 (2d Dist. 2004).

Along the same lines, if a prior tenant operated an UST during its tenancy, the responsibility for the removal of that UST under state and federal environmental laws rests with the tenant as "operator," even if the lease is silent on the issue. Inclusion of a specific lease provision obligating the tenant to remove the UST upon expiration of the lease term, however, should be considered.

The existence of a "reportable release" of regulated substances from the UST creates its own set of issues, not the least of which is responsibility for undertaking corrective action. Once again, under state and federal UST laws, the responsibility rests on the tank "owner" and "operator." However, special attention needs to be given to heating oil and pre-74 tanks because of the unique treatment afforded them under Illinois law. In a nutshell, Illinois law imposes no obligation on an UST "owner" or "operator" to undertake any corrective action in response to a reportable release from a heating oil or pre-74 tank. Accordingly, in situations involving a tenant as "owner" or "operator" of a heating oil or pre-74 UST, a lease provision that imposes an obligation on the tenant to remove the UST at the expiration of the lease term and to undertake such corrective action "as the law requires" obligates the tenant to do nothing more than remove the tank. The landlord that wants the tenant to do more than simply remove the tank must be more specific in drafting the lease terms.

In order to avoid disputes over the extent of the tenant's cleanup obligations, it behooves both the landlord and the tenant to strive for specificity in describing the corrective action obligations of the tenant as tank "operator" upon expiration of the lease. Simply requiring the tenant to conduct such corrective action as is required to secure a no further remediation letter for the property from the IEPA may not be adequate because the IEPA will issue NFR letters for property despite the presence of significant soil and groundwater contamination. Unless the landlord is willing to allow restrictions on the future use of the property that would allow for significant contamination to remain, the landlord should require the tenant to obtain an NFR letter based on a demonstration that contaminant levels at the property do not exceed the most stringent cleanup objectives for residential property under the IPCB's TACO (tiered approach to corrective action objectives) rules at 35 Ill.Admin. Code pt. 742.

B. [9.26] Asbestos-Containing Materials

If the leased premises contain asbestos (and under the OSHA occupational asbestos exposure regulations, thermal system insulation and surfacing materials, debris present in rooms, enclosures, or areas where such material is present and not intact, and resilient flooring installed before 1980 are presumed to contain asbestos), the landlord must notify the tenant of that fact. Although no obligation is imposed on commercial property owners to remove asbestos-containing materials, implementation of an operations and maintenance (O&M) program by the landlord to monitor the condition of asbestos-containing materials during the term of the lease should be considered.

Although an asbestos abatement can be performed in occupied spaces, it is not recommended absent exigent circumstances. Abatement must be conducted in accordance with work practice standards under the asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP) (40 C.F.R. pt. 61, Subpart M) and OSHA (29 C.F.R. §1926.1101, *et seq.* (OSHA construction industry standard)). Because the Clean Air Act exposes the landlord to liability for any noncompliance with the asbestos NESHAP work practice standards by the tenant, or a contractor employed by the tenant, it is recommended that the landlord control any abatement performed during the lease term.

C. [9.27] Lead-Based Paint

In 1996, the USEPA and the Department of Housing and Urban Development issued joint regulations implementing the Residential Lead-Based Paint Hazard Reduction Act of 1992 (RLPHRA), 42 U.S.C. §4851, *et seq.*, which are found at 24 C.F.R. pt. 35 and 40 C.F.R. pt. 745. Under these regulations, lessors of “target housing” must, to the extent of their actual knowledge, disclose to lessees the presence of any lead-based paint or lead-based paint hazards at the leased premises. “Target housing” includes any residential dwelling constructed before 1978, except housing for the elderly and persons with disabilities (unless a child under the age of six years resides, or is expected to reside, there) or any dwelling without a bedroom. Also excluded from the disclosure requirements are residences certified by a certified inspector to be free of lead-based paint, property in foreclosure, and dwellings subject to short-term leases of 100 days or less, provided that no lease renewal or extension can occur.

