18
ENVIRONMENTAL CONCERNS

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I. [§18.1] INTRODUCTION

Federal, state, and local environmental laws and regulations present challenges to the eminent domain practitioner. When a condemning authority has set a real property transfer in motion and environmental concerns arise, practitioners on both sides of the conveyance need to address the possibility of strict, retroactive, joint, and several liability as well as thorny valuation issues.

This chapter serves several purposes. It is a primer on sources of liability under federal, state, and local environmental law. It introduces the eminent domain practitioner to the regulatory agencies that enforce environmental laws. It also discusses the impact that contamination may have on the valuation of real property, the conduct of pretrial discovery and motion practice, and the trial itself. The discussion should have special meaning for condemning authorities, they must proceed thoughtfully when acquiring contaminated property to ensure they satisfy the statutory requirements necessary to avoid liability.

II. SOURCES OF LIABILITY

A. Federal Law

(CERCLA)

2.Resource Conservation And Recovery Act (RCRA)

1. Comprehensive Environmental Response, Compensation, And Liability Act (CERCLA)

a.[§18.2]In General
b.[§18.3]Liable Parties
c.[§18.4]Defenses
d.Condemning Authorities

a. [§18.2]In General

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 *U.S.C.* §§ 9601 *et seq.*, was the catalyst that introduced environmental law into the practice of eminent domain law. CERCLA was adopted in December 1980. With few exceptions, it created strict, retroactive, joint and several liability for the cost of responding to the release of hazardous substances into soils or groundwater. As a result of CERCLA, any purchaser of property, including a condemning authority, could find itself facing cleanup liability if hazardous substances are detected on property that it acquired.

CERCLA has been referred to by some as "Superfund." That term is simply a reference to one aspect of CERCLA: a fund created to pay for the program from taxes on the petroleum, chemical, and waste disposal industries. The Superfund actually comprised two different funds: the Hazardous Substances Response Trust Fund, 42 *U.S.C.* §§ 9631–9633, and the Post-Closure Liability Trust Fund, 42 *U.S.C.* § 9641. The first was used for the payment of response costs at sites from which hazardous substances have been released and have damaged or threatened public health or the environment. The Post-Closure Liability Trust Fund was used to remedy releases of hazardous substances from hazardous waste disposal facilities that have been closed under the Solid Waste Disposal Act, 42 *U.S.C.* §§ 6901 *et seq.* The statutes creating both funds have been repealed, Pub.L.No. 99-499, Title V, §§ 514(b), 517(c)(1), Oct. 17, 1986, 100 Stat. 1767, 1774, and the Hazardous Substance Superfund is now codified under 26 *U.S.C.* Chapter 98, Subchapter A.

The United States Environmental Protection Agency (EPA) administers the fund, and the uses of the fund are outlined in 42 *U.S.C.* § 9611. It may be used to pay for two types of cleanups, called "response actions" by CERCLA: remedial actions and removal actions. 42 *U.S.C.* § 9601(25). Remedial actions involve the permanent containment, treatment, or disposal of hazardous substances. 42 *U.S.C.* § 9601(24). Removal actions involve short-term, rapid action to control, contain, and abate spills or other releases of hazardous substances. 42 *U.S.C.* § 9601(23). The EPA has established procedures and standards for evaluating and responding to releases of hazardous substances in the National Oil and Hazardous Substances Contingency Plan (more commonly referred to as the National Contingency Plan or "NCP"). 42 *U.S.C.* § 9605.

Few pieces of property become federal Superfund sites. The National Priorities List (NPL) contains approximately 1,000 sites that EPA must address under CERCLA. However, state and local environmental agencies can use CERCLA's provisions to recover costs incurred in investigating or remediating sites that are not listed on the NPL or in attempting to force liable parties to do so. 42 *U.S.C.* § 9607(a)(4)(B). In addition, private actions under CERCLA have now become commonplace. Eminent domain practitioners must pay attention to CERCLA because any property owner might be forced to incur expenses to remediate property and seek contribution from others.

b. [§18.3]Liable Parties

Under 42 *U.S.C.* § 9607(a) every current owner and operator of a facility, every person who owned or operated a

facility at the time of the disposal of hazardous substances, and every person who arranged for transportation, treatment, or disposal of a hazardous substance at the facility from which a hazardous substance is released, is liable for all necessary costs incurred by the United States or by any other party in responding to a release of hazardous substances, as long as those response costs are consistent with the NCP, 42 *U.S.C.* § 9605. Regulations found in 40 C.F.R. Part 300 set forth the rules for investigating and cleaning up a site under CERCLA. Failure to comply with the NCP will result in the rejection of cleanup cost claims. *Washington State Dept. of Transportation v. Washington Natural Gas Co.*, 59 F.3d 793 (9th Cir. 1995) (response cost claim rejected when transportation agency performed cleanup to maintain road construction schedule and did not determine extent of contamination, choose cost-effective response, or comply with NCP public notice and comment requirements).

A person who holds an easement may not generally be held liable as the owner or operator under CERCLA, *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364 (9th Cir. 1994), unless it takes actual control over the right-of-way, *City of Toledo v. Beazer Materials & Services, Inc.*, 923 F.Supp. 1013 (N.D. Ohio 1996) (city could be held liable under CERCLA because it had acquired right-of-way without using its eminent domain authority). See also *City of Emeryville v. Elementis Pigments, Inc.*, 2001 WL 964230 (N.D. Cal. 2001) (city had taken control over right-of-way through its eminent domain authority but, because it had also exercised due care, it could not be held liable under CERCLA).

c. [§18.4]Defenses

There are three statutory defenses under CERCLA in 42 *U.S.C.* § 9607(b). The first two — an act of God or an act of war — are rarely invoked. The third defense is the most commonly raised. Under 42 *U.S.C.* § 9607(b)(3), a party avoids liability if the release of hazardous substances and the damages resulting from it were caused solely by

an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

It is this language that gives rise to the so-called "innocent purchaser" defense, discussed in §§ 18.5 – 18.7.

d. Condemning Authorities

(1)[§18.5]Innocent Purchaser Defense
(2)[§18.6]Innocent Purchaser Requirements
(3)[§18.7]Innocent Purchaser Status When Taking Title Through Exercise Of Eminent Domain

(1) [§18.5]Innocent Purchaser Defense

In 1986 CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub.L.No. 99-499, 100 Stat. 1613, which provided some relief to persons who exercise eminent domain authority. "Contractual relationship," as used in 42 *U.S.C.* § 9607(b)(3), is defined to exclude land contracts, deeds, or other instruments transferring title to or possession of real property after disposal or placement of the hazardous substance if any of the following apply:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

42 *U.S.C.* § 9601(35)(A). SARA also imposes this requirement: "In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) and (b)."*Id.* This means the defendant must also have exercised due care with respect to the hazardous substances involved and must have taken reasonable precautions against the foreseeable acts of third parties. See § 18.4.

(2) [§18.6]Innocent Purchaser Requirements

A person buying property has a defense to Superfund liability if the person can satisfy the "no reason to know" requirements of 42 *U.S.C.* § 9601(35)(A)(i). To establish that the defendant had no reason to know, the purchaser must have undertaken, at the time of acquisition, "all appropriate inquiries . . . into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices." 42 *U.S.C.* § 9601(35)(B)(i)(I). When a court is determining whether a party that purchased property before May 31, 1997, is entitled to claim this defense, it must consider

(VII) Specialized knowledge or experience on the part of the defendant.

(VIII) The relationship of the purchase price to the value of the property if the property was not contaminated.

(IX) Commonly known or reasonably ascertainable information about the property.

(X) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

42 *U.S.C.* § 9601(35)(B)(iii).

For property purchased after May 31, 1997, compliance with ASTM Standard E1527-97 has to also satisfy the requirements of CERCLA until November 1, 2006. 42 *U.S.C.* § 9601(35)(B)(iv)(II). Thereafter, persons who seek to take advantage of CERCLA's innocent owner provisions must comply with regulations promulgated by the EPA on November 1, 2005', Standards and Practice for All Appropriate Inquiries. 40 C.F.R. § 312.1 (describing in great detail nature of investigation that must now be conducted).

The purchaser must also satisfy the requirements of 42 *U.S.C.* § 9607(b)(3). Therefore, the purchaser must deal with hazardous substances with due care and take reasonable precautions against the foreseeable acts or omissions of third parties or the consequences of those acts or omissions.

(3) [§18.7]Innocent Purchaser Status When Taking Title Through Exercise Of Eminent Domain

Under 42 *U.S.C.* § 9601(35)(A)(ii), an environmental audit requirement is not imposed on those acquiring property through the exercise of eminent domain. However, eminent domain authorities must still meet the requirements of 42 *U.S.C.* § 9607(b)(3) by dealing with the hazardous substances in a prudent fashion and taking reasonable precautions against the foreseeable acts or omissions of third parties who might otherwise cause a

release of hazardous substances. It may be small comfort to the condemning authority, however, that it does not face liability under CERCLA. For example, soil contamination may add significant costs to the planned use of the property if the contaminated soils must be specially handled, stored, treated, disposed of, or remediated. If contaminated groundwater is encountered, it too might trigger unanticipated costs because of special treatment or disposal requirements.

