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Structuring the Deal and Environmental Issues in the Real Estate Contract

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The author would like to thank former associates Stacy Bettison and Jeff Srulovitz for their previous contributions to this material.

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I. [3.1] INTRODUCTION

Business and tax considerations determine, by and large, the structure of a transaction. Unquestionably, in a brick-and-mortar transaction, environmental issues will be the subject of much discussion during the negotiations. Ultimately, however, the environmental risk-shifting provisions drafted during the transaction's negotiations must accommodate and support the business and tax objectives of the deal.

Knowledgeable and experienced corporate practitioners now recognize the value of identifying and confronting environmental issues as early as reasonably possible in the negotiation process. These same practitioners acknowledge the benefits and importance of performing a thorough and comprehensive environmental due diligence whether they represent the seller or the buyer. A thorough and properly performed due diligence should identify the nature and extent of the environmental considerations, which will provide substantial assistance in the drafting of the risk-shifting provisions that support the structure of the deal. In short, an early and complete due diligence allows the parties to manage more effectively the environmental risks associated with the transaction.

With respect to the real property that may be the subject of the transaction, an early and thorough environmental due diligence also allows the parties and their lawyers to consider and, perhaps, to take advantage of state voluntary remediation programs and environmental insurance policies that have become widely available only within the last five to ten years. If the parties to the deal are not fully knowledgeable about the extent and nature of the environmental liabilities associated with their transaction, they may not be able to utilize the relevant state voluntary cleanup programs. In addition, if the parties are unaware of potential liabilities, they may be unable to take advantage of available environmental insurance policies to craft a transaction that offers maximum environmental protections to the participants. In short, the importance of a properly conducted due diligence to both the seller and the buyer cannot be overstated.

If the transaction is the transfer of the controlling shares of a corporation, an early and thorough environmental due diligence will identify regulatory and permit compliance issues and potential environmental liabilities with the corporation's formerly owned properties and/or discontinued operations. The environmental due diligence for a stock transaction should also include an assessment or investigation of potential liabilities associated with the disposal locations that received the corporation's waste. The due diligence for a stock transaction is more involved and larger in scope than the due diligence typically performed for an asset transaction.

Sections 3.2 – 3.9 below identify the environmental considerations that influence the parties' decisions to proceed with the transaction. After identifying some of the environmental considerations, the discussion in §§3.10 – 3.25 focuses on the standard contractual provisions that parties commonly use to shift and allocate environmental risks among the participants in the deal, with sample provisions in Appendix §§3.26 – 3.31.

Several environmental laws are important to consider when structuring the transaction, although the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, is the most prominent federal environmental statute about

which practitioners must be knowledgeable. Other federal laws include the following: the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795; the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §136, *et seq.*; the Toxic Substances Control Act (TSCA), 15 U.S.C. §2601, *et seq.*; the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §1251, *et seq.*; the Clean Air Act (CAA), 42 U.S.C. §7401, *et seq.*; and the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. §11001, *et seq.*

II. INITIAL STEPS

A. [3.2] Understanding the Deal

Before transactional attorneys can begin drafting the provisions that shift or allocate environmental liabilities, these practitioners must not only know the structure of the deal, *e.g.*, a stock or asset transaction, but they should also have a fair understanding of the environmental liabilities associated with the deal. Under CERCLA, for example, the environmental liabilities of a business, in practice, follow the stock of that business. Accordingly, a stock purchaser assumes, pursuant to CERCLA, not only the environmental liabilities of the corporation's ongoing operations but also any environmental liabilities relating to discontinued operations and formerly owned operating properties (collectively referred to as "legacy liabilities"), as well as off-site locations where the corporation sent waste (commonly known as "generator liability").

In an asset transaction, CERCLA imposes liability on the current owner of the property unless the buyer can avail itself of the "innocent landowner" defense or the other limitations on CERCLA liability found in the brownfields amendments to CERCLA that Congress enacted in 2002. 42 U.S.C. §9601(35)(B). Therefore, under most asset transactions, a buyer need focus only on the environmental liabilities of the particular asset or property being acquired. The asset buyer typically does not have to be concerned with legacy liabilities or with off-site liabilities unless contamination has migrated from the property being acquired to neighboring properties.

Apart from understanding the general structure of the deal, the practitioner needs to know the timing, or schedule, of the transaction. The timing dictates the extent of the due diligence on environmental matters the practitioner can reasonably expect to perform before the transaction is to close.

B. [3.3] Seller's Pre-Transaction Investigation

A party contemplating the disposition of assets or a controlling interest of stock in a corporation initially must decide whether to conduct its own environmental due diligence of its assets or business before proceeding with the sale. If the seller has implemented a meaningful environmental audit or assessment program, that decision, in essence, has already been made and little, if any, additional investigation may be required.

If, on the other hand, the potential seller is uninformed about the potential or actual environmental liabilities associated with its business or assets, the seller may consider whether to

perform a pre-transaction environmental investigation. In making this decision, the seller should assume that most potential buyers are sophisticated and knowledgeable about environmental liabilities and issues and will insist on an opportunity to do their own due diligence. If the buyer does not insist on an environmental assessment, the financial institution financing the acquisition, in all likelihood, will insist on such an assessment. Also, the seller should be aware that a number of states, such as New Jersey, require sellers of property to disclose environmental liabilities to buyers. See N.J.Stat. Ann. §§13:1K, 7:26B (known as Industrial Site Recovery Act (ISRA)); available at www.state.nj.us/dep/srp/regs/isra/israrule.pdf). If the seller intends to, at the least, consider seriously taking advantage of voluntary cleanup laws and environmental insurance, a pre-transaction investigation is necessary. If the contemplated transaction is the transfer of a corporation's stock, the seller may want to ensure the corporation is in compliance with relevant environmental laws and regulations before subjecting the corporation to the buyer's due diligence.

Although unquestionably a pre-transaction environmental investigation may provide the seller with useful information, the seller's discovery of potential violations of environmental laws as a result of the investigation may trigger reporting obligations to the USEPA or the state EPA. Moreover, after the seller receives the environmental report, the seller may be required to implement additional investigation measures or to conduct remedial activity. Thus, a seller must be aware of the risks associated with a pre-transaction environmental investigation or assessment.

If time permits, a phased investigation, or environmental site assessment (ESA), of the subject real estate may mitigate the risks. The seller's investigation initially may not include any soil or groundwater sampling but may be limited to site visits, employee interviews, and a document and database review. The outcome of this initial ESA, or Phase I investigation, determines the necessity for any invasive sampling of the property's soil or groundwater.