In addition to making the appropriate disclosure in the residential lease, the lessor must provide the lessee with any available information concerning the existence of lead-based paint or lead-based paint hazards at the property, as well as a copy of the USEPA pamphlet *Protect Your Family from Lead in Your Home*. 24 C.F.R. §35.88(a)(1); 40 C.F.R. §745.107(a)(1).

The federal disclosure requirements do not apply to nonresidential property. However, any repair or renovation activities (other than routine maintenance) that may disturb lead-based paint, whether at residential or commercial property, must comply with Occupational Safety and Health Administration construction industry lead exposure standards at 29 C.F.R. §1926.62. Routine maintenance activities are regulated by the general industry standard for lead at 29 C.F.R. §1910.1025. As is the case with asbestos, abatement of lead-based paint in occupied spaces should be avoided if at all possible.

One issue that has arisen with respect to lead-based paint is whether a residential tenant has a private cause of action against a landlord for regulatory noncompliance. In *Abbasi v. Paraskevoulakos*, 187 Ill.2d 386, 718 N.E.2d 181, 240 Ill.Dec. 700 (1999), the Illinois Supreme Court found no private cause of action to exist under the Illinois Lead Poisoning Prevention Act, 410 ILCS 45/1, *et seq.* However, in *Price v. Hickory Point Bank & Trust*, 362 Ill.App.3d 1211, 841 N.E.2d 1084, 299 Ill.Dec. 352 (4th Dist. 2006), a landlord's violations of a local ordinance and federal regulations implementing the RLPHRA were held to be prima facie evidence of negligence, notwithstanding the landlord's lack of knowledge of the existence of lead-based paint. *But cf. Garcia v. Jiminez*, 184 Ill.App.3d 107, 539 N.E.2d 1356, 132 Ill.Dec. 550 (2d Dist. 1989) (residential tenant obligated to establish landlord's actual or constructive knowledge of presence of lead-based paint in order to prevail on common-law negligence claim).

D. [9.28] Radon

Although sometimes discussed in Phase I environmental site assessments of commercial property, radon is generally not an issue in commercial leasing.

IV. [9.29] REMEDIES

The most common environmental scenario encountered by the lessor of commercial property is contamination of the property by the lessee during the tenancy. In the event the tenant's use of the property results in contamination, what are the remedies available to the landlord? As discussed in §§9.30 – 9.32 below, remedies are available under both federal and state environmental laws. Contractual remedies may also be available under the lease. See §9.33 below. The choice of remedy is usually determined by two factors: the identity of the party who is to perform the cleanup; and the level of cleanup that the landlord desires to achieve.

A. Statutory Remedies

1. [9.30] CERCLA Cost Recovery

As a result of the United States Supreme Court's decision in *United States v. Atlantic Research Corp.*, 551 U.S. ___, 168 L.Ed.2d 28, 127 S.Ct. 2331 (2007), a landlord's status as a "potentially responsible party" (PRP) under CERCLA (as owner of the property) does not prohibit it from maintaining a CERCLA cost recovery action under §107(a), 42 U.S.C. §9607. Accordingly, one option available to the landlord is to undertake a voluntary cleanup of the property and then bring a federal CERCLA action against the polluting tenant to recover its cleanup costs. However, a CERCLA cost recovery action contains a number of traps for the unwary, the most significant of which is that the response costs incurred by the plaintiff must be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP), 40 C.F.R. pt. 300. The NCP is a set of federal regulations that parties must follow in conducting response or removal activities under CERCLA. Unless a party can demonstrate that its response costs were incurred consistent with the NCP, it will be unable to recover those costs of response from the polluting party. *Public Service Company of Colorado v. Gates Rubber Co.*, 175 F.3d 1177 (10th Cir. 1999). However, initial investigative, assessment,

and monitoring costs may be recoverable notwithstanding noncompliance with the NCP. *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998); *Continental Title Co. v. Peoples Gas Light & Coke Co.*, No. 96 c 3257, 1999 U.S. Dist. LEXIS 14729 (N.D.Ill. Sept. 10, 1999). *But see Angus Chemical Co. v. Mallinckrodt Group, Inc.*, No. 3:95-295, 1997 U.S. Dist. LEXIS 4628 (W.D.La. Mar. 4, 1997); *Ambrogi v. Gould, Inc.*, 750 F.Supp. 1233 (M.D. Pa. 1990).