2. Resource Conservation And Recovery Act (RCRA)

a. [§18.8]In General

The Resource Conservation and Recovery Act of 1976 (RCRA), 42 *U.S.C.* §§ 6901 *et seq.*, establishes another major federal regulatory program that can be the source of significant liability to parties involved in a condemnation proceeding. The scope of RCRA regulations was initially limited to the generation, handling, and disposal of solid and hazardous waste. That original scope has been broadened considerably, however, with the promulgation of regulations that include standards for cleaning up sites formerly used for the generation, handling, and disposal of hazardous waste.

The regulations promulgated under RCRA, found at 40 C.F.R. Part 260, became effective on May 19, 1980. Those regulations established criteria to determine whether a waste must be handled as a hazardous waste. Once material is considered waste (*i.e.*, discarded, no longer suitable for its intended use), see 40 C.F.R. § 261.2, it can be considered a hazardous waste either by exhibiting one of the characteristics attributed to hazardous waste or by being listed as a hazardous waste, *i.e.*, by appearing on one of the hazardous waste lists promulgated by the EPA. 40 C.F.R. § 261.3(a)(2). Any waste identified as hazardous is subject to extensive RCRA requirements concerning storage, transportation, treatment, and disposal, which essentially manage the wastes from "cradle to grave."

b. [§18.9]Liability Provisions

The EPA Administrator has authority to sue any present or past hazardous waste generator or transporter, or the owner or operator of a treatment, storage, or disposal facility that has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste in such a way that it "may present an imminent and substantial endangerment to health or the environment." 42 *U.S.C.* § 6973(a). Consistent with the initial focus of RCRA, liability has traditionally been imposed on parties for regulatory violations related to the improper storage, handling, or disposal of hazardous waste abandoned on the property, see, *e.g.*, *United States v. Bliss*, 667 F.Supp. 1298 (E.D. Mo. 1987), but the liability provisions have also been interpreted to apply to inactive sites, *United States v. Northeastern Pharmaceutical Chemical Co.*, 810 F.2d 726 (8th Cir. 1986) (RCRA imposes strict liability on past off-site generations of hazardous waste and on past transportations of hazardous waste). Liability has also been imposed on persons who have purchased property several years after the dumping of hazardous materials had ceased. *United States v. Price*, 523 F.Supp. 1055 (D. N.J. 1981), *aff'd* 688 F.2d 204.

Private parties also have the right to bring a civil action against any person or governmental entity that is "alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order" effective under RCRA. 42 *U.S.C.* § 6972(a)(1)(A). The statute also allows for private actions against any person or governmental entity (including any past or present generator, transporter, owner, or operator of a treatment, storage, or disposal facility) that 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." 42 *U.S.C.* § 6972(a)(1)(B).

The EPA has issued regulations under RCRA regarding the cleanup of contamination that results from hazardous waste. 40 C.F.R. Part 265. Under those regulations, RCRA has been used to impose liability for the cleanup of hazardous waste sites and for the recovery of cleanup costs. The practitioner should note that neither 42 *U.S.C.* § 6972 nor § 6973 contains a provision for relief of liability that is comparable to the innocent purchaser provision in CERCLA. See §§ 18.5 – 18.7. As a result, any person or entity that purchases or condemns property and fails to discover RCRA-regulated contamination could face substantial cleanup requirements, costs, penalties, and fines. See, *e.g.*, *Price* (owner of former landfill liable under RCRA because its indifference to presence of hazardous substances on property contributed to leaking of wastes from site even though all dumping of those substances had ceased). Moreover, the corrective action and permitting requirements imposed by RCRA can be complex, costly, and time-consuming. It is vital for a potential property purchaser or condemnor to evaluate the conditions and compliance status of the property being acquired as it relates to possible liability under RCRA.

Several decisions provide examples of efforts to use RCRA to recover cleanup costs. In *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), property owners cleaned up contamination at a site that had previously been used as a gas station. The owners attempted to recover cleanup costs from the former owners and a petroleum company. The court of appeals held that 42 *U.S.C.* § 6972 authorizes only injunctive relief, not recovery of private party cleanup costs. The following year, in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996), the Supreme Court held that a purchaser of property contaminated with petroleum products could not use RCRA to recover the past costs it incurred in cleaning up the property after the purchase because the plaintiff had not established that an "imminent and substantial endangerment" existed at the time the lawsuit was commenced. Other courts have generally followed this lead, refusing to hold a company previously in control of contaminated property liable under RCRA unless there is proof that the company is currently in violation of a regulation or that it spilled hazardous chemicals or other contaminants at the site. See, *e.g.*, *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2d Cir. 1997); *Hudson Riverkeeper Fund, Inc. v. Atlantic Richfield Co.*, 138 F.Supp.2d 482 (S.D. N.Y. 2001). Closer to home, the Middle District of Alabama has used similar reasoning to deny a defendant property owner's motion for leave to file a third-party complaint under 42 *U.S.C.* § 6972(a)(1)(A) that would have asserted contribution and indemnity claims for future cleanup costs against state and local governmental entities as well as former lessees of the property. *Davenport v. Neely*, 7 F.Supp.2d 1219 (M.D. Ala. 1998). In contrast, the courts have generally found that 42 *U.S.C.* § 6973 empowers the government to first clean a site up and then seek response costs. See *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), 115 A.L.R.Fed. 817.

B. Florida Law

1. *F.S.* Chapter 376

g.[§18.16]Innocent Purchaser Status
h.[§18.17]Defenses
i.[§18.18]Retroactivity
j.[§18.19]Private Actions

a. [§18.10] In General

F.S. Chapter 376 was originally designed to regulate discharges of petroleum and petroleum products from petroleum storage systems. In 1992, the legislature expanded the scope of the chapter to cover certain "hazardous substances."Ch. 92-30, Laws of Fla.

b. [§18.11] Liability Provisions

F.S. 376.302(1) provides that the following are violations of *F.S.* Chapter 376 and are prohibited:

(a) To discharge pollutants or hazardous substances into or upon the surface or ground waters of the state or lands, which discharge violates any departmental "standard" as defined in s. 403.803(13).

(b) To fail to obtain any permit or registration required by this chapter or by rule, or to violate or fail to comply with any statute, rule, order, permit, registration, or certification adopted or issued by the department pursuant to its lawful authority.

(c) To knowingly make any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter, or to falsify, tamper with, or knowingly render inaccurate any monitoring device or method required to be maintained under this chapter or by any permit, registration, rule, or order issued under this chapter.

F.S. 403.803(13) defines a departmental "standard" as any Department of Environmental Protection (DEP) rule concerning, among other things, air and water quality and solid waste management. This subsection does not discuss rules relating to soil quality. The DEP cleanup rules for petroleum discharges establish the level of certain substances that can remain in the soils after cleanup. See Fla. Admin. Code Chapter 62-770.

A person who violates *F.S.* 376.302(1) is liable to the state for any damage caused and for civil penalties under *F.S.* 403.141. *F.S.* 376.302(2). Criminal liability may also attach. *F.S.* 376.302(3)–(4).

c. [§18.12] Key Definitions

"Pollutants" are defined in *F.S.* 376.301(36) to include "any product as defined in s. 377.19(11), pesticides, ammonia, chlorine, and derivatives thereof, excluding liquefied petroleum gas."

"Product" is defined in *F.S.* 377.19(11) as

any commodity made from oil or gas and includes refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, casinghead gasoline, natural gas gasoline, naphtha, distillate, condensate, gasoline, waste oil, kerosene, benzine, wash oil, blended gasoline, lubricating oil, blends or mixtures of oil with one or more liquid products or byproducts derived from oil or gas, and blends or mixtures of two or more liquid products or byproducts derived from oil or gas, whether hereinabove enumerated or not.

"Hazardous substances" are those substances defined as such under CERCLA. *F.S.* 376.301(21).

F.S. 376.301(13) defines "discharge" as including but not limited to "any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, releasing or dumping of any pollutant or hazardous substance which occurs and which affects lands and the surface and ground waters of the state not regulated by ss. 376.011–376.21 [covering coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state]."

d. [§18.13] Abatement Obligations

F.S. 376.305(1) provides: "Any person discharging a pollutant as prohibited by ss. 376.30–376.319 shall immediately undertake to contain, remove, and abate the discharge to the satisfaction of the department." It should be noted that *F.S.* 376.305(1) covers only discharge of a pollutant; it does not cover discharge of a hazardous substance.

e. [§18.14] Standard Of Liability

Liabilities and defenses are addressed at *F.S.* 376.308. When the DEP brings a lawsuit, negligence is not an issue. The department need prove only that the prohibited discharge or polluting condition occurred. *F.S.* 376.308(1).