C. Buyer's Due Diligence

1. [3.4] Buyer's Scope of Investigation

The nature and extent of the buyer's environmental due diligence are dictated by the contemplated structure of the transaction, the timing of the deal, the seller's cooperation, the buyer's aversion to risk, and the requirements of the buyer's lenders. If the transaction is an asset deal, the buyer will concentrate the environmental investigation on the assets to be acquired. If it is a stock deal, the buyer will not only have to assess the environmental status of the assets but also should consider the corporation's state of compliance with environmental laws and regulations as well as environmental liabilities associated with off-site properties and the entity's legacy liabilities.

Obviously, the timing of the transaction and the extent of the seller's cooperation will bear on the scope of the buyer's due diligence. An accelerated negotiation schedule or grudging cooperation from the seller will limit the due diligence and place added importance on both the breadth of the contractual representations, warranties, and indemnities the seller provides and the depth of the seller's financial resources to honor these contractual promises.

Finally, in planning an environmental due diligence, the buyer must also be mindful of the lender's requirements. The buyer should plan on meeting with the lender early in the planning process to learn the lender's concerns and the role the lender has in the environmental investigation.

Specifically, with respect to the purchase of real property, the buyer should be familiar with the USEPA's "all appropriate inquiries" (AAI) rule. On November 1, 2005, the USEPA promulgated its federal standards and practices for conducting all appropriate inquiries (40 C.F.R. pt. 312) as required under 42 U.S.C. §§9601(35)(B)(ii) and 9601(35)(B)(iii). The USEPA's AAI rule became effective on November 1, 2006, and it established specific regulatory requirements and standards for conducting an environmental assessment into the previous ownership, uses, and environmental conditions of a property that a purchaser must conduct to qualify for certain landowner liability protections or exemptions under CERCLA. Such protections or exemptions include the "innocent landowner," the "bona fide prospective purchaser," and the "contiguous property owner" defenses or liability exemptions available under CERCLA. ASTM International, the organization that established in the late 1980s the industry standard for performing an environmental site assessment, in 2005 revised its environmental assessment standard so that a Phase I environmental assessment performed in compliance with the ASTM standard also complies with the AAI rule. That standard is known as ASTM E1527-05 (available at www.astm.org).

Without question, a buyer or purchaser in an asset transaction should consider the requirements set forth in the AAI rule when planning its environmental due diligence. However, any party contemplating complying with the AAI rule as part of its due diligence must note that some elements of the rule may be at odds with the dynamics of the transaction. For example, the rule requires that current occupants and neighbors of the subject property be interviewed as part of the environmental assessment of the property. Conducting such interviews may be inconsistent with efforts to keep the transaction confidential, which may be an essential requirement for the seller. As a result, a party may have to choose between maintaining the confidential nature of the transaction, which may mean not conducting the interviews and putting the performance of the AAI at risk, and obtaining the liability protections that flow from complying with the AAI rule but jeopardizing the confidentiality mandate of the seller.

Another consideration an asset purchaser must weigh when contemplating whether to perform an AAI assessment to obtain CERCLA liability protection is the post-transaction obligations the buyer may have to assume to maintain the liability protection. To retain the liability protections and exemptions under CERCLA that compliance with the AAI rule provides a purchaser, the purchaser, after acquiring title or control of the property, will be obligated to maintain any land use restrictions or institutional controls pertaining to the property as well as to comply with certain obligations to control or address any contamination of the property. For additional details and specifics on the AAI rule, see Chapter 1.

2. [3.5] The Environmental Consultant

The buyer should anticipate retaining an environmental consultant either to directly assist the buyer or to comply with the lender's directive. The lender may require an independent opinion on the environmental status of the property or business being purchased.

The buyer should insist that the environmental consultant be prepared to provide a range of cost estimates for remediation in addition to providing an opinion on the environmental condition of the subject property or business. Because many states have voluntary remediation laws, the environmental expert should be able to provide a range of remediation estimates on the basis of performing a cleanup compliant with these laws.

In some circumstances, a seller may have retained its own environmental consultant who has prepared an opinion and a cost estimate. A buyer, before accepting such an opinion, should know the seller's consultant's reputation and expertise as well as the scope of the engagement with the seller. Even when armed with this knowledge, a buyer is well-advised to have its own consultant review and evaluate the seller's consultant's opinion.

If the subject transaction is a stock deal, the buyer should retain an environmental consultant that is knowledgeable about the federal and state environmental laws and regulations and the measures, programs, and processes that must be implemented to ensure compliance with the applicable laws and regulations. A buyer must know if the corporate entity it is contemplating buying is in compliance and if it is not, what it will cost to bring the entity into compliance and the extent of any fines or penalties that may be imposed if it is not in compliance.

3. [3.6] Due Diligence vs. Indemnities

Rarely, if ever, will the environmental indemnities that a seller is willing to offer eliminate, or be a substitute for, the buyer's due diligence. Typically, a seller's indemnity, at most, indemnifies a buyer for preexisting liabilities or, in other words, those liabilities that existed at the closing of the transaction. The buyer is responsible for those liabilities that arise after the closing. The parties should identify and reach consensus on the environmental liabilities that exist at the closing. The buyer's due diligence, which may include sampling and testing, provides the "snapshot" of the liabilities that exist at the time of the closing; thereafter, if the buyer makes an indemnity claim for a previously unknown environmental condition or liability, the parties will have the evidence available from the due diligence to weigh the merits of the claim.

In addition to providing the means to assess an indemnity claim, the parties' due diligence efforts also provide useful information to establish the acceptable scope of the indemnities, representation, and warranties of the agreement that govern the transaction. By and large, any decision to save money by not performing a due diligence will prove to be very "penny wise and pound foolish."

III. CONTEXT OF CONTRACTUAL NEGOTIATIONS — LIABILITY ALLOCATION

A. What Is Available to Both Parties

1. [3.7] State Voluntary Cleanup Laws

To encourage development of their brownfields, many states have enacted voluntary cleanup laws and implemented site remediation programs. These programs typically provide for a

procedure that allows a property owner or developer to remediate contaminated property on an expedited basis under the state's environmental agency's oversight. If the property is successfully remediated, these voluntary cleanup laws usually provide for the state environmental agency to issue a no further action (NFA) or no further remediation (NFR) letter. In Illinois, the voluntary cleanup procedure is known as the site remediation program (SRP), and the IEPA issues an NFR letter to the party who successfully completes the program and to the property owner, if they are different persons or entities. See 415 ILCS 5/58.10; 35 Ill.Admin. Code pt. 740.