Another bar to the landlord's maintenance of a CERCLA cost recovery action is the petroleum exclusion. The response costs for which cost recovery is sought must relate to a release, or threatened release, of "hazardous substances." "Hazardous substance" is a defined term that specifically excludes petroleum. 42 U.S.C. §9601(14). Consequently, if the contaminant at issue is petroleum, CERCLA does not afford a basis for recovery.

Attorneys' fees are not recoverable in a CERCLA §107 action. *Key Tronic Corp. v. United States*, 511 U.S. 809, 128 L.Ed.2d 797, 114 S.Ct. 1960 (1994).

2. [9.31] RCRA Citizen Suit

If the landlord has not incurred any response costs (or prefers not to) and wants the tenant to undertake the remediation, RCRA may afford an appropriate remedy. RCRA provides two bases for initiation of a citizen suit:

- a. under §7002(a)(1)(A) (42 U.S.C. §6972(a)(1)(A)), for a violation of any "permit, standard, regulation, condition, requirement, prohibition, or order" under RCRA; or
- b. under §7002(a)(1)(B) (42 U.S.C. §6972(a)(1)(B)), against any "past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."

A citizen suit under RCRA has a number of advantages over a CERCLA cost recovery action. The plaintiff need not expend any response costs, and compliance with the National Contingency Plan need not be shown. Also, because RCRA does not contain a petroleum exclusion, petroleum contamination may be the subject of a RCRA suit. Attorneys' fees are also recoverable. 42 U.S.C. §6972(e).

The RCRA citizen suit provisions contain mandatory prefiling notice requirements. Notice of intent to file suit is to be given to appropriate state and federal environmental officials as well as the prospective defendant. See 42 U.S.C. §§6972(b)(1)(A), 6972(b)(2)(A). Failure to give the required notice is grounds for dismissal. *Hallstrom v. Tillamook County*, 493 U.S. 20, 107 L.Ed.2d 237, 110 S.Ct. 304 (1989). If the government is already diligently prosecuting the violations, no private action may be maintained. *See Supporters To Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320 (7th Cir. 1992).

Only injunctive relief is available through a RCRA citizen suit. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 134 L.Ed.2d 121, 116 S.Ct. 1251 (1996). Cleanup costs incurred after a RCRA suit is commenced are not recoverable. *Avondale Federal Savings Bank v. Amoco Oil Co.*, 170 F.3d 692 (7th Cir. 1999).

3. [9.32] Citizen Enforcement Action Before Illinois Pollution Control Board

Instead of pursuing statutory remedies under CERCLA or RCRA, the landlord could, alternatively, seek reimbursement of its corrective action costs in a citizen enforcement action before the Illinois Pollution Control Board. In a line of cases beginning with *Lake County Forest Preserve District v. Ostro*, PCB 92-80, 1994 Ill. ENV LEXIS 484 (Mar. 31, 1994), the IPCB has recognized the right of a private party to recover cleanup costs incurred in response to violations of the Illinois Environmental Protection Act. *Herrin Security Bank v. Shell Oil Co.*, PCB 94-178, 1994 Ill. ENV LEXIS 1063 (Sept. 1, 1994); *Streit v. Oberweis Dairy, Inc.*, PCB 95-122, 1995 Ill. ENV LEXIS 859 (Sept. 7, 1995); *Dayton Hudson Corp. v. Cardinal Industries, Inc.*, PCB 97-134, 1997 Ill. ENV LEXIS 488 (Aug. 21, 1997); *Richey v. Texaco Refining & Marketing, Inc.*, PCB 97-148, 1997 Ill. ENV LEXIS 460 (Aug. 7, 1997); *Malina v. Day*, PCB 98-54, 1998 Ill. ENV LEXIS 28 (Jan. 22, 1998); *Union Oil Company of California v. Barge-Way Oil Co.*, PCB 98-169, 1999 Ill. ENV LEXIS 9 (Jan. 7, 1999); *Kelly-Mac Partners v. Robertson-Ceco Corp.*, PCB 99-162, 1999 Ill. ENV LEXIS 334 (July 22, 1999); *MDI Limited Partnership #42 v. Regional Board of Trustees for Boone & Winnebago Counties*, PCB 00-181, 2002 Ill. ENV LEXIS 267 (May 2, 2002); *Village of Park Forest v. Sears, Roebuck & Co.*, PCB 01-77, 2002 Ill. ENV LEXIS 329 (June 6, 2002); *McCarrell v. Air Distribution Associates, Inc.*, PCB 98-55, 2003 Ill. ENV LEXIS 130 (Mar. 6, 2003); *2222 Elston LLC v. Purex Industries, Inc.*, PCB 03-55, 2003 Ill. ENV LEXIS 359 (June 19, 2003); *Grand Pier Center LLC v. River East LLC*, PCB 05-157, 2005 Ill. ENV LEXIS 387 (May 19, 2005). *But see NBD Bank v. Krueger Ringier, Inc.*, 292 Ill.App.3d 691, 686 N.E.2d 704, 226 Ill.Dec. 921 (1st Dist. 1997).