F.S. 376.313 imposes strict liability on those who discharge a pollutant or cause a condition of pollution. See *Sunshine Jr. Stores, Inc. v. State, Dept. of Environmental Regulation*, 556 So.2d 1177, 1179–1180 (Fla. 1st DCA 1990) (in appeal from final agency action, district court said legislature, in enacting *F.S.* Chapter 376, "did not make liability for polluting the environment contingent on a showing of negligence or fault").

F.S. 376.308(4) specifically states that liability under *F.S.* Chapter 376 "shall be joint and several. However, if more than one discharge occurred and the damage is divisible and may be attributed to a particular defendant or defendants, each defendant is liable only for the costs associated with his or her damages. The burden shall be on the defendant to demonstrate the divisibility of damages."

f. [§18.15] Liable Parties

Persons liable to the DEP for discharges and polluting conditions are the following:

•Any person who caused a discharge or other polluting condition or who owned or operated the facility at the time the condition occurred, or the stationary tanks or the nonresidential location that constituted the facility at the time that the discharge occurred.

•For hazardous substances discharges, all persons specified in *F.S.* 403.727(4).

•For discharge of petroleum, petroleum products, or dry cleaning solvents, the owner of the facility unless the exceptions in *F.S.* 376.308(1)(c) apply. See § 18.17.

F.S. 376.308(1). The persons specified in *F.S.* 403.727(4) are roughly the same persons who would be liable under 42 *U.S.C.* § 9607(a): current owners and operators of a facility, owners and operators at the time of disposal, persons who arranged, by contract or otherwise, for disposal or treatment of a hazardous substance, and any person who accepted a hazardous substance for transport to disposal or treatment facilities. See § 18.3.

g. [§18.16] Innocent Purchaser Status

An innocent purchaser defense is provided at *F.S.* 376.308(1).

The following persons shall be liable to the department for any discharge or polluting condition: . . . In the case of

a discharge of petroleum, petroleum products, or drycleaning solvents, the owner of the facility, the drycleaning facility, or the wholesale supply facility [is liable to the department for any discharge or polluting condition], unless the owner can establish that he or she acquired title to property contaminated by the activities of a previous owner or operator or other third party, that he or she did not cause or contribute to the discharge, and that he or she did not know of the polluting condition at the time the owner acquired title. If the owner acquired title subsequent to July 1, 1992, or, in the case of a drycleaning facility or wholesale supply facility, subsequent to July 1, 1994, he or she must also establish by a preponderance of the evidence that he or she undertook, at the time of acquisition, all appropriate inquiry into the previous ownership and use of the property consistent with good commercial or customary practice in an effort to minimize liability. . . . In an action relating to a discharge of petroleum, petroleum products, or drycleaning solvents under chapter 403, the defenses and definitions set forth herein shall apply.

The Florida Legislature adopted the innocent purchaser language of CERCLA, but only with respect to property affected by petroleum contamination, not property affected by hazardous substances. See *F.S.* 376.308(1)(c). See also §§ 18.5 – 18.7.

h. [§18.17] Defenses

In addition to the innocent purchaser defense, other defenses available to a person in an action brought by the DEP under *F.S.* Chapter 376 are

•an act of war;

•an act of government;

•an act of God; or

•an act or omission of a third party, other than an agent of the defendant or someone in privity with the defendant, when the defendant can prove that

•it exercised due care with respect to the pollutant, and

•it took precautions against foreseeable acts or omissions of the third party.

F.S. 376.308(2).

i. [§18.18] Retroactivity

F.S. 376.302 was enacted in 1983. The statute contains no explicit legislative expression of retroactivity. At least one court has indirectly discussed the retroactivity issue under *F.S.* Chapter 376, saying only that the plaintiff "must, of course, prove causes of action arising after the statute's effective date."*Cunningham v. Anchor Hocking Corp.*, 558 So.2d 93, 99 (Fla. 1st DCA 1990).

j. [§18.19] Private Actions

Before February 2005, there was a split of authority among Florida's courts regarding whether *F.S.* 376.313(3) provided for actions by private parties for violations of *F.S.* 376.30–376.319. Some courts had held that *F.S.* 376.313 did provide a private right of action, while others held that the statute simply preserved existing common-law actions. See, *e.g.*, *Kaplan v. Peterson*, 674 So.2d 201 (Fla. 5th DCA 1996) (statute creates a private action); *Mostoufi v. Presto Food Stores, Inc.*, 618 So.2d 1372 (Fla. 2d DCA 1993), *disapproved on other grounds* 894 So.2d 20 (statute simply retains common-law rights of action).

The Florida Supreme Court resolved the conflict among the lower courts in 2005 and held that *F.S.* 376.313(3) does create a private cause of action for violations of *F.S.* 376.30–376.319. See *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So.2d 20 (Fla. 2005). The cause of action is limited to a claim by one party against another party based on allegations of a discharge of pollutants or hazardous substances under *F.S.* 376.302. Such a discharge may be into or on surface or groundwater of the state or lands as long as there is a violation of a DEP standard. See § 18.11. There is no need to show that the discharge was the result of negligence. *F.S.* 376.313(3).

Different rules apply to a civil action brought after July 1, 1986, against the owner or operator of a petroleum storage system for damages caused by a discharge from a petroleum storage system that meets the requirements of Fla. Admin. Code Chapter 62-761. *F.S.* 376.313(4). Under these circumstances, the statute does not impose strict liability. Instead, negligence must be proved. *Id.* Nevertheless, a failure to comply with *F.S.* Chapter 376 or with the rules promulgated under that chapter is viewed as prima facie evidence of negligence. *F.S.* 376.313(4).

"Damages" are not defined in *F.S.* Chapter 376. Before *Aramark Uniform & Career Apparel, Inc.*, at least one court (the District Court of Appeal, Fifth District, in *Kaplan*) had determined that the statute does not allow the plaintiff to recover the diminution in value to its property as a result of contamination. Instead, recovery had typically been limited to the cost of responding to the discharge of a pollutant. *Id.* The trial court in *Aramark*, however, found that contamination of Easton's property had diminished the property's value by $153,000. The Supreme Court acknowledged the damages and found that they were reasonable even absent proof of causation. According to *F.S.* 376.313(6), a court may award attorneys' fees and expert witness fees when it determines that doing so is in the public interest. In comparison, when state action does not rise to the level of a compensable taking by inverse condemnation, a property owner is not entitled to recover attorneys' fees and costs incurred in opposing the state action. *Dept. of Environmental Protection v. Gibbins*, 696 So.2d 888 (Fla. 5th DCA 1997).

The statutory defenses to liability under *F.S.* 376.313(3) are found in *F.S.* 376.308. See § 18.17. Notably, the court in *Aramark Uniform & Career Apparel, Inc.*, found that *F.S.* 376.313 does not require the plaintiff to prove that a defendant property owner caused the contamination on its own property. The court stated that, because the statute creates strict liability, the defendant could be found liable even though a predecessor owner may have caused the contamination on the defendant's property that later migrated to the plaintiff's property, unless the current owner can prove that it is entitled to an affirmative defense.

2. [§18.20] *F.S.* Chapter 403

F.S. Chapter 403, the Florida Air and Water Pollution Control Act, contains numerous prohibitions that the DEP may enforce. *F.S.* 403.087(1) prohibits the operation, maintenance, construction, expansion, or modification of a stationary installation that is reasonably expected to be a source of air or water pollution "without an appropriate and currently valid permit issued by the department unless exempted by department rule."*F.S.* 403.088 prohibits any person from discharging into state waters any waste that reduces the quality of receiving waters below their established classification. However, the statute does not prohibit the application of pesticides to such waters to control insects, weeds, or algae, provided the application is approved by the appropriate department. *Id.*

F.S. 403.161(1)(a) prohibits "any person"from causing pollution "so as to harm or injure human health or welfare, animal, plant, or aquatic life or property."*F.S.* 403.161(1)(b) prohibits violations of department rules or regulations. *F.S.* 403.161(1)(c) prohibits false statements in documents required to be filed with the DEP or maintained under *F.S.* Chapter 403, and *F.S.* 403.161(1)(d) makes it a violation of the statute for any person to fail to report the release of a hazardous substance within one day. A willful violation of *F.S.* 403.161(1)(a) is a third degree felony, punishable by up to five years in prison and a $50,000 fine. *F.S.* 403.151(3). Reckless violations of *F.S.* 403.161(1)(a) and willful violations of *F.S.* 403.161(1)(b) and (1)(c) are second degree misdemeanors. *F.S.* 403.161(5). The potential for an enforcement action under the statute's record-keeping provisions also exists, and

these violations are often easier to prove than substantive violations. The judicial and administrative remedies available to the DEP for violations specified in *F.S.* 403.161(1) are extensive and are described in *F.S.* 403.121. The remedies include a civil action "to recover damages for any injury to the air, waters, or property . . . of the state caused by any violation."*F.S.* 403.121(1)(a).