The state voluntary cleanup laws typically contain default cleanup standards. This means that a property owner or developer entering into the program will know at the outset the cleanup levels the remediation must achieve before the state agency will issue an NFA or NFR letter. These cleanup levels may vary depending on the ultimate use of the property and the owner's or developer's willingness to limit or restrict the future uses of the property. In Illinois, the cleanup objectives for the SRP are found in the tiered approach to corrective action objectives (TACO). See 35 Ill.Admin. Code pt. 742.

These state voluntary cleanup programs can provide buyers and sellers an available and workable mechanism to remediate contaminated property that is the subject of a transaction. Under the procedures of a voluntary cleanup program, the state agency acts as an independent party and not only determines the adequacy of a remediation but also issues a document representing that the state agency will take no further action with respect to the property, except in limited circumstances, if the property is successfully remediated. Because the voluntary programs set forth the standards for an acceptable cleanup, they provide an available mechanism to resolve the question of "how clean is clean" and to narrow the range of the estimated cleanup costs. Thus, the parties to the transaction can focus on, and perhaps more readily resolve, the questions of who will perform the cleanup and how the cost of the cleanup will be addressed, *e.g.*, through a purchase price reduction, an escrow, a holdback, etc.

2. [3.8] Environmental Insurance

Before the advent of environmental insurance policies, owners of property that likely carried environmental liability searched only for buyers with deep pockets who could assume, and comply with, the terms of a comprehensive and meaningful indemnity against future environmental remediation, toxic tort, or property damage claims that might arise relating to the property. Specifically, owners of distressed property, or brownfields, were hesitant to sell to buyers who did not have the financial resources to pay for an adequate remediation of the property or to defend or satisfy property damage or toxic tort claims because the seller of the property, as a prior owner, remained exposed to such liabilities. As such, owners of properties concluded that it was safer to retain the property and wait for a buyer who had substantial resources and was willing to provide complete indemnification.

Ten to fifteen years ago, insurance companies began to offer environmental insurance policies once they recognized the dilemmas some owners faced with continued liability for properties. These insurance policies, commonly known as cost cap coverage (CCC) and pollution legal liability (PLL) insurance, serve as an alternative, or supplement, to the contractual environmental indemnity that a party has typically demanded from the party who assumes an

environmental risk or liability. These policies provide protection for the insured if the actual cost of remediating a property surpasses the projected cost or if an unknown environmental condition is discovered after closing and/or if a third party asserts a property damage or personal injury claim arising from the property's environmental condition.

Under the CCC plans, the insured is typically required to pay a buffer above the “cap” of the expected remediation cost. For example, if the projected cost to clean up a parcel of land is \$4 million and the actual cost exceeds that amount because of the discovery of additional contamination or changes in regulatory standards, the insured may have to pay \$1 million above the \$4 million cap before coverage for cost overruns will begin. The PLL insurance policies can provide coverage for third-party claims alleging toxic torts, property damage, or claims relating to diminution in fair market value for the property.

Since these policies were first introduced over a decade ago, insurance companies have refined the policies and, at the same time, to some extent reduced the cost of coverage. Thus, these policies can provide both parties with an alternative, or supplement, to the environmental indemnity traditionally sought in transactions, and both the seller and the buyer may do well to consider the purchase of such policies. A downside to these policies is that they have not been tested by the courts to any meaningful extent. The terms of coverage remain uncertain and open to interpretation. The insurers typically interpret and apply the coverage provisions narrowly, while the insured press for a broader interpretation of coverage.

For example, at least one court has upheld an insured's claim that a CCC policy provided coverage for any remediation that the USEPA would eventually require. In *Frazer Exton Development, LP v. Kemper Environmental, Ltd.*, No. 03 Civ. 0637 (HB), 2004 U.S. Dist. LEXIS 14602 at *4 (S.D.N.Y. July 28, 2004), an environmental consulting firm that was hired to investigate a Superfund site and perform the remedial investigation/feasibility study decided to form an entity to purchase the site and assume the seller's Superfund obligations. The purchaser sought a CCC policy at a time when the USEPA had not approved the remedy for the site. While two alternatives had been identified, the parties did not know whether one of these alternatives, or another plan, would be ultimately approved by the USEPA. In a declaratory judgment action by the insured, the court concluded that the CCC policy was broad enough to insure the risk of cost overruns regardless of the remedy ultimately approved and implemented. 2004 U.S. Dist. LEXIS 14602 at **24 – 25.

Because the terms and conditions of these policies will certainly be the subject of ongoing litigation, counsel for the parties should be sure to review the insurance policies carefully and ensure that the coverage is appropriate for the clients' needs. In any event, these policies are not a substitute for a thorough due diligence of the assets and liabilities to be addressed in the transaction documents.

B. [3.9] Noncontractual Remedies Available to Buyer

When drafting the contractual provisions that shift or allocate the environmental liabilities among the parties, the transactional lawyer must appreciate the environmental statutory and common-law remedies that are available to the buyer of contaminated property. For example,

CERCLA provides that under certain circumstances, a party that incurs “response costs” in remediating property contaminated with “hazardous substances” may recover all, or a portion of, those costs from any prior owner of the property who owned the property at the time of a “release” of the hazardous substances, including the seller. See 42 U.S.C. §§9607(a), 9613(f). See *United States v. Atlantic Research Corp.*, 551 U.S. ___, 168 L.Ed.2d 28, 127 S.Ct. 2331 (2007). The parties, however, can agree to limit or modify, contractually, the available statutory remedies, or if they cannot agree on language to limit or modify the existing statutory remedies, the parties can acknowledge that nothing in the transactional documents limits or modifies the rights they may have under the existing statutory or common law.

CERCLA’s definition of “hazardous substances” excludes petroleum. See 42 U.S.C. §9601(14). Thus, an asset buyer does not have a right under CERCLA to recover from the seller cleanup costs related only to a petroleum release. Moreover, a buyer loses the ability to recover its response costs if the remediation performed is not in compliance with the National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) (www.epa.gov/oilspill/ncpover.htm). See 42 U.S.C. §§9605(a), 9607(a)(4)(B). See also *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 616 (7th Cir. 1998) (stating that party seeking contribution from prior owner for response costs must show it incurred costs compliant with NCP); *Farmland Industries, Inc. v. Morrison-Quirk Grain Corp.*, 54 F.3d 478, 481 (8th Cir. 1995) (“NCP compliance is a prerequisite for recovery of response costs under CERCLA”). A buyer also may lose the right to recover all, or a portion, of the response costs it has incurred, and will incur, if it did not perform an “all appropriate inquiries” assessment of the property before it purchased the property. A buyer who does not have a right of recovery under CERCLA, or a state statutory equivalent, against the seller will be left to the available contractual and common-law remedies.