One issue the IPCB has not directly addressed in the *Ostro* line of cases is whether the cleanup costs sought to be recovered are excessive under the IPCB's tiered approach to corrective action objectives (TACO) rules. The TACO rules (adopted in conjunction with the state's Voluntary Site Remediation Program, 35 ILCS 5/58, *et seq.*) establish risk-based cleanup objectives for soil and groundwater contamination in Illinois. The most stringent cleanup objectives are called "Tier I" objectives and are largely determined by the exposure risks associated with the use of the property. Accordingly, TACO Tier I cleanup objectives for residential property are more stringent than cleanup objectives for property that is industrial or commercial because the risk of exposure to contamination at residential property is greater.

Under the TACO rules, contamination at levels exceeding applicable cleanup objectives may remain if certain measures are implemented to reduce the risk of exposure to within acceptable limits. For example, if the existing contaminant levels in soil exceed applicable cleanup objectives determined by the risks associated with exposure through inhalation or ingestion, the soil contamination may remain if an engineered barrier (such as a building or pavement) is utilized to sufficiently reduce the risk of exposure. Institutional controls (such as a deed restriction) may also be required to ensure that the contaminant levels will not pose an unacceptable risk.

Suppose the landlord conducts a cleanup of the tenant's contamination at commercial property to achieve Tier I residential cleanup objectives under TACO and then seeks to recover its costs of cleanup from the polluting tenant in an action before the IPCB under *Ostro* and its progeny. Suppose further that the cost of cleanup to achieve Tier I residential cleanup objectives

was \$100,000 more than the cost to achieve cleanup levels appropriate for industrial or commercial property. Under these circumstances, the tenant may well argue that the landlord's cleanup costs were excessive and the very most that the landlord can recover are the costs to clean up the property to achieve cleanup objectives appropriate for the use of the property under TACO.

To date, the IPCB has not directly addressed this issue in a cost recovery action. The closest the IPCB has come is in *Village of Park Forest, surpa*, a case in which a municipality sought to recover cleanup costs from a prior owner of the property. Believing that the costs the municipality incurred were excessive and not supported by §33(c) of the Illinois Environmental Protection Act, 415 ILCS 5/33(c), the prior owner moved for summary judgment. The IPCB denied the motion, finding there to be insufficient evidence as to whether the costs incurred were economically unreasonable as a matter of law.