F.S. 403.141(1) provides that a person who commits a violation of *F.S.* 403.161(1) is liable to the state for damages to state property and for the expenses of the state to trace the "source of the discharge," to control and abate the source and the pollutants, and to restore state property. Civil penalties of not more than $10,000 per offense may also be imposed, although the courts may receive evidence in mitigation. *F.S.* 403.141(1). Each day that a violation continues is considered a separate offense. *Id.* If two or more persons are involved, the statute makes them jointly and severally liable unless the damage is divisible, in which case "each violator is liable only for that damage attributable to his or her violation."*F.S.* 403.141(2). The statute does not specify who has the burden of proving divisibility.

Imminent hazards from hazardous wastes are addressed in *F.S.* 403.726. The DEP must take action necessary under *F.S.* 403.121 or 403.131 "to abate or substantially reduce any imminent hazard caused by a hazardous substance, including a spill into the environment of a hazardous substance."*F.S.* 403.726(2). "An imminent hazard exists if any hazardous substance creates an immediate and substantial danger to human health, safety, or welfare or to the environment."*F.S.* 403.726(3). *F.S.* 403.121(2)(b) authorizes the DEP to institute an administrative proceeding to "order the prevention, the abatement, or control of the conditions creating the violation or other appropriate corrective action." The department may also seek injunctive relief to enforce compliance with *F.S.* Chapter 403, or "any rule, regulation, permit certification, or order; to enjoin any violation specified in s. 403.161(1); and to seek injunctive relief or to prevent irreparable injury to the air, waters, and property, including animal, plant, and aquatic life, of the state, and to protect human health, safety, and welfare caused or threatened by any violation."*F.S.* 403.131.

F.S. 403.727(4), Florida's "Little CERCLA," is patterned after § 107(a) of CERCLA. See § 18.3. It provides in pertinent part that an owner and operator of a facility, any person who at the time of disposal of a hazardous substance owned or operated a facility at which the hazardous substance was disposed of, and any person who arranged for disposal or treatment of hazardous substances or accepted such substances for disposal or treatment

is liable for all costs of removal or remedial action incurred by the department under this section and damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from the release or threatened release of a hazardous substance as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510.

Other than for an "act of government," defenses to liability under this statute are similar to those set out in § 107(b) of CERCLA. *F.S.* 403.727(5). See § 18.4. Florida's Little CERCLA does not contain an innocent purchaser defense.

3. [§18.21] Florida Department Of Transportation

The legislature has provided the Florida Department of Transportation (DOT) with an exemption from liability as an owner under *F.S. Chapters 376* and 403. *F.S.* 337.27(4). The exemption is broader than the exemption available under CERCLA and provides:

When the department acquires property for a transportation facility or in a transportation corridor through the exercise of eminent domain authority, or by purchase or donation, it is not subject to any liability imposed by chapter 376 or chapter 403 for preexisting soil or ground-water contamination due solely to its ownership. This section does not affect the rights or liabilities of any past or future owners of the acquired property nor does it affect

the liability of any governmental entity for the results of its actions which create or exacerbate a pollution source. The department and the Department of Environmental Protection may enter into interagency agreements for the performance, funding, and reimbursement of the investigative and remedial acts necessary for property acquired by the department.

Id.

C. [§18.22] Local Ordinances

Local ordinances can also impose liability. For example, Miami-Dade County, Fla., Code § 24-42(1), makes it unlawful "for any person to throw, drain, run or otherwise discharge into any of the waters of this County, or to cause, permit or suffer to be thrown, run, drained, allowed to seep, or otherwise discharged into such water any organic or inorganic matter, which shall" breach certain county standards, cause water pollution, or cause a nuisance or sanitary nuisance. Code § 24-42(3) provides that no person shall "cause a nuisance or sanitary nuisance."A sanitary nuisance is defined in Code § 26A-2(a) as "the commision of any act, by an individual, municipality, organization or corporation, or the keeping, maintaining, propagation, existence or permission of anything, by an individual, municipality, organization or corporation, by which the health or life of an individual . . . may be threatened or impaired or by which or through which, directly or indirectly, disease may be caused." Code § 26A-4 provides: "Any person found guilty of creating, keeping or maintaining a nuisance injurious to health shall be punished by imprisonment . . . not to exceed sixty (60 days) or by a fine not exceeding two hundred ($200.00), or by both. . . ."

In *Seaboard System Railroad, Inc. v. Clemente ex rel Metropolitan Dade County*, 467 So.2d 348, 355 (Fla. 3d DCA 1985), the court determined that an earlier version of the Miami-Dade County code provision quoted above imposed strict and retroactive liability on the current owner of property even though the current owner "neither actively participated in nor possessed knowledge of the discharge or maintenance of hazardous substances on the polluted property."

To date, innocent purchaser protection has not existed under local ordinances. Therefore, at least in Miami-Dade County, persons who take title to property have reasons beyond CERCLA and state statutory law to have environmental concerns about these acquisitions. See. *e.g., American Telephone & Telegraph Co. v. Fraiser*, 545 So.2d 405 (Fla. 1st DCA 1989) (applicable Jacksonville ordinances do not contain same strict liability provisions as Miami-Dade County ordinance constructed in *Clemente*).

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D. Common Law

1. [§18.23] Liability Theories

Depending on the factual circumstances, Florida recognizes several theories of common-law liability for contamination to real property, including negligence, strict liability for ultra-hazardous activities, nuisance, and trespass. These causes of action are usually brought in conjunction with and in addition to those based on statute.

2. [§18.24] Duty To Disclose Latent Defects In Property

Under Florida's common law, is there a duty to disclose the presence of contamination as a condition that may not be obvious to a purchaser but that would affect the value of property? In the case of a sale of residential property, the Florida Supreme Court has determined that the seller of a home who has knowledge of facts materially affecting the home's value but that are not obvious or known to the purchaser has a duty to disclose these facts to the purchaser. *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985). A seller may be liable under *Johnson* for failure to disclose, regardless of whether the nondisclosure was intentional or negligent. *Billian v. Mobil Corp.*, 710 So.2d 984 (Fla. 4th DCA 1998). However, the buyer may not hide behind the seller's unintentional negligence when the buyer also is negligent in failing to discover the condition. See *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So.2d 334 (Fla. 1997).

This duty to disclose has not been extended to the sale of commercial property. *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*, 578 So.2d 363 (Fla. 3d DCA 1991), 12 A.L.R.5th 1087. *Futura* involved the sale of property previously used for a wood-treating plant. The court held that, under the doctrine of caveat emptor, the purchaser of commercial property has the duty to learn about the purchase. *Futura* did not involve a claim under *F.S.* Chapter 376. The District Court of Appeal, Second District, addressed the application of caveat emptor in light of the state's environmental statutes and found that *F.S.* Chapter 376 does not change the outcome. *Mostoufi v. Presto Food Stores, Inc.*, 618 So.2d 1372 (Fla. 2d DCA 1993), *disapproved on other grounds* 894 So.2d 20. However, judicial interpretations of *F.S.* Chapter 376 have not been a model of consistency. The opposite result was reached by the District Court of Appeal, Fifth District, in *Kaplan v. Peterson*, 674 So.2d 201 (Fla. 5th DCA 1996) (caveat emptor does not bar lawsuit to recover cost of cleaning up discharge that occurred in violation of *F.S.* Chapter 376).

E. Reimbursement And Rehabilitation Programs

1. [§18.25] In General

The Florida DEP administers several programs providing for the cleanup of environmental contamination. These programs initially focused on the cleanup of environmental contamination related to petroleum products; subsequently a program was created to remediate contamination by dry cleaning chemicals. The practitioner should note that, with only a few exceptions, eligibility in these programs is closed, although it is important to clarify whether a contaminated property was previously determined eligible in one of these programs and if state cleanup assistance is available. These programs are briefly described in §§ 18.26 – 18.27.

2. [§18.26] Petroleum Cleanup/Reimbursement Programs

A variety of state cleanup programs have been developed within the past 20 years in response to the recognized environmental and health risks related to petroleum contamination sources. Although most of these programs are no longer available, the practitioner should be aware of them because many properties have already been determined eligible in one of these programs. A large number of sites previously determined eligible remain in state petroleum cleanup programs, and the potential eligibility status of property must be considered with respect to both valuation issues and appropriate regulatory compliance as part of the acquisition of older urban properties. State-funded cleanup work is being performed on a priority basis determined by the score assigned to the site according to the environmental sensitivity of the location and level of contamination. Preliminary records research in the DEP database should indicate whether a property is already in a cleanup program and the status of work based on the site score.