Many courts have recognized the “absolute” liability CERCLA imposes on potentially responsible parties. See, e.g., *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 89 (2d Cir. 2000). Accordingly, these courts, in reviewing the allocation of environmental liabilities in an asset transaction, have insisted that the parties express their intent to relieve the asset seller of CERCLA liability, in particular, and of environmental liabilities, in general, with something more than the traditional “as is” description of the conveyance. In short, the parties should explicitly address the environmental allocation issues if the buyer intends to relieve the seller, or the seller insists on being relieved, of CERCLA liability.

Finally, a CERCLA cost recovery is generally not available to the buyer of a business in a stock transaction. The CERCLA liabilities follow the corporation, and such a buyer typically is left only with the available contractual remedies to recover on environmental claims from the selling shareholder after the close of the transaction.

IV. [3.10] THE CONTRACTUAL PROVISIONS — REPRESENTATIONS, WARRANTIES, AND INDEMNITIES

During negotiations, parties to a transaction address the issue of allocating the environmental liabilities associated with the business or assets being conveyed. As with any liability issue,

representations, warranties, and indemnities are the contractual provisions the parties use to allocate or shift environmental risks. The provisions to a contract typically address the considerations in §§3.11 – 3.25 below.

A. [3.11] Properties To Be Considered

In an asset transaction, the property or properties being conveyed are the subject of the representations, warranties, and indemnities negotiated. If the parties believe there is a chance that the contamination on the property to be conveyed has migrated or will migrate to an adjoining property, the environmental risks associated with that adjoining property should also be addressed.

In a stock transaction, the parties must consider the environmental liabilities of not only the properties and facilities currently owned, operated, or leased by the corporation but also all formerly owned, operated, or leased properties and off-site properties that may have received the wastes generated at any time by the corporation. Additionally, the parties must be mindful of the properties and businesses of previously owned subsidiaries or affiliates of the corporation for which the corporation has provided an indemnity to the buyer of the subsidiary or affiliate. Finally, the parties have to review and address environmental compliance issues of the business itself. Accordingly, rarely will the same representation, warranty, or indemnity be applicable or appropriate for all the categories of properties or the range of compliance obligations related to the business being sold. The practitioner should expect to tailor and craft these contractual provisions to the type of property or issues they are to cover with such qualifications as time limits, materiality thresholds or limitations, indemnity caps or baskets, or knowledge limitations or definitions.

B. [3.12] Time Limitations

Sellers want their representations, warranties, and indemnity obligations to expire as soon as possible. With respect to representations and warranties, a seller would be delighted if they did not survive the closing. The buyer, on other hand, wants the seller's representations, warranties, and indemnities to survive, if possible, indefinitely. Although this natural tension on time limitations can be mitigated by a thorough due diligence, environmental insurance, and the issuance of no further remediation or no further action letters, it cannot be eliminated as part of the negotiations, particularly with respect to corporate transactions where compliance issues and legacy liabilities must be addressed. When time limits are discussed, several characteristics of environmental liabilities should be considered.

First, the release of a hazardous substance may take a long time to manifest. Similarly, a compliance problem may not become known until an agency serves a notice of violation or other enforcement action. Unless the seller can identify substantial reasons why a buyer has little or no risk from unknown environmental conditions or unknown compliance violations, the seller can expect the representations to survive closing and the claim period of the indemnity provision to extend beyond a year or two.

Second, because an environmental investigation and cleanup may take several years to complete, the parties should distinguish in their contract between the length of time to notify the seller of an environmental liability and the length of time to perform a cleanup. The former may prompt a buyer to perform testing, if it did not do so during due diligence, on the acquired property during the contractual limitation period for notification. The latter time period, if applicable to the transaction, should be calibrated to what is technically realistic.

C. [3.13] Materiality Limitations — Caps and Thresholds

A “materiality” qualification to a representation, warranty, or indemnification can prove to be a nettlesome issue during negotiations. If the transaction involves a number of facilities or business operations, the discovery of a relatively minor environmental liability at one of them may not be “material.” However, if over time a number of distinct “immaterial” environmental liabilities arise that in the aggregate would be a substantial liability, the parties may have a dispute over whether the “material” qualification has been triggered. To address this issue, the parties may consider the use of a threshold dollar amount, either by event or in the aggregate, for determining “materiality.” Such a threshold is often referred to as a “basket.”

With a basket provision, the buyer maintains a running total of the environmental liabilities it has incurred from the time of the closing of the transaction. When the total liabilities exceed the threshold, or basket, by definition the liabilities in the aggregate are “material,” and a buyer may make a contractual claim against the seller.

The inverse consideration to a basket is a “cap” or limit on one party’s liability or shared liability after a certain level of expenditures. Regardless of whether the parties are considering using thresholds, caps, or shared liabilities to set limits on the definition of “materiality,” they should state explicitly, or at least consider, whether these provisions replace or supplement any coexisting statutory liability.

D. [3.14] Disclosure Schedules

A disclosure schedule attached to the transaction document can limit or define the scope of warranties and representations. For example, such a schedule can identify the properties covered by a specific representation or warranty, or it can be used to define the extent of the “knowledge” of the seller, particularly as to the status of compliance. The seller’s knowledge or the extent of the seller’s disclosure can also be defined by a schedule of environmental documents delivered to the buyer. The parties, however, should be wary of simple lists of environmental reports or assessments as a definition of the extent of the seller’s disclosure. Environmental reports often reference other documents and describe in a summary or cryptic fashion operations and processes. The question can arise after the transaction closes whether the referenced material comprises the information “disclosed” or whether the description of an operation or a process was a “disclosure.”

E. [3.15] Definitions

It is crucial that the contractual provisions clearly define key terms that dictate the substance of the representations, warranties, and indemnities. Certain terms have standard definitions that are used in contracts that convey property.

Liability. While the meaning of “liability” might be clear to most, a definition can be useful. Sellers typically assume that liability will arise solely in the context of a specific adjudication. So as to avoid a dispute about the breadth of liability, the parties may consider including a definition.

Release. The definition of “release” is important when it comes to the seller’s representations about the property. As discussed in §3.19 below, it is standard in real estate transactions that the seller represent that there have been no releases on the property. Because the buyer and seller might have different ideas of what a release is, it is advisable to define the term in the contract. “Release” is usually defined quite broadly and can encompass any action that has the effect of exposing something to the environment, such as spilling, leaking, pumping, pouring, emitting, injecting, escaping, or dumping.