Although the IPCB in *Village of Park Forest* did not address the merits of the respondent's claim that the cleanup costs the petitioner was seeking to recover were excessive, the IPCB's decision in *Matteson WHP Partnership v. Martin*, PCB 97-121, 2000 Ill. ENV LEXIS 411 (June 22, 2000), does suggest that an owner may be able to recover from a polluting tenant all of its costs to remediate the leased property to achieve the most stringent cleanup standard available under TACO. In *Matteson*, the commercial landlord filed a citizen enforcement case against a polluting dry cleaner tenant, alleging various violations of the Illinois Act and the IPCB's water pollution control regulations in connection with perchloroethylene contamination at the property. The landlord sought a IPCB order requiring the tenant to clean up the perchloroethylene contamination at the property to within area background concentrations. The tenant argued that the appropriate level of cleanup of the property was determined by the TACO rules and, at most, the landlord was entitled to nothing more than a cleanup sufficient for commercial property. Although the IPCB agreed with the tenant that TACO applied, it rejected the tenant's argument that a cleanup to achieve commercial cleanup standards was all that was warranted and ordered a cleanup to achieve the most stringent cleanup objectives under TACO, *i.e.*, Tier I objectives for residential property. The IPCB's order requiring the tenant to clean up the soil to achieve residential cleanup objectives was affirmed by the appellate court in *Martin v. Illinois Pollution Control Board*, 323 Ill.App.3d 1145, 800 N.E.2d 884, 279 Ill.Dec. 596 (1st Dist. 2001) (Rule 23).

In several subsequent decisions, the IPCB has cited *Matteson* for the proposition that there are limits on the scope of the remediation it may order to address violations of the Illinois Act and IPCB rules. *Kapp, Inc. v. Hartley Carlton*, PCB 05-196, 2005 Ill. ENV LEXIS 426 (July 7, 2005); *Theodore Kosloff Trust v. A&B Wireform Corp.*, PCB 06-163, 2006 Ill. ENV LEXIS 552 (Oct. 5, 2006).

B. [9.33] Contractual Remedies

In addition to the remedies available under environmental laws, both the landlord and the tenant may have remedies under the lease. Depending on the nature of any warranties and representations given, a violation of a warranty or representation relating to environmental matters may constitute a breach of the lease and an event of default. It may also constitute a violation of the usual lease prohibition against "waste."

Unlike statutory remedies, remedies available to the parties under the lease in the event of a breach can be tailored to fit the unique circumstances created by the tenancy. However, great care must be taken in drafting provisions imposing cleanup obligations. If, for example, the landlord wants the polluting tenant to clean up the property to meet residential standards and obtain a no further remediation letter from the IEPA, the desired standards for issuance of the NFR letter must be stated expressly. For example:

Tenant, at its sole cost and expense, shall obtain a no further remediation letter issued by the Illinois Environmental Protection Agency for the property based on a demonstration that contaminant levels do not exceed applicable Tier I cleanup objectives for residential property under the Illinois Pollution Control Board's Tiered Approach to Corrective Action Objectives Rules, 35 Ill.Admin. Code pt. 742, without the utilization of engineered barriers or institutional controls, with the exception of such institutional controls as may be existing at the property as of the commencement date of the Lease.

If the desired cleanup objectives cannot be reasonably achieved (*e.g.*, if residential cleanup objectives will be achieved only by removing a building), the lease can be written to require that the tenant is responsible for meeting the most stringent achievable objective. However, under such circumstances, the landlord should be compensated for the contamination that remains. The landlord's compensation could be measured by the difference between the tenant's actual cleanup costs and the estimated cost to achieve the desired level of cleanup, or by the diminution in property value attributable to the remaining contamination.

Whether issuance of an NFR letter from the IEPA is to be sought in connection with cleanup conducted pursuant to the terms of a lease should be given serious consideration in the drafting of lease terms. In certain circumstances, involvement by the IEPA is a foregone conclusion. For example, releases from underground storage tanks regulated under the state's UST program will necessarily involve the IEPA to some degree. However, corrective action that is not mandated by a particular regulatory program but is undertaken voluntarily will trigger IEPA oversight only if requested. NFR letters issued by the state following successful participation in the Illinois Voluntary Site Remediation Program provide certain valuable protections to the party obtaining the letter and to the other parties identified in the statute, 415 ILCS 5/58.10(d). For a variety of reasons, however, the parties to the lease may simply not want to get the government involved. A release of contaminants from the leased premises that has impacted off-site properties, if brought to the attention of the IEPA under the Site Remediation Program, may trigger the IEPA's notification obligations under the Illinois right-to-know statute, 415 ILCS 5/25d-1, *et seq.*, and result in the issuance of an administrative cleanup order by the IEPA. Under such circumstances the benefits of participation in the Site Remediation Program and issuance of an NFR letter may be outweighed by the burdens associated with the giving of the mandated off-site contamination notice.