In 1986, the legislature created the first relevant environmental cleanup program in its Early Detection Incentive (EDI) Program and the Reimbursement Program, *F.S.* 376.3071(12). Subject to specific eligibility requirements, these programs provided state cleanup and reimbursement of cleanup costs incurred by private parties for sites impacted by petroleum products released from petroleum storage tank systems. Applications for these programs closed on December 31, 1988. However, sites previously admitted into the program remain eligible for funding. Following the termination of the EDI program, the legislature created the Florida Petroleum Liability and Restoration Insurance Program (FPLRIP), which continued to support petroleum storage tank cleanup efforts. *F.S.* 376.3072. Unlike the EDI Program, eligibility for the FPLRIP required that the facility satisfy DEP financial responsibility and storage tank requirements. This program ended on December 31, 1998, although sites previously determined eligible in the program will be addressed in the same manner as described for EDI sites.

Another petroleum-based cleanup program was the Abandoned Tank Restoration Program (ATRP), *F.S.* 376.305(6). This program provided assistance for site cleanup of contamination from abandoned petroleum storage systems. The ATRP applied to petroleum storage systems that had not stored petroleum products for consumption, use, or sale at the facility since March 1, 1990. The program ended June 30, 1996, with the exception of sites at which it could be demonstrated and confirmed that the responsible party was unable to pay for the proper closure of the storage tank system. The DEP will take into consideration the owner's net worth and the economic impact on the owner to determine the owner's financial ability. Eligibility in the ATRP results in the same cleanup process as in the EDI program and the FPLRIP.

In 2005, the Florida Legislature effectively abrogated the June 30, 1996, deadline for participation in the ATRP. *F.S.* 376.30715. This statute permits financial assistance for contaminated sites that were acquired prior to July 1, 1990, and that ceased operating as a petroleum storage or retail business prior to January 1, 1985. Therefore, this legislation permits current owners entrance into a state program (Innocent Victim Petroleum Storage System Restoration Program) provided that they meet the statute's timeframe requirements relating to ownership and use.

Another program created by the Florida Legislature was the Preapproved Site Rehabilitation Program, which modified the reimbursement of petroleum cleanup costs at eligible sites. *F.S.* 376.30711. Unlike past programs, this program requires that the cleanup contractor obtain preapproval from the DEP for the scope of the work and the costs associated with the cleanup work. This program provides for the direct payment to the designated contractor performing cleanup work at the site following approval from the DEP. As had been established previously with the reimbursement program, the cleanup work may be performed only at sites with scores above the level specified by the DEP's priority order. Therefore, eligible sites with lower scores may not be able to perform cleanup work for many years until the program activity reaches the lower-ranked site scores.

Two additional programs were also established that may provide some assistance at petroleum-contaminated sites.

The Petroleum Cleanup Participation Program (PCPP) is available for sites at which the discovered petroleum contamination relating to a stationary petroleum storage system occurred before January 1, 1995. The site must not already be eligible for one of the existing state cleanup programs. *F.S.* 376.3071(13). Cleanup work up to $300,000 is performed in the Preapproval Program in the priority order described above. The program also requires the preparation of a limited contamination assessment report (LCAR) and a commitment by the responsible party to pay 25% of the site rehabilitation costs. *F.S.* 376.3071(13)(c). The availability for eligibility in this program ended on December 31, 1998. It is still possible in some circumstances to achieve eligibility in the PCPP if certain information and documentation exists establishing contamination within the time periods prescribed by this program. As with the other state petroleum cleanup programs, a site previously determined eligible in this program remains eligible for funding; however, cleanup work may be suspended until the site score is reached according to cleanup priority order.

The Preapproved Advanced Cleanup Program (PACP) provides an option for sites eligible in one of the petroleum cleanup programs to proceed with preapproved cleanup work before the site score is reached. *F.S.* 376.30713. This is achieved through a process in which the responsible party agrees to pay a percentage of the cleanup costs. *Id.* The process involves submitting a bid for payment of a percentage of the ultimate site cleanup costs. The bids may be submitted from May 1 through June 30 and November 1 to December 31. *F.S.* 376.30713(2)(a). Sites are approved for work under the PACP based on the bid percentage and the available funding for that bid window. Although the PACP was suspended during recent years, the program was reactivated in 2007. Additionally, the PACP can be used in conjunction with the PCPP, which had previously not been possible.

3. [§18.27] Dry Cleaning Cleanup Program

F.S. 376.3078 establishes a program for cleanup of contamination at sites used as either dry cleaning facilities or wholesale supply facilities. Eligibility in the program is available to either the owner/operator of the facility or the owner of the real property on which the facility is located. Unlike some of the procedures previously discussed, this program consists of only a state cleanup program and does not contain a mechanism for reimbursement of costs of cleanup that may otherwise be incurred at the site. In addition to providing for state cleanup of the sites, the program prohibits any administrative or judicial action by or on behalf of any person to compel rehabilitation or to pay for the costs of rehabilitation of environmental contamination resulting from the discharge of dry cleaning solvents. *F.S.* 376.3078(3). In *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494 (Fla. 1999), the court held that the provisions of the Act that provide eligible entities immunity from governmental actions are intended to be applied retroactively. The court also noted that "a different result might well be reached if these immunity provisions were applied to abrogate the cause of action of a private plaintiff rather than a government entity's cause of action."*Id.* at 505.

The DEP promulgated regulations in Fla. Admin. Code Chapter 62-781 to implement this program. Program funding is limited relative to the overall costs associated with the estimated cleanup required at the dry-cleaning sites that exist. The cleanup work is performed by state contractors according to a priority order based on site score (see § 18.25).

4. [§18.28] Risk-Based Corrective Action Programs

Sites that are not otherwise in a cleanup program should adhere to the rule regarding risk-based corrective action (RBCA), which became effective April 17, 2005, and was codified in Chapter 62-780 of the Florida Administrative Code. This new "Global RBCA" rule provides a phased, risk-based set of procedures for the rehabilitation of contaminated sites for which remedial action is mandated by *F.S.* Chapter 376, and supplements other rules addressing risk-based corrective actions: Rule 62-770 (Petroleum Cleanup), Rule 62-782 (Drycleaning Solvent Cleanup Criteria), and Rule 62-785 (Brownfields Cleanup Criteria Rule). Chapter 62-780 also specifies

requirements for the notification of off-site owners. All risk-based groundwater and soil Clean-up Target Levels (CTLs) from the existing DEP programs have been combined into Rule 62-777, Contaminant Cleanup Target Levels.

III. VALUATION

A. [§18.29] In General

Article X, § 6, of the Florida Constitution guarantees full compensation to the owner of property taken by eminent domain. Under *F.S.* 73.071, a jury determines the amount of compensation due, which includes the value of the property taken. The value determination can be affected by contamination on the property and environmental regulation of property use. See Chapter 9 of this manual for a general discussion of compensation.

B. [§18.30] Contaminated Property

Nationally, there is a split of authority on the question of whether evidence of contamination or cleanup costs should be admissible on the issue of valuation of property for purposes of an eminent domain proceeding. See Nichols on Eminent Domain § 13B.03 (Matthew Bender rev. 3d ed. 2001). A majority of courts have held that this evidence may be admissible, and even courts that exclude evidence of contamination are exploring other mechanisms, such as holding condemnation proceeds in a trust or escrow account, to deal with possible remediation expenses. Nichols, s*upra*, at § 13B.03[4].

The Florida Supreme Court weighed in on this issue fairly early in the debate, and has not taken the opportunity to recede from its opinion. In *Finkelstein v. Dept. of Transportation*, 656 So.2d 921 (Fla. 1995), the court held that evidence of contamination would be admissible only to the extent that market data reflect a decrease in value or a stigma associated with the property in a contaminated condition. *Finkelstein* involved a property that was eligible for reimbursement under the EDI Program (see § 18.26), and the court specifically limited its holding "to the facts of this case, in which there was a program for reimbursement of the remediation costs."*Id.* at 924.

Initially, the Supreme Court agreed with the district court that evidence of property contamination is relevant to market value in an eminent domain valuation proceeding. This conclusion was consistent with the holding in *Florida Power & Light Co. v. Jennings*, 518 So.2d 895 (Fla. 1987), in which the court held that any factor that has an impact on the market value of the land may be considered to explain the basis for an expert's valuation opinion. "However," the court explained in *Finkelstein*, "holding that contamination is relevant to market value does not necessarily mean that evidence of contamination was admissible in this case."*Id.* at 924. The court held that in respect to property that is "agreed to be or alleged to be contaminated, the focus of the opinion testimony must be value. Evidence of contamination, because of its prejudicial nature, should not be a feature of a valuation trial beyond what is necessary to explain facts showing a reduction in value caused by contamination."