Hazardous substances and hazardous wastes. Often, the definition of operative environmental terms in business transactions is similar to the definitions found in the many environmental laws. For instance, “hazardous substances” may be defined as in CERCLA and the Illinois Environmental Protection Act. It may be important to also provide that hazardous substances should also include crude oil or petroleum because CERCLA specifically excludes these terms from the definition of hazardous substances. Additionally, CERCLA excludes from its definition of “hazardous substances” building materials. Thus, the inclusion of asbestos in the definition of hazardous substances is optional, particularly because asbestos has been, for the most part, removed from or encapsulated in most properties. However, the parties should, at the very least, consider whether asbestos or other building materials, such as urea formaldehyde, should be included in this definition. Finally, as an alternative, the parties may turn to the definition of hazardous wastes in the Resource Conservation and Recovery Act. This definition, however, is not as expansive as the CERCLA definition.

In the last several years, mold or microbial matter has become an important environmental concern. The parties would be wise to include a definition of “mold” or “microbial matter.”

Environmental laws. Another term that typically requires defining is “environmental laws.” The definition for this term should be all-encompassing to include applicable statutes, governmental rules and regulations, agency orders, consent decrees, and permits or licenses that relate to the prevention, remediation, reduction, or control of pollution or protection of the environment. More specifically, the definition of environmental laws may include a recitation of all the federal laws, including the Clean Air Act; the Clean Water Act; CERCLA; the Resource Conservation and Recovery Act; the Emergency Planning and Community Right-To-Know Act; §§6 and 8 of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§655, 657; and the Toxic Substances Control Act. In addition, the definition should include the state laws that are comparable to the federal laws, any additional state laws that may be relevant and any local or county ordinances, and when applicable, foreign laws, regulations, and protocols.

In the past, parties might have wished to include in their definition of environmental laws the specific standards of the USEPA or state environmental protection agency as they related to cleanup issues. This is less of a concern today because often, state voluntary cleanup laws contain default cleanup standards. The cleanup levels are evident, and the issuance of a no further remediation or no further action letter provides additional authority for those standards. While the cleanup standards do vary depending on the ultimate use of the property, it may no longer be necessary to include, in the definition of environmental laws, cleanup standards if the property will be the subject of an NFA or NFR letter.

F. [3.16] Specific Representations

The contract should also include clauses pertaining to specific representations the seller is willing to make about the property or a business being sold. For the buyer's part, contract provisions can potentially provide for substantial coverage against risks incurred due to ownership. From the seller's point of view, making some representations may be difficult because of limited, or no, knowledge about some of the issues in question. As such, these representations will need to be ones for which the parties bargain, and coming to agreement on the language of the representations can be a significant part of the contract negotiation process.

It is important that the buyer understand that the seller's representations will not completely absolve the buyer of all future liability. The contractual provisions are not binding on the government and are not likely to impact the rights of private third parties. Thus, the contractual provisions do not give full protection against other parties; they do, however, provide the buyer with a cause of action against the seller. The seller, being cognizant of this, wants to limit the scope of the representations to the extent that such limits may give the seller some protection.

1. [3.17] Permits

If the buyer conducts a thorough environmental audit, it is likely to discover the status of permits, including denied permits or out-of-date permits. Because the status of permits bears so greatly on the continued lawful operation of many properties, the buyer should seek a representation by the seller that all required federal, state, and local permits directly or indirectly relating to environmental protection have been obtained and are up-to-date. A representation may also be made that the facility or business is presently, and at all times in the past has been, in full compliance with the required environmental permits.

Another issue with which the parties should concern themselves is the transferability of certain permits. Changes in property ownership may cause some agencies to review permits. Certain permits may not be transferable, and the new owner may find it necessary to obtain completely new permits. Whatever the circumstances, the contract should contain language that addresses permit transferability and the responsibilities of each party to ensure the transferability of permits or to assist in obtaining new permits.

2. [3.18] No Pending Actions

Typical for most contracts is the inclusion of the seller's representation that there is no pending administrative or legal action against the seller for alleged violations of law. Similarly,

the buyer wants to include a representation in the contract that the seller is not the subject of any ongoing investigations or discussions with governmental or other agencies regarding a potential or alleged violation.

Also, the contract should have a representation that the seller has not received any notice in any form of an administrative or legal proceeding or of any other possible action. This is especially important because a business might receive a notice of some kind that it is being investigated or that information is being sought, and this type of preliminary notice can be a red flag signaling actions on the horizon. Thus, inclusion of the term “notice” should be considered when drafting these representations.

The buyer may also seek to secure a catchall provision that the property is fully compliant with all environmental laws and regulations. This representation should include that the seller has maintained all records required by federal and state environmental statutes.

Last, if the property has been the subject of consent decrees or administrative consent orders, a representation on the part of the seller that the decrees or orders have provided a full release of liability is recommended. At a minimum, the seller should warrant or represent that the business is in compliance with the decree or order.

3. [3.19] No Releases on Property

Perhaps one of the most important representations the buyer should secure from the seller is the one that addresses what is often the most costly liability — the release of hazardous substances and liability arising under CERCLA. Because CERCLA imposes strict liability on owners and operators for releases or threatened releases, and because CERCLA, by its own terms, is not concerned with the individual who, in fact, caused the release, it is crucial to obtain a representation that specifically provides that there have been no releases on the property.

A typical representation to this effect is that there are no past or current releases of hazardous substances on, over, at, from, into, or onto any facility at the property. Without such a representation, the buyer can be exposed to substantial liabilities with no recourse against the seller in a stock transaction.

The scope of these representations will be a point for negotiation between the parties. The seller may insist on limiting the representation to “known releases.” For the buyer, such a representation may not be sufficient because CERCLA’s liability is strict and without regard for whether there was knowledge of releases. Additionally, many properties may have some releases, ranging from de minimis to substantial releases. Because the seller does not want to be responsible for every potential liability for even minor or immaterial releases, it is in the interest of the seller to limit the scope of releases to those that are substantial or material in nature.

Also important for the buyer is securing a representation from the seller that there have been no releases from neighboring properties. Again, the breadth of CERCLA liability is something of great concern to the buyer. Releases that occurred on neighboring properties have the ability to migrate to the property that is the subject of the transaction and create a liability for the buyer.

4. [3.20] No Other Environmental Conditions

The buyer may also seek a general representation by the seller that there is no other environmental condition, situation, or incident on or at the property that could give rise to an action or to liability under any law, regulation, ordinance, or common law. Obtaining this representation may be difficult because the seller may consider this representation too broad and as one that could open the door to any type of liability. Nonetheless, if there are lingering questions or significant concerns as to other environmental conditions of the property, it may be in the buyer's interest to attempt to negotiate for some type of general representation to this effect.

5. [3.21] No CERCLA Liens or State Superliens

In 1986, CERCLA was amended to provide the federal government with a lien on property when an individual was found liable for costs and damages under the statute. These liens arise after response costs are incurred by the United States and after the owner of the property receives written notice of potential liability.