For the tenant, remedies available in the event of a breach of an environmental condition by the landlord may include rent abatement and lease termination. Finally, a provision awarding attorneys' fees to the party successfully enforcing the environmental provisions of the lease (whether landlord or tenant) should be included.

V. [9.34] SAMPLE LEASE PROVISIONS

NOTE: The following provisions may be useful as a guide in drafting lease terms. However, they are generally written from the perspective of the landlord and must be modified as necessary to fit the particular leasing situation.

ENVIRONMENTAL MATTERS

I. Definitions.

A. “Environmental Law or Laws” shall mean any and all federal, state, or local laws, regulations, ordinances, rules, orders, directions, requirements, or court decrees pertaining to health, industrial hygiene, or the environmental conditions on, under, or about the Premises, including, without limitation, the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §6901, *et seq.*, as amended, and regulations promulgated thereunder; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, as amended, and regulations promulgated thereunder; the Hazardous Materials Transportation Act, 49 U.S.C. §1801, *et seq.*, as amended, and regulations promulgated thereunder; the Toxic Substances Control Act, 15 U.S.C. §2601, *et seq.*, as amended, and regulations promulgated thereunder; the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136, *et seq.*, as amended, and regulations promulgated thereunder; the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §1251, *et seq.*, as amended, and regulations promulgated thereunder; the Safe Drinking Water Act of 1974, 42 U.S.C. §300f, *et seq.*, as amended, and regulations promulgated thereunder; the Clean Air Act, 42 U.S.C. §7401, *et seq.*, as amended, and regulations promulgated thereunder; and all parallel, similar, or relevant Laws.

B. “Hazardous Materials” shall mean any (i) “hazardous waste” as defined in RCRA; (ii) “hazardous substance” as defined in CERCLA; (iii) petroleum or liquid petroleum or wastes; and (iv) any other toxic or hazardous substances that may be regulated from time to time by applicable Environmental Laws.

C. “Environmental Conditions” shall mean any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of Hazardous Materials on, from, or about the Premises other than in compliance with applicable Environmental Laws. The term “Environmental Conditions” includes, but is not limited to, the presence of Hazardous Materials on, from, or about the Premises attributable to the operation of any underground or above-ground storage tanks, oil/water separators, or in-ground hydraulic lifts or hoists, and associated equipment.

D. “Environmental Costs” shall mean any and all judgments, damages, penalties, fines, costs, liabilities, obligations, losses, or expenses of whatever kind and nature (including, without limitation, diminution in value of the Property, damages for the loss or restriction on use of leaseable space, damages arising from any adverse impact on marketing of space, sums paid in settlement of claims, attorneys’ fees, consultants’ fees, and experts’ fees),

arising from or incurred in connection with Environmental Conditions, including, but not limited to, those relating to the presence, investigation, or remediation of Hazardous Materials.

II. Representations, Warranties, and Covenants.

A. Tenant represents, warrants, and covenants to and with Landlord that

1. Tenant has the full right, power, and authority to carry out its environmental obligations hereunder.

2. Tenant is financially capable of performing and satisfying its environmental obligations hereunder.

3. Tenant is not now, and never has been, in violation of any applicable Environmental Law, including, but not limited to, any Environmental Law relating to the generation, handling, usage, transportation, treatment, storage, or disposal of Hazardous Materials, nor is it subject to any threatened, existing, or pending action by any governmental authority in connection therewith.

4. Tenant's generation, handling, usage, transportation, treatment, storage, or disposal of Hazardous Materials at the Premises shall at all times comply with applicable Environmental Laws, and will not cause or allow any Environmental Condition to occur or exist.

5. Tenant, at its expense, shall comply with all Environmental Laws pertaining to the Premises or Tenant's use of the Premises, and with all directions of all public officers issued pursuant to any Environmental Law, which shall impose any duty on the owner or operator with respect to the use or occupancy of the Premises.