Id. at 925. The court added:

An opinion as to a decrease in value cannot be a mere surmise that because property is contaminated, it logically follows that the value of the property is decreased. There must be a factual basis through evidence of sales of comparable contaminated property upon which to base a determination that contamination has decreased the value

of the property. If there is no evidence in the record upon which the fact finder can determine that the value of the property has been decreased, then the petitioner would be entitled to the fair market value of the property valued as uncontaminated.
Id. The court placed on the condemning authority the burden of proof regarding the decrease in value.

The timing of the taking can affect valuation. In *Finkelstein*, the property was taken while in the process of being cleaned. In addition, the property had qualified for the EDI reimbursement program at the time of the taking. As a result, the court held that the property should be valued as if the cleaning of the property had been successfully completed at the time of the taking.

DOT had sought to introduce evidence of a "stigma" associated with the property that reduced its value. The condemnees argued that this evidence should not be admissible because the stigma to their property was only temporary. The Supreme Court decided, however, that if expert testimony meets the test set forth in *F.S.* 90.705(2), "then whether the stigma is or is not temporary will be encompassed within the examination and cross-examination of the experts."*Finkelstein*, 656 So.2d at 925. Therefore, if there is a sufficient factual predicate to conclude that contamination does affect market value, evidence of the contamination may be admissible. *Id.*

There has been no further application of *Finkelstein* in Florida case law dealing with evidence of contamination in the eminent domain context. As noted in footnote 1 of *Broward County v. LaPointe*, 685 So.2d 889 (Fla. 4th DCA 1997), the Supreme Court did not reach the issue of whether remediation costs would be relevant and admissible in an eminent domain valuation proceeding. However, in a tax assessment challenge, a district court held that it was error to exclude evidence of contamination and clean-up costs. *Gulf Coast Recycling, Inc. v. Turner*, 753 So.2d 712 (Fla. 2d DCA 2000). See also *Mola Development Corp. v. Orange County Assessment Appeals Board*, 95 Cal.Rptr.2d 546 (Ct.App. 2000) (for tax assessment purposes, proper to value property as uncontaminated and reduce by present value estimated cleanup costs). Similarly, in an inverse condemnation claim, a court may not exclude testimony about significant factors affecting property value, including the dilapidated condition of the building and the costs of bringing the structure into code compliance, or the fact that the building was demolished for public health and safety reasons. *C.E. Huffman Trucking, Inc. v. Red Cedar Corp.*, 723 So.2d 296 (Fla. 2d DCA 1998). See § 18.36 for further discussion of inverse condemnation.

Although Florida's courts have not further refined *Finkelstein*, courts in other states have offered different approaches to the question. See Stokes, *Valuing Contaminated Property in Eminent Domain: A Critical Look at Some Recent Developments*, 19 Tul.Envtl.L.J. 221 (2006) (analyzing recent case law relating to valuation of contaminated property; arguing for admissibility of evidence of contamination, remediation costs, stigma, and other related effects on market value).

The majority of states will allow evidence of contamination and costs of remediation in an eminent domain case. See, *e.g.*, *Silver Creek Drain District v. Extrusions Division, Inc.*, 663 N.W.2d 436 (Mich. 2003) (Michigan's condemnation statute permits reservation of right to recover remediation costs; estimated remediation costs may be considered in determining just compensation); *Northeast Ct. Economic Alliance, Inc. v. ATC Partnership*, 776 A.2d 1068 (Conn. 2001) (error to exclude evidence of contamination or remediation costs if there is impact on fair market value; value may be established through evidence of sales of comparable uncontaminated property discounted by some factor including costs of remediation).

Some courts have limited the admissibility of evidence of contamination and will value the property as if remediated. See, *e.g.*, *Housing Authority of City of New Brunswick v. Suydam Investors, L.L.C.*, 826 A.2d 673 (N.J. 2003) (contaminated property to be valued as if remediated); *City of New York v. Mobil Oil Corp.*, 783 N.Y.S.2d 75 (App.Div. 2004) (affirming order granting motion in limine as to evidence of remediation costs; property should be valued as if remediated, taking into account any residual stigma attached to previously

contaminated property).

For a more direct application of the diminution in value/stigma issues, or for comparison of various approaches to this issue, see *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994) (denying defendant's motion for summary judgment because diminution in value may be demonstrable under Pennsylvania law without proof of "permanent physical damage to land"); *Federal Deposit Insurance Corp. v. Jackson-Shaw Partners No. 46, Ltd.*, 850 F.Supp. 839 (N.D. Cal. 1994) (damage for trespass or nuisance limited to abatement costs and loss of use; tort damages for alleged "wrongful occupation" consist of lesser of diminution in value or cost of repair; because there was no loss of use and no evidence of abatement costs, and because defendant paid all costs of repair, diminution in value damages not recoverable; damages in quasi-contract may be recoverable for contamination of groundwater beneath plaintiff's property); *National Compressed Steel Corp. v. Unified Government of Wyandotte County/Kansas City*, 38 P.3d 723 (Kan. 2002) (environmental contamination relevant to appraising the value of property sought to be condemned); *Aladdin, Inc. v. Black Hawk County*, 562 N.W.2d 608 (Iowa 1997) (error to reduce just compensation by cost of remediation; eminent domain proceeding not proper forum for assessing liability for environmental contamination); *Terra-Products, Inc. v. Kraft General Foods, Inc.*, 653 N.E.2d 89 (Ind. Ct.App. 1995) (reduction in fair market value remaining after remediation of contamination may be recoverable but plaintiff failed to prove reduction); *Illinois Dept. of Transportation ex rel. People v. Parr*, 633 N.E.2d 19 (Ill. App.Ct. 1994) (evidence of alleged remediation costs not admissible in determining property value).

C. [§18.31] Further Issues

Until Florida's courts have more experience in attempting to satisfy the concerns raised in *Finkelstein v. Dept. of Transportation*, 656 So.2d 921 (Fla. 1995), discussed in § 18.30, this area of the law will remain a developing one. Possible extensions of *Finkelstein* can be identified, however. For example, when state funding is available for cleanup at a site that is declared eligible under one of the state cleanup programs (see §§ 18.25 – 18.27), the circumstances might warrant valuation of the property as if cleanup of the property had been successfully completed at the time of the taking. Similarly, the availability of insurance coverage for a contamination incident or the application of one of the state cleanup programs might trigger a result comparable to *Finkelstein*. Each case will turn on its own facts as courts grapple with the many fact patterns involving contamination issues.

To a lesser extent, the area of "brownfield" redevelopment may present yet another opportunity to test the reach of *Finkelstein*. Generally, these programs offer public funding of remediation in the form of grants, tax abatement, and tax increment financing to spur reuse and redevelopment of abandoned properties. See, *e.g.*, Berger, Campbell, Crolle, Crawl, Marsh, Randolph, Solo & Stephens, *Recycling Industrial Sites in Erie County: Meeting the Challenge of Brownfield Redevelopment*, 3 Buff.Envtl.L.J. 69 (1995). The existence of brownfield relief complicates valuation and may allow property owners to argue that it is inappropriate to consider contamination in the valuation process.

IV. [§18.32] RECOVERY OF COSTS

F.S. 73.091(1) obligates the condemning authority to pay all reasonable costs incurred in defense of an eminent domain proceeding. Recovery of attorneys' fees' appraisal fees, and, when business damages are compensable, accountants' fees' are specifically provided by statute. *Id.* The application of this statutory provision to environmental costs will likely depend on the facts of each case. When a condemning authority seeks to reduce the value of property because of the presence of contamination, costs associated with experts retained by the condemnee to respond to the argument appear to be recoverable. Soil or groundwater sampling costs, expert reports, or other environmental expenses may also be recoverable under appropriate circumstances.

An attorney's high level of experience in environmental matters was properly considered in the fee determination portion of a complex inverse condemnation claim arising from environmental harm to a landowner's property in *Schick v. Dept. of Agriculture & Consumer Services*, 599 So.2d 641 (Fla. 1992). Environmental expert fees for a feasibility study relating to various relocation sites were not recoverable as a moving expense when the costs related only to compliance with police power regulations in *Malone v. Division of Administration, State of Florida Dept. of Transportation*, 438 So.2d 857 (Fla. 3d DCA 1983). A landowner was not entitled to compensation for the value of an existing nonconforming use on the landowner's property because the costs to bring a property into compliance with applicable pollution, health, and safety regulations were not compensable in *State, Dept. of Transportation v. Bennett*, 592 So.2d 1150 (Fla. 4th DCA 1992). When a settlement agreement provides for a condemning authority to bear responsibility for possible environmental remediation costs, care should be taken to specify whether the court should reserve jurisdiction to assess attorneys' fees incurred in connection with environmental contamination issues. ''''See' *Broward County v. LaPointe*, 685 So.2d 889 (Fla. 4th DCA 1997).

V. ENVIRONMENTAL ASSESSMENT AND ENGINEERING

A. [§18.33] In General

It is now fairly common for a condemning authority to perform some level of environmental assessment before acquiring property. Access to property is to be provided to the condemnor. *F.S.* 337.274, for example, authorizes entry on reasonable notice for the Department of Transportation to conduct a site assessment.