Several Northeastern states also passed superlien statutes that gave the state a priority lien against all of the property that a responsible party owned or might acquire. This became problematic because there was no recorded evidence that such a lien existed, and it was difficult to determine whether a possible lien might emerge that would take priority over other liens.

The USEPA issued in 2003 the Interim Enforcement Discretion Policy Concerning 'Windfall Liens' Under Section 107(r) of CERCLA, which is available at www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf. Section 107(r)(2) provides that

[i]f there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1) [(regarding bona fide prospective purchasers)], and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator [of the USEPA], for the unrecovered response costs. 42 U.S.C. §9607(r)(2).

This "windfall lien" shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property. 42 U.S.C. §9607(r)(4)(A). A buyer should consider whether the windfall lien provisions will apply and negotiate accordingly with the seller as well as the USEPA to determine the amount and satisfaction of such lien.

6. [3.22] No Underground Storage Tanks

Underground storage tanks (USTs) containing petroleum or petroleum-based products or hazardous substances can be a substantial source of liability for property owners. USEPA

regulations require the upgrading of existing UST systems and also provide for new tank performance standards. It is prudent to obtain a representation from the seller that either there are no existing USTs on the property or, if there are, that the existing UST systems are in compliance with the new tank systems performance standards and satisfy specific upgrade requirements.

If the owner had USTs on the property but opted to close some or all of the systems, the buyer should secure a representation that the closure of those systems has met the standards specified by the USEPA and/or the relevant state agency.

7. [3.23] Property Not Listed on NPL, CERCLIS, or Comparable State List

While it might be standard for the seller to represent that the property is not on the National Priorities List (NPL), the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) list, and/or a state equivalent of these lists, a careful and comprehensive due diligence should reveal such a listing. Not only should a Phase I environmental site assessment under ASTM E1527-05 (available at www.astm.org) most likely reveal this information, but there are also numerous databases in existence that the buyer may access to determine the status of a property. If there is a discrepancy between information learned from an environmental audit or a database search and the seller's representation, a representation addressing the non-listing of the property is recommended.

8. [3.24] Presence of Asbestos, PCBs, or Mold/Microbial Matter

The presence and condition of asbestos-containing materials (ACMs) on a property should be determined during an inspection of the premises. If there is some question about the presence of ACMs, the buyer should seek a representation as to whether the ACMs are friable or non-friable. When dry, friable ACMs can be crumbled or reduced to powder consistency, which presents greater health risks than non-friable ACMs. When dry, non-friable ACMs cannot be crumbled, it is less likely to present human health risks. The main concern in seeking a representation is to understand the type and condition of ACMs and whether removal is required. Removal of asbestos may be required depending on its condition, and the buyer and seller may need to negotiate cost allocation and removal efforts.

If the subject of the transaction is a utility or other facility with electrical equipment, an inspection should reveal whether polychlorinated biphenyls (PCBs) are present. Again, if there is some question about the presence or potential release of PCBs, the buyer should secure a representation from the seller indicating the state of such PCBs. Ideally, the buyer should seek a representation that there is no equipment or material containing PCBs. Also, a determination should be made as to whether the electrical equipment is owned by a local utility. If so, that utility should have responsibility for the maintenance and remediation of any PCB-containing equipment.

Finally, an inspection may be able to uncover the presence of mold or microbial matter. However, detecting or discovering the presence of mold or microbial substance can be difficult. Accordingly, the buyer should seek a representation from the seller that the facilities and buildings included in the transaction are without mold or, more expansively, microbial matter.

9. [3.25] No Hazardous Substances on the Premises

Finally, the presence of stored hazardous substances on the premises can be a concern because of the potential for a release and resulting cleanup costs. The buyer might request the contract include the seller's representation that there are no hazardous substances on the property. The seller, on the other hand, may resist such a representation because of the common existence of stored hazardous substances on many industrial properties.

Properties in large metropolitan areas, such as Chicago, may have elevated levels of lead or polynuclear aromatic hydrocarbons on the premises, particularly in the soil, when such levels are compared to regional "background" levels for such constituents. The elevated levels of these constituents may be present not because of any operation on the property but because of historic emissions from vehicles that had used leaded gasoline or because emissions from coal burning facilities permeated the metropolitan area. Accordingly, the parties to an asset transaction involving property in a metropolitan area may want to appropriately qualify any representation pertaining to the presence of hazardous substances.

V. APPENDIX — EXAMPLE CONTRACTS PROVISIONS

A. [3.26] Definitions

"Environmental, health, and safety liabilities" means any cost, damages, expense, liability, obligation, or other responsibility arising from or under any environmental law and consisting of or relating to

- 1. any environmental, health, or safety matters or conditions (including on-site or off-site contamination, occupational safety and health, and regulation of chemical substances or products);**
- 2. fines, penalties, judgments, awards, settlements, legal or administrative proceedings, damages, losses, claims, demands and response, investigative, remedial, or inspection costs and expenses arising under environmental law;**
- 3. financial responsibility under environmental law or law related to occupational safety and health for cleanup costs or corrective action, including any investigation, cleanup, removal, containment, or other remediation or response actions required by any environmental law (whether or not such action has been required or requested by any governmental entity or any other person) and for any natural resource damages; or**
- 4. any other compliance, corrective, investigative, or remedial measures required under environmental law.**

The terms "removal," "remediation," and "responsive action" include the types of activities covered by the United States Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, as amended.

“Environmental law” means any law with respect to the preservation of the environment or the promotion of worker health and safety, including any law relating to hazardous materials, drinking water, surface water, groundwater, wetlands, landfills, open dumps, storage tanks, underground storage tanks, solid waste, wastewater, storm-water runoff, noises, odors, air emissions, waste emissions, or wells. Without limiting the generality of the foregoing, the term encompasses each of the following statutes and the regulations promulgated thereunder, and any similar applicable state, local, or foreign law, each as amended: (1) CERCLA; (2) the Solid Waste Disposal Act, 42 U.S.C. §6901, *et seq.*; (3) the Hazardous Materials Transportation Act, Pub.L. No. 93-633, 88 Stat. 2156; (4) the Toxic Substances Control Act, 15 U.S.C. §2601, *et seq.*; (5) the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §1251, *et seq.*; (6) the Clean Air Act, 42 U.S.C. §7401, *et seq.*; (7) the Safe Drinking Water Act of 1974, 42 U.S.C. §300f, *et seq.*; (8) the National Environmental Policy Act of 1969, Pub.L. No. 91-190, 83 Stat. 852; (9) the Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613; (10) Title III of the Superfund Amendments and Reauthorization Act, (11) the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136, *et seq.*; and (12) the provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.*, relating to the handling of and exposure to hazardous materials and similar substances.