6. Tenant will not install, use, or operate any underground storage tank without the express written permission of Landlord, which permission may be withheld in Landlord's sole and arbitrary discretion.

B. Landlord represents, warrants, and covenants to and with Tenant that

1. Landlord has the full right, power, and authority to carry out its environmental obligations hereunder.

2. Landlord is financially capable of performing and satisfying its environmental obligations hereunder.

3. As of the commencement date of the Lease, neither Landlord, nor to the knowledge of Landlord, any of Landlord's current tenants, is now, or ever has been, in violation of any applicable Environmental Law, including, but not limited to, Environmental Laws relating

to the generation, handling, usage, transportation, treatment, storage, or disposal of Hazardous Materials, at the Property, nor is Landlord, or to the knowledge of Landlord, any of Landlord's current tenants, subject to any threatened, existing, or pending action by any governmental authority in connection therewith.

4. As of the commencement date of the Lease, to the knowledge of Landlord, any generation, handling, usage, transportation, treatment, storage, or disposal of Hazardous Materials at the Property has complied with applicable Environmental Laws, and no Environmental Condition is known to have occurred or exist.

III. Notice.

Tenant shall give immediate written notice to Landlord of (a) any proceeding or inquiry by any governmental authority with respect to the presence of any Hazardous Materials on the Premises or the migration thereof from or to other areas; (b) all claims and potential claims made, inquired about, or threatened by any third party against Tenant or the Premises relating to any loss or injury resulting from any Hazardous Materials; and (c) Tenant's discovery of any occurrence or condition on any property adjoining or in the vicinity of the Premises that could cause the Property or any part thereof to be subject to any restrictions on its ownership, occupancy, transferability, or use under any Environmental Law.

IV. Indemnifications.

A. Tenant shall defend, with counsel reasonably approved by Landlord, all actions against Landlord with respect to, and pay, protect, indemnify, and hold harmless, to the extent permitted by law, Landlord from and against any and all Environmental Costs of any nature arising out of, or claimed to be arising out of, any Environmental Conditions. Notwithstanding anything in this Lease to the contrary, Landlord agrees that Tenant shall not be responsible for Environmental Conditions to the extent that such Environmental Conditions (1) exist as of the commencement date of the Lease, or (2) result from either the actions or omissions of Landlord or any breach of a representation or warranty made by Landlord herein.

B. Landlord shall defend, with counsel reasonably approved by Tenant, all actions against Tenant with respect to, and pay, protect, indemnify, and hold harmless, to the extent permitted by law, Tenant from and against any and all Environmental Costs of any nature arising out of, or claimed to be arising out of, any Environmental Conditions to the extent that such Environmental Conditions (1) exist as of the commencement date of the Lease, or (2) result from either the actions or omissions of Landlord, or any breach of a representation or warranty made by Landlord herein. Tenant agrees that Landlord shall not be responsible for any Environmental Conditions to the extent that such Environmental Conditions result from the actions or omissions of Tenant, or Tenant's agents, employees, or invitees. Tenant further agrees that Landlord shall have no obligation to Tenant under this Lease for Environmental Conditions arising during the term of this Lease from the actions or omissions of any person or entity who or that is not an agent, employee, or invitee of Landlord.

C. The foregoing indemnities shall include, without limitation, Environmental Costs arising out of any violations of Environmental Laws, regardless of any real or alleged fault, negligence, willful misconduct, gross negligence, breach of warranty, or strict liability on the part of either party hereto. The foregoing indemnities shall also survive the end of the Lease term.

V. Tenant Disclosures.

Prior to the commencement date, and prior to January 1 of each year of the Lease term, including January 1 of the year immediately following the year during which the term ends, Tenant shall disclose to Landlord in writing the names and amounts of all Hazardous Materials, or any combination thereof, that were stored, used, or disposed of on the Premises or that Tenant intends to store, use, or dispose of on the Premises. Further, Tenant shall provide Landlord a copy of every document Tenant makes available to any governmental authority or to any person under any Environmental Law.