B. [§18.34] Phase I And II Reports

Environmental assessments are typically performed in successive work phases. A Phase I assessment involves a visual inspection of the property, review of regulatory files and databases, interviews with individuals familiar with past and present site operations and conditions, and evaluation of available historical aerial photographs. A Phase I assessment normally does not include sample collection or analysis. The scope of work may vary depending on site-specific conditions, circumstances, or objectives. However, over the past 10 years efforts have been made to develop a standardized general scope of work. The ASTM Phase I standard (ASTM E 1527) is an example of the activities typically included in this work phase.

On November 1, 2005, the United States Environmental Protection Agency (EPA) published its final All Appropriate Inquiries (AAI) Rule (70 Fed.Reg. 66070-01) titled "40 CFR Part 312, Standards and Practices for All Appropriate Inquiries" (AAI regulation). The rule in effect adopts the revised 2005 version of the American Society for Testing Materials (ASTM) Phase I standard (E 1527 2005 Phase I Environmental Site Assessment Standard) (Phase I ESA), which was published on November 21, 2005, and which made the 2000 ASTM obsolete. The most recent AAI regulation became effective on November 1, 2006, but is interchangeable with the most recent ASTM Phase I Standard. Both establish the level of environmental due diligence required of property owners who seek to qualify for certain protections from strict liability under CERCLA, as well as owners applying for federal Brownfield grants.

Depending on the results of the Phase I assessment, it may be necessary to perform a Phase II assessment to sufficiently evaluate the property conditions and potential environmental risk. Phase II activities can involve the collection and analysis of groundwater, surface water, or soil in areas considered to contain the highest risk based

on conditions or facility information obtained during the Phase I work. It is also common to collect samples of any wastes or building materials, such as suspected asbestos-containing materials (*e.g.*, ceiling materials, floor tiles, insulation), possible lead-based paints, or mold related to moisture problems. The results of sample analysis must be compared to existing federal, state, or local standards to evaluate site conditions and define potential remediation requirements.

C. [§18.35] Nature And Significance Of Soil, Surface Water, And Groundwater Standards

The standards used in evaluating property conditions usually provide the basis for determining whether a problem exists and the extent of actions required to remediate the site. In some instances, standards may exist on several regulatory levels — federal, state, and local — for the soil and water being tested. In other instances, there may not be any established standards. In ————Florida——, the standards established by the DEP are typically used in this analysis. These standards exist in various regulatory chapters of the Florida Administrative Code, depending on the medium (surface water, groundwater, or soil) and the nature of the material identified. Because of the sensitivity of environmental conditions, the regulatory agency may apply drinking water standards in some locations. Additionally, the local regulatory agency may have more stringent standards than either state or federal agencies. The standards enforced by each jurisdictional regulatory agency must be identified to ensure a meaningful review of the analysis results and characterization of site conditions.

Depending on whether standards exist for the specific constituent and medium, it may not be appropriate or reasonable to apply the established standard at every site. Depending on the sensitivity of the site and the surrounding uses and background levels, it may be appropriate to apply alternative site cleanup levels. These alternative cleanup levels can be established by performing a risk assessment involving the analysis of the nature of the contaminant constituent and the risk to human health or the environment based on the potential pathways by which exposure may occur. This risk-based cleanup approach is often accepted by regulatory agencies.

VI. [§18.36] ENVIRONMENTAL REGULATION AND INVERSE CONDEMNATION

Environmental regulation can give rise to an inverse taking claim. See *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981); *F.S.* 380.08. Although protection of environmentally sensitive areas and pollution prevention are legitimate governmental concerns, an environmental regulatory scheme will be judged in the same manner as any exercise of state authority that allegedly constitutes an impermissible encroachment on private property rights. In this fact-intensive analysis, courts will consider the following:

1. Whether there is a physical invasion of the property.

2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the

property.

3. Whether the regulation confers a public benefit or prevents a public harm.

4. Whether the regulation promotes the health, safety, welfare, or morals of the public.

5. Whether the regulation is arbitrarily and capriciously applied.

6. The extent to which the regulation curtails investment-backed expectations.

Graham, 399 So.2d at 1380–1381.

Several environmental regulatory actions have constituted takings of property without just compensation when the regulation rendered the land essentially worthless. See *Zabel v. Pinellas County Water & Navigation Control Authority*, 171 So.2d 376 (Fla. 1965) (denial of dredge and fill permit deprived owner of valuable use of submerged land); *Alford v. Finch*, 155 So.2d 790 (Fla. 1963) (closing of private property to hunting); *Schick v. Florida Dept. of Agriculture*, 504 So.2d 1318 (Fla. 1st DCA 1987) (state contamination of private water supply); *Askew v. Gables-By-The-Sea, Inc.*, 333 So.2d 56 (Fla. 1st DCA 1976) (denial of dredge and fill permit).

A property owner has a heavy burden when bringing a claim for inverse condemnation. See Chapter 13 of this manual. A taking requires the deprivation of substantially all use of the property by the challenged environmental regulation. *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994). The possible use of the property is judged by an objective standard. See *Graham* (proposed development would result in pollution and public harm; developer's subjective expectations do not establish taking).

Government action restricting use of land without compensation may be constitutional under many scenarios. See *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663 (Fla. 1979) (no taking when town's overuse of shallow aquifer forced property owner to drill more expensive deep well); *Martinez v. Bolding*, 570 So.2d 1369 (Fla. 1st DCA 1990) (no taking even though state denied dredge and fill permit because landowner failed to apply for necessary federal permit); *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. 1st DCA 1990) (land use plan did not deny substantial use of property; no specific development plan denied); *Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County*, 349 So.2d 667 (Fla. 3d DCA 1977) (zoning change precipitated by ecological concerns did not render property valueless).

Although Florida's "project influence" rule will bar consideration of evidence of the effect on market value caused by the project for which the property is taken, see *State Road Dept. v. Chicone*, 158 So.2d 753 (Fla. 1963), the property owner is entitled to recover any actual damages resulting from surveys or environmental assessments performed by the condemning authority in connection with a taking. *F.S.* 337.274. The condemning authority's exercise of its right of entry is not a taking in and of itself. *Id.* However, some courts outside of Florida have held that too much precondemnation testing may amount to a temporary taking, giving rise to a possible inverse condemnation claim. See *National Compressed Steel Corp. v. Unified Government of Wyan-dotte County/Kansas City*, 38 P.3d 723 (Kan. 2002); *Burlington Northern & Santa Fe Railway Co. v. Chaulk*, 631 N.W.2d 131 (Neb. 2001).

All administrative remedies must be exhausted before an inverse condemnation claim can be pursued, *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1983) (failure to appeal denial of dredge and fill permit), unless administrative proceedings would be useless, *F.S.* 253.763(2)); *Bowen v. Florida Dept. of Environmental Regulation*, 448 So.2d 566 (Fla. 2d DCA 1984), *approved* 472 So.2d 460. Once a property owner accepts the administrative determination and files an inverse condemnation claim, the propriety of the regulatory action cannot be challenged. *Albrecht v. State*, 444 So.2d 8 (Fla. 1984) (uncompensated taking claim distinct from challenge to agency's denial of dredge and fill permit). A regulatory action that effectively deprives an owner of all economically beneficial uses of a property is a compensable taking unless the purpose is to control a public nuisance. *Keshbro, Inc. v. City of Miami*, 801 So.2d 864 (Fla. 2001). This is true for even temporary takings. *Id.* See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). However, a temporary land use regulation, like a development moratorium,

can rarely, if ever, completely deprive the landowner of all economically beneficial use of the property. *Leon County v. Gluesenkamp*, 873 So.2d 460 (Fla. 1st DCA 2004) (reversing finding of temporary taking); see also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002), 10 A.L.R.Fed.2d 681 (moratorium on development does not constitute per se taking).

VII. [§18.37] LACK OF REGULATORY COMPLIANCE AS DEFENSE TO TAKING

Because the conservation of natural resources is a policy of the state under Article II, § 7, of the Florida Constitution, environmental concerns must be considered in the context of an eminent domain proceeding. *Seadade Industries, Inc. v. Florida Power & Light Co.*, 245 So.2d 209 (Fla. 1971), 47 A.L.R.3d 1255. A condemning authority exceeds its discretion in determining whether to take property if it fails to consider, among other factors, environmental factors, long-range area planning, and safety. See *Hillsborough County v. Sapp*, 280 So.2d 443 (Fla. 1973). The failure to properly consider environmental factors is a basis for denial of an order of taking. See *Florida Power & Light Co. v. Berman*, 429 So.2d 79 (Fla. 4th DCA 1983) (no evidence that project manager responsible for considering ecological factors had any training or experience in ecology or environmental planning); *Florida Power Corp. v. Gulf Ridge Council*, 385 So.2d 1155 (Fla. 2d DCA 1980) (no environmental factors considered). In contrast, a proper public purpose to support a taking has been found for a beach replenishment project designed to preserve the shore line on public and private property, and to address environmental concerns. *Cordones v. Brevard County*, 781 So.2d 519 (Fla. 5th DCA 2001).