“Governmental Entity” means any government or any agency, bureau, board, commission, court, department, official, political subdivision, tribunal, or other instrumentality of any government, whether federal, state or local, or domestic or foreign.

“Hazardous Activity” means the distribution, generation, handling, importing, management, manufacturing, processing, production, refinement, release, storage, transfer, transportation, treatment, or use (including any withdrawal or other use of groundwater) of hazardous materials in, on, under, about, or from the facilities or any part thereof into the environment, and any other act, business, operation, or thing that increases the danger, or risk of danger, or poses an unreasonable risk of harm to persons or property on or off the facilities, or that may affect the value of the facilities of the Company.

“Hazardous materials” means each and every element, compound, chemical mixture, contaminant, pollutant, material, waste, or other substance that is defined, determined, or identified as hazardous or toxic under any environmental law or the release of which is prohibited under any environmental law. Without limiting the generality of the foregoing, the term will include (1) “hazardous substances” as defined in CERCLA, the Superfund Amendments and Reauthorization Act, or Title III of the Superfund Amendments and Reauthorization Act and regulations promulgated thereunder, each as amended; (2) “hazardous waste” as defined in the Solid Waste Disposal Act and regulations promulgated thereunder, as amended; (3) “hazardous materials” as defined in the Hazardous Materials Transportation Act and the regulations promulgated thereunder, as amended; (4) “chemical substance” or “mixture” as defined in the Toxic Substances Control Act and regulations promulgated thereunder, as amended; (5) petroleum and petroleum products and by-products; and (6) asbestos.

“Knowledge of the shareholders” or “shareholders’ knowledge” means the knowledge of the shareholders, directors, and officers of the Company that would have resulted following a reasonable and diligent investigation with respect to the relevant matters by the shareholders, directors, and officers of the Company.

“Law” means any constitutional provision, statute, law, rule, regulation, permit, decree, injunction, judgment, order, ruling, determination, finding, or writ of any governmental entity.

“Microbial matter” means the presence of fungi or bacterial matter that reproduces through the release of spores or the splitting of cells, including mold, mildew, and viruses, whether or not such microbial matter is living, that poses a threat to the health, safety, or welfare of any person or adversely affects the value of the property.

“Permit” means any license, permit, franchise, certificate of authority, or order, or any waiver of the foregoing, issued by any governmental entity.

“Release” means any spilling, leaking, emitting, discharging, depositing, escaping, leaching, dumping, or other releasing into the environment, whether intentional or unintentional.

B. Warranties, Definitions, Indemnifications

1. [3.27] Example 1

a. Definitions.

(1) “Environmental conditions” means any contamination arising out of, relating to, or resulting from emissions, discharges, disseminations, disposals, releases, or threatened releases of hazardous substances into the air (indoor and outdoor), surface water, ground water, soil, land surface or subsurface, buildings, facilities, real or personal property, or fixtures.

(2) “Environmental laws” means, without limitation, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*; the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. §§11001, *et seq.*; the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795; the Clean Air Act; the Clean Water Act (Federal Water Pollution Control Act); and the Safe Drinking Water Act of 1974, 42 U.S.C. §300f, *et seq.*, as any of the above statutes are or may be amended at any time and all rules and regulations promulgated pursuant to any of the above statutes, and any other foreign, federal, state or local law, statute, ordinance, rule, or regulation governing environmental conditions, as the same are or may be amended at any time and all applicable judicial and administrative decisions, orders, and decrees relating to environmental conditions.

(3) “Hazardous” substances means any pollutants; contaminants; toxic, hazardous, or extremely hazardous substances, materials, wastes, constituents, compounds, or chemicals; natural or man-made elements (including, without limitation, petroleum or any by-products or fractions thereof); any form of natural gas; Bevill Amendment [42 U.S.C. §6921(b)(3)(A)(ii)] materials; lead; and polychlorinated biphenyls (PCBs) and PCB-containing equipment regulated by, or may form the basis of liability under, any environmental laws.

(4) “Response activities” means actions taken by the seller to investigate, monitor, remove, remediate, respond to, and/or correct environmental conditions existing as of the closing date at, from, or relating to the real property and/or the improvements. The parties intend for response activities to (a) achieve cleanup standards consistent with those applicable to industrial/commercial facilities without restoration, demolition, scrapping, or disposal of any of the improvements, or any portions thereof; and (b) be cost-effective and reasonably necessary to meet statutory, regulatory, or other governmental standards or requirements, including, without limitation, standards or requirements contained in consent or other government orders. Notwithstanding the foregoing, seller’s response activities shall not unreasonably interfere with the purchaser’s use of the property and shall be subject to the purchaser’s approval upon reasonable notice.

b. **Seller’s Warranty.** Seller warrants that it will perform all response activities, as defined herein, within [four years] of the anniversary date of the closing date. The parties agree that performance of response activities will be deemed completed when the IEPA issues a No Further Remediation Letter for industrial/commercial uses (NFR Letter) under the Site Remediation Program (SRP), as defined in the SRP. The seller shall have the right to select the certified professional to manage and certify the response activities subject to the purchaser’s right to reasonably object to the seller’s selection. In performing response activities, the seller will conform either to the general numerical standards or the applicable standards derived from a property-specific risk assessment all as set forth in the SRP for property restricted by deed to industrial/commercial use. In the event that the seller fails to complete response activities prior to the [fourth] anniversary of the closing date due in whole or in part to any strike, lockout, labor trouble (whether legal or illegal), civil disorder, failure of power, restrictive governmental laws and regulations, riots, insurrections, war, shortages, accidents, casualties, acts of God, acts caused directly by the purchaser or purchaser’s agents, employees or invitees, or any other cause beyond the reasonable control of seller (force majeure events), and the time periods set forth in this Paragraph ___ shall be extended by the number of days the seller is delayed in its performance of response activities as a result of such force majeure events, provided, however, that the seller notifies the purchaser promptly upon the occurrence of any force majeure event and makes all reasonable efforts to mitigate any delays arising therefrom.

c. **Seller’s Indemnification.** The seller shall indemnify, save, and keep the purchaser, its successors and assigns, forever harmless against and from all liability, demands, claims, actions, or causes of action, assessments, losses, fines, penalties, costs, damages, and expenses, including, without limitation, those asserted by any federal, state or local

governmental entity, or any third party, including reasonable attorneys' fees (losses), sustained or incurred by the purchaser and its successors and assigns as a result of or arising out of or by virtue of the environmental conditions existing on or before the closing date and/or performance of the response activities or operation and maintenance (O&M) activities. The seller shall further indemnify the purchaser against any and all losses resulting from the seller's failure to obtain an NFR letter for the real property within the period set forth in Paragraph ___ above.