VI. Inspection.

Landlord shall have the right, but not the duty, to inspect the Premises at any time to determine whether Tenant is complying with the terms of this section. If Tenant is not in compliance, then Landlord shall have the right to immediately enter upon the Premises to remedy, at Tenant's expense, any Environmental Conditions caused by Tenant's failure to comply, notwithstanding any other provision of this Lease to the contrary. Such remediation measures shall be done in accordance with the recommendations of Landlord's environmental engineers and/or consultants, and/or the requirements of any governmental authority having jurisdiction over such matters. Tenant shall pay to Landlord, as additional rent, all Environmental Costs incurred by Landlord in performing any such remediation measures within 30 days after Landlord's written request therefore. Landlord shall use reasonable efforts to minimize interference with Tenant's business operations, but Landlord shall not be liable for any interference caused thereby.

VII. Corrective Action.

A. If Tenant causes or allows any Environmental Conditions to exist at the Property that result in contamination of soil and groundwater at concentrations exceeding the most stringent Tier I cleanup objectives for soil and groundwater established by the Illinois Pollution Control Board (IPCB) under its Tiered Approach to Corrective Action Objectives Rules (TACO Rules), 35 Ill.Admin. Code pt. 742, then Tenant, at its expense, shall obtain a no further remediation (NFR) letter from the Illinois Environmental Protection Agency (IEPA) with respect to such Environmental Conditions. Tenant shall apply for issuance of an NFR letter by the IEPA only upon achieving the most stringent Tier I cleanup objectives for soil and groundwater established by the IPCB under the TACO Rules. The most stringent Tier I cleanup objectives for soil and groundwater shall be achieved by Tenant without the utilization of engineered barriers or institutional controls, with the exception of such institutional controls as may be existing at the Property as of the commencement date of the Lease.

B. Tenant shall use its best efforts to achieve the most stringent Tier I cleanup objectives for soil and groundwater established by the IPCB under the TACO Rules, and to secure the issuance of an NFR letter from the IEPA for the Property on that basis, not later than two years after the end of the Term. If Tenant fails to secure an NFR letter prior to the expiration of said two-year period, then Landlord, at its option, may either (1) direct Tenant to continue with its efforts to achieve the most stringent Tier I cleanup objectives for soil and groundwater established by the IPCB under the TACO Rules, and to secure the issuance of an NFR letter from the IEPA for the Property on that basis; or (2) take over the project from Tenant and itself complete the project to Landlord's satisfaction, at Tenant's expense.

C. If the most stringent Tier I cleanup objectives for soil and groundwater established by the IPCB under the TACO Rules cannot be reasonably achieved by Tenant, then Tenant shall meet the most stringent achievable objectives. The determination whether any particular cleanup objective is reasonably achievable is within Landlord's sole discretion; provided, however, that Landlord's determination as to the achievability of any particular cleanup objective shall be without prejudice to any rights Landlord may have against Tenant, at law or in equity, under this Lease or under applicable Environmental Laws, to compensation for any loss, including, but not limited to, diminution in fair market value of the Property attributable to the presence of contamination at the Property that exceeds the most stringent Tier I cleanup objectives for soil and groundwater established by the IPCB under the TACO Rules.

VIII. Tenant's Financial Assurance.

To ensure the availability of funds to satisfy Tenant's environmental obligations hereunder, on or before the execution of this Lease, Tenant, at its expense, at Landlord's discretion, shall either:

A. Maintain pollution legal liability insurance with minimum limits of \$_____ with respect to the Premises, providing coverage for on-site and off-site cleanup costs and third-party bodily injury and property damage claims arising from on-site and off-site Environmental Conditions;

B. Obtain a bond or letter of credit in the amount of \$_____, which shall provide for payment thereunder to be applied toward satisfying Tenant's environmental obligations under this Lease if Tenant fails to satisfy such obligations; or

C. Deposit funds in the amount of \$_____ in an interest-bearing escrow account, with an escrowee satisfactory to Landlord, such escrowed funds to be used by Landlord to satisfy Tenant's environmental obligations under this Lease if Tenant fails to do so.