Final approval from the EPA, the United States Army Corps of Engineers, the DEP, or a local environmental regulatory agency is not a prerequisite to entry of an order of taking. The condemning authority must, however, demonstrate (1) a reasonable probability of obtaining any necessary approvals from independent governmental agencies charged with oversight, and (2) that the condemnation will not result in lasting harm if the approvals are denied. *Seadade Industries, Inc.* Inability to comply with an environmental regulation must be raised by the landowner in the responsive pleadings or the defense may be waived. *Maples v. State, Dept. of Transportation*, 588 So.2d 25 (Fla. 1st DCA 1991).

A landowner whose property may be subject to condemnation to satisfy an environmental regulatory requirement (such as wetlands mitigation) may intervene in an administrative proceeding concerning the prospective use of the landowner's property. *Gregory v. Indian River County*, 610 So.2d 547 (Fla. 1st DCA 1993). However, the *Gregory* court held that condemnation-related issues, such as whether there was a reasonable necessity for the taking or whether the condemning authority acted in bad faith, can be resolved only in the context of the eminent domain proceeding and may not be reviewed by an administrative hearing officer.

VIII. CONSIDERATIONS DEMANDED BY STRICT LIABILITY SCHEME

A. [§18.38] In General

Environmental concerns pose legal as well as practical problems for both condemnors and condemnees. Because the issues relevant to a particular transaction will be dependent on its facts, this discussion may not be applicable to given set of circumstances.

Efforts should be made to promptly determine whether a property with environmental issues is already eligible for one of the state cleanup programs, because many of the reimbursement and rehabilitation programs discussed in §§ 18.25 – 18.28 are closed, and there are only very limited opportunities for sites to be added to the programs. If the site is eligible for a program, attention should be given to the priority score and the amount of time until any cleanup work might be performed within the program. One possibility that should be considered is an effort to accelerate cleanup under the Preapproved Advanced Cleanup Program (PACP), see § 18.26, although the availability of this program is also subject to funding decisions by the Florida Legislature and actions by the DEP.

B. [§18.39] Tenant In Possession

When a condemnee remains in possession of property pending a relocation, a condemnor is forced to consider the consequences of possible poor housekeeping practices by the tenant. Protection afforded by federal or state law to a condemning authority does not protect the condemning authority if a tenant causes contamination after title passes.

C. [§18.40] Contents Of Containers

Under the Resource Conservation and Recovery Act, 42 *U.S.C.* §§ 6901 *et seq.* (see § 18.8), a generator of hazardous wastes has an obligation to properly store, transport, and dispose of hazardous wastes. 42 *U.S.C.* § 6922. Condemnation of the property would not excuse the generator from complying with this obligation. Depending on the circumstances, both civil and criminal penalties may exist if a generator fails to comply with RCRA.

Under the federal Superfund Law, hazardous wastes under RCRA are hazardous substances. Furthermore, under CERCLA, a person who arranges for treatment or disposal of hazardous substances retains the liability for cleanup of the treatment or disposal facility should it become the subject of cleanup under the Superfund Law. 42 *U.S.C.* § 9607(a)(3).

Under certain circumstances, a party that incurs costs to respond to releases of hazardous substances can recover the costs from the current or former owner or operator of the facility or the person who arranged for the disposal of the hazardous substances. 42 *U.S.C.* § 9607. The burying of a container can constitute a disposal. *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, 737 F.Supp. 1272 (W.D. N.Y. 1990), *aff'd* 964 F.2d 85 (depositing chemicals in underground leakproof containers constitutes disposal even when third party later caused breach in containers that resulted in release). The abandonment of containers containing hazardous substances is a release under CERCLA. 42 *U.S.C.* § 9601(22).

Given these provisions, the potential for disputes between condemnors and condemnees involving abandonment or relocation of RCRA-regulated waste and containers containing hazardous substances is obvious. Similarly, the wisdom in condemnors and condemnees fairly addressing these issues consistent with applicable law should also be obvious.

D. [§18.41] Underground Tanks

As noted earlier, underground tanks are heavily regulated under federal and Florida law. Property with underground tanks in compliance with law should not pose any unusual issues of valuation. However, the

condemning authority will have to conform to applicable law in connection with the proper removal of any tank contents and the proper abandonment of the tanks.

Tanks on the property that should have been abandoned by the owner or operator of the tanks raise different considerations. If they are discovered before possession is transferred to the condemning authority, the authority may explore ways to ensure that the tank owner or operator meets its legal obligations before possession is transferred. If they are discovered after possession is transferred, the condemning authority will likely have to evaluate the existence of a claim for costs to comply with applicable law. The presence of these tanks may also affect valuation.

A tank owner may elect to abandon tanks in place as permitted by law. This abandonment may be incompatible with the condemning authority's planned use of the property. Good planning and dialogue should lead to a sensible approach to tank abandonment under these circumstances. Also, the change in ownership may, in cases such as the ATRP program, prevent the site from participating in a state cleanup/reimbursement program for which it would otherwise have been eligible. Therefore, eligibility should be evaluated before transfer of ownership.

E. [§18.42] Contamination Discovered Before Transfer Of Possession

When contamination is discovered before possession is transferred, a variety of factors will determine the reaction to the discovery. In some cases, the condemning authority might elect to forgo the taking or reduce the scope of the taking.

If an environmental regulatory agency is already involved, it behooves the condemning authority to understand the schedule and plans of the agency in relation to the investigation and cleanup of the property. The condemnee will want to ensure that there is no double exposure compliance with environmental laws, created by the cost of investigation and cleanup, and an effort by the condemning authority to reduce the value of property by virtue of the presence of contamination.

If an environmental regulatory agency is not involved, many issues arise. For example, depending on the gravity of the problem, the presence of the contamination may have to be reported to an environmental agency. Even if it does not have to be reported, there may be policy reasons why the condemning authority must advise an environmental agency of the discovery, depending on the seriousness of the contamination. The condemning authority may have an interest in evaluating the timing of a soil or groundwater investigation and any cleanup that might be required in relation to the condemning authority's scheduled need for the property or any restrictions on the availability of funds for the taking (especially with respect to environmental clearance). Another consideration is whether a reimbursement program may be appropriate.

There are too many potential fact patterns to establish set rules for every situation. Suffice it to say that the presence of contamination should dictate dialogue and analysis of cost-effective solutions between the condemning authority and the condemnee.

F. Contamination Discovered After Transfer Of Possession

1. [§18.43] In General

When contamination is discovered after possession is transferred, the condemning authority will face legal and practical considerations in evaluating how to proceed.

2. [§18.44] Construction Contracts

Condemning authorities should consider the development of standard conditions in construction contracts that dictate the procedure to be followed if unexpected contamination is encountered during preconstruction or construction activities. Other issues relating to worker safety, disposal of contaminated soil, debris, or other materials, notices to regulatory agencies, indemnification, use of subcontractors, insurance, entry onto the property of others, and cost controls may also need to be addressed.

3. [§18.45] Investigation And Remediation

When the contamination must be investigated further or remediated to comply with applicable law, the condemning authority will want to ensure that the work performed is reasonable, necessary, and consistent with the risk presented by the property. If a state reimbursement program is applicable, the requirements of that program must be met. Performing more work than is necessary, or performing work to meet construction needs as opposed to the requirements of the law, may eliminate any claim the condemning authority might have to recover costs from responsible parties. See *Washington State Dept. of Transportation v. Washington Natural Gas Co.*, 59 F.3d 793 (9th Cir. 1995) (response cost claim rejected when transportation agency performed cleanup to maintain road construction schedule and did not determine extent of contamination, choose cost-effective response, or comply with public notice and comment requirements of NCP).

4. [§18.46] Notice To Responsible Parties

If a condemning authority intends to make a claim against responsible parties, it will need to identify those parties and it may be prudent to give the parties reasonable notice of investigation and cleanup plans before such plans are implemented.

G. [§18.47] Purchased Property

If property is acquired by purchase under a sales contract, standard buyer-seller environmental terms will have to be considered. Buyers typically want a representation about the environmental condition of the property and some recourse against the seller if the property is contaminated. This protection can take the form of an indemnity, an escrow account (depending on what is known about the property), or even rescission of the sale. Sellers typically seek a release of environmental liability, a sale "as is," a limit on the amount or time period of any indemnity, and the termination of any escrow sum after some reasonable period of time. Again, the issues relevant to a particular transaction are too fact-dependent to provide a specific formula for handling each transaction.

Endnotes

1 (Popup - Popup)

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