

# *Welcome!*

---

## **Addressing Environmental Issues in Real Estate Development**

Presented by Steve Parascandola and David Berry





- The **largest business and litigation law firm** headquartered in the Research Triangle area and one of the largest in North Carolina
- Provide a **full range of legal services** to a diverse and dynamic group of **local, national and international clients**, ranging in size from **large public companies** to **emerging growth businesses**
- Dedicated to furthering clients' interests by providing **intelligent guidance, strategic counsel, solid advice** and **excellent results**



# Commonly Applicable Environmental Laws

---

- Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q
- Comprehensive Environmental Response, Compensation, and Liability Act (Superfund or CERCLA), 42 U.S.C. §§ 9601-9675
- Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136Y

# Commonly Applicable Environmental Laws

---

- Freedom of Information ACT (FOIA), 5 U.S.C. §§ 552-552a
- Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 1801-1819
- National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d
- Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678



# Commonly Applicable Environmental Laws

---

- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k
- Superfund Amendments and Reauthorization Act (SARA) Title III, 42 U.S.C. §§ 11001-11050
- Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j-2b
- Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692



# CERCLA

---

- Joint, Several, Strict and Retroactive Liability
- Owner, Operator and Arranger Liability



# Liability Takes Many Forms and May Not be Readily Apparent

---

- Soil and Groundwater
- Fixtures and Improvements – LUSTs, ACMs, PCBs



# Liability Takes Many Forms and May Not be Readily Apparent

---

- Emissions
- Off-Site Contamination
- Third-Party Claims



# Liability Takes Many Forms and May Not be Readily Apparent

---

- Past Disposal Practices – Arranger” Liability
- Wetlands
- Filings and Required Reporting – EPCRA, Groundwater Permits



# Typical Background to a “Deal” Requiring Environmental Due Diligence

---

- Identifying the Target and Negotiating the Letter of Intent



# Typical Background to a “Deal” Requiring Environmental Due Diligence

---

- Typical Allocation of Environmental Liability
  - Seller Retains All “Pre-Closing” Liability
  - Buyer Assumes All Unidentified “Post-Closing” Liability



# Typical Background to a “Deal” Requiring Environmental Due Diligence

---

- Specifying Due Diligence Rights
  - “As Is” Deals
  - Limited Inspection Rights
  - Full Phase I and II Investigations
  - Management/Employee Interviews



# Typical Background to a “Deal” Requiring Environmental Due Diligence

---

- Stock vs. Asset Transactions
  - Successor Liability Issues
    - Traditional Corporate Law Principles
    - CERCLA and Other Environmental Laws
    - EPA and State Enforcement Issues
- Permits, Reporting Requirements, Notifications and Filings



# Typical Background to a “Deal” Requiring Environmental Due Diligence

---

- Financing Issues
  - Lender Liability Issues
    - Foreclosure Issues
    - “Operator” Issues
    - Valuation of Collateral



# Engagement of Due Diligence Team – The Role of Attorneys and Environmental Consultants

---

- Consultants – Assessment of Property and Compliance with Laws
- Attorneys – Consideration of Consultants' Assessment and Risk Management
- Although Some Overlap, Very Distinct Roles
- Importance of Maintaining Attorney-Client Privilege
- Preparation of Time and Responsibility Chart



# Initial Environmental Due Diligence: The Phase I Process

---

- The Bona Fide Prospective Purchaser (BFPP), Contiguous Property Owner (CPO) and Innocent Landowner (ILO) Defenses
  - “Transaction Screen” vs. Full Phase I Assessment
    - “Friendly” Deals
    - Contractual Indemnities
    - Monetary Considerations/Low Risk Transaction



# Initial Environmental Due Diligence: The Phase I Process

---

- Assessing Apparent Condition of Property to be Acquired
  - Examples of Obvious Environmental Risks
    - CERCLIS, RCRIS and Other Listings
    - On and Off-Site Wells
    - Staining
    - Old Structures
    - ASTs



# Initial Environmental Due Diligence: The Phase I Process

---

- “Hidden” Costs of Compliance
  - “Orphan” USTs
  - Monitoring/Remediation System Upgrades
  - ACMs
- Confirming Compliance with Applicable Reporting Requirements



# Initial Environmental Due Diligence: The Phase I Process

---

- Confirming All Required Permits and Approvals
- Assessing Historical Use and Surrounding Property
- Identifying Pending or Threatened Third Party Claims



# Initial Environmental Due Diligence: The Phase I Process

---

- Lease Issues
  - Restoration Provisions
  - Compliance with All Laws Provisions
  - Indemnifications Provisions
  - Change of Control Issues



# Negotiating Environmental Representations and Warranties

---

- Compliance with All Environmental Laws
  - “Acquired Assets” in Full Compliance
  - Seller in Full Compliance
  - Full Compliance During Period of Ownership
  - No Knowledge of Violations or Claims
  - “Best of Seller’s Knowledge” Provisions



# Negotiating Environmental Representations and Warranties

---

- Waiver of Claims and Indemnification of Seller
- Limitations on Contractual Indemnities
  - Time Limits
  - Statutes of Limitation
  - CERCLA and Other Legal Limitations
- Requiring Compliance and Permit Transfers by Closing
- Identifying Post-Closing Liabilities
- Preparation of Environmental Schedules to the M&A Agreement



# Reviewing Corporate Records and Conducting Management Interviews

---

- Confirming Historical Environmental Compliance
- Uncovering Past Violations



# Expanded Environmental Due Diligence – The Phase II Process and Release Reporting Issues

---

- Negotiating Costs of Phase II Assessments
- Scope of Phase II Assessment Work
  - Limited “Grab Sampling”
  - Laboratory Parameters
- Responsibility for Release Reporting
- Timing of Release Reporting
- Liability Issues
  - Seller’s Failure to Report Discovered Releases



# Insurance, Brownfield Program, Dry Cleaner Solvent and UST Trust Fund Issues

---

- Confirming Coverage and Continuation of Coverage
- Ensuring Assignability of Trust Fund Rights
  - Confirming State-Specific Requirements



# Post-Closing Issues

---

- Access Agreements and Ongoing Remediation Requirements
- Methods of Enduring Post-Closing Compliance
  - Escrow Agreements
  - Letters of Credit
  - Individual Guarantees
  - Rent Offers
  - Property Transfer Liability Insurance



**Thank you for attending today's  
Real Estate Development Law webinar!**

---

## **Don't forget...**

- Today's PowerPoint presentation and recording will be available on [SmithLaw.com/Webinars](https://SmithLaw.com/Webinars) by Thursday
- For previous Real Estate Development Law webinar recordings, please visit [SmithLaw.com/Webinars](https://SmithLaw.com/Webinars)