The seller's obligation to indemnify the purchaser for losses due to environmental conditions, as set forth herein, shall terminate, and the purchaser shall have no further right to indemnification if and when the seller obtains from the IEPA the NFR Letter for industrial/commercial uses pursuant to the provisions of the SRP for the real property. Notwithstanding the foregoing, the seller's obligation to indemnify the purchaser with respect to losses arising from (1) third-party claims arising out of the presence or migration of contamination from the real property prior to obtaining the NFR letter and (2) disposal of hazardous substances at off-site locations shall not terminate.

d. **Purchaser's Indemnity.** The purchaser shall indemnify, save, and keep the seller, its successors and assigns, forever harmless against and from all liability, demands, claims, actions or causes of action, assessments, losses, fines, penalties, costs, damages, and expenses, including reasonable attorneys' fees, sustained or incurred by the seller, its successors and assigns, as a result of or arising out of or by virtue of any contamination arising out of, relating to, or resulting from post-closing date emissions, discharges, disseminations, disposals, releases, or threatened releases of hazardous substances at the real property (releases) into the air (indoor and outdoor), surface water, groundwater, soil, land surface or subsurface, buildings, facilities, real or personal property, or fixtures except to the extent that such releases represent the migration through soil or water or releases into the air of hazardous substances on, in, or under the real property prior to closing.

e. **Confidentiality.** The parties agree to keep the terms of this Paragraph ___ confidential, except to the extent the seller and the purchaser may have to disclose its provisions to obtain an indemnity from [prior owner] or the purchaser may have to disclose its provisions in order to obtain a loan to purchase the property.

f. **Insurance.** Beginning on the closing date and continuing until the response activities have been completed, the purchaser shall maintain the following insurance policies, to be issued by an insurance company or companies reasonably acceptable to the seller: (1) commercial general liability in an amount not less than \$1 million per incident and \$2 million aggregate, with a \$10 million umbrella; and (2) pollution legal liability in an amount not less than \$3 million. In addition, prior to beginning any aboveground cleanup of the property and continuing until such cleanup is complete, the purchaser shall maintain cleanup cost cap insurance issued by an insurance company reasonably acceptable to the seller in an amount equal to the estimated cost of the purchaser's cleanup. The seller shall be named as additional insureds on such policies. At the closing, the purchaser shall deliver to the seller certificates of insurance reasonably acceptable to the seller. In addition, the purchaser shall deliver to the seller evidence of renewal of such policies not less than 30 days prior to the expiration of such policies.

2. [3.28] Example 2

Definitions:

“Action” means any claim, action, charge, suit, arbitration, inquiry, proceeding, or investigation by or before any governmental entity.

“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, as amended, and the rules and regulations promulgated thereunder.

“CERCLIS” means the Comprehensive Environmental Response and Liability Information System, as provided for by 40 C.F.R. §300.5.

“Company material adverse effect” means any change, event, occurrence, effect, or state of facts that, individually or aggregated with any other such change, event, occurrence, effect, or state of facts, has, or would be reasonably expected to have, a material adverse effect on the business, results of operations, condition (financial or otherwise), assets and properties, and of the company and its subsidiaries, taken as a whole; provided, however, that none of the following shall constitute a “company material adverse effect”: (1) changes in securities markets or general economic, regulatory, or political conditions not uniquely related to the company (including acts of terrorism or the commencement or escalation of any war whether declared or undeclared or other hostilities); or (2) changes or effects arising out of, or attributable to, the announcement of the execution of this agreement, compliance by the company with its obligations hereunder, the consummation of the transactions contemplated hereby, or the identity of the investors.

“Company’s knowledge” means the actual knowledge of the individuals listed on [Schedule ____].

“Environmental claim” means any written or oral notice, claim, demand, or other communication (collectively, a “claim”) alleging or asserting liability for investigatory costs, cleanup costs, governmental entity response costs, damages to natural resources or other property, personal injuries, fines, or penalties arising out of, based on, or resulting from (1) the presence or release into the environment at any location, or (2) circumstances forming the basis of any violation, or alleged violation, of any environmental law. The term “environmental claim” shall include any claim by any governmental entity for enforcement, cleanup, removal, response, remedial, or other actions or damages pursuant to any applicable environmental law and any claim by any third party seeking damages, contribution, indemnification, cost recovery, compensation, or injunctive relief resulting from the presence of hazardous materials or arising from alleged injury or threat of injury to health, safety, or the environment.

“Environmental law” means any law relating to the regulation or protection of human health, safety, or the environment or to emissions, discharges, releases, or threatened releases of pollutants, contaminants, chemicals, or industrial, toxic, or hazardous substances

or wastes into the environment (including ambient air, soil, surface water, groundwater, wetlands, land, or subsurface strata), or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of pollutants, contaminants, chemicals, or industrial, toxic, or hazardous substances or wastes. Without limiting the generality of the foregoing, the term will encompass each of the following statutes and the regulations promulgated thereunder, as amended: (1) CERCLA; (2) the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795; (3) the Hazardous Materials Transportation Act, Pub.L. No. 93-633, 88 Stat. 2156; (4) the Toxic Substances Control Act (TSCA), 15 U.S.C. §2601, *et seq.*; (5) the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §1251, *et seq.*; (6) the Clean Air Act, 42 U.S.C. §7401, *et seq.*; (7) the Safe Drinking Water Act of 1974, 42 U.S.C. §300f, *et seq.*; (8) the National Environmental Policy Act of 1969, Pub.L. No. 91-190, 83 Stat. 852; and (9) the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. §11001, *et seq.*

“Governmental entity” means the United States, any state or other political subdivision thereof, and any other foreign or domestic entity exercising executive, legislative, judicial, regulatory, or administrative authority or functions of or pertaining to government, including any government authority, agency, department, corporation, board, commission, court (including the Bankruptcy Court), tribunal, or instrumentality of the United States or any foreign entity, any state of the United States, or any political subdivision of any of the foregoing.

“Hazardous material” means (1) any petroleum or petroleum products, flammable explosives, radioactive materials, asbestos in any form that is or could become friable, urea formaldehyde foam insulation, and transformers or other equipment that contain dielectric fluid containing levels of polychlorinated biphenyls (PCBs); (2) any chemicals or other materials or substances that are defined as or included in the definition of “hazardous substances,” “hazardous wastes,” “hazardous materials,” “extremely hazardous wastes,” “restricted hazardous wastes,” “toxic substances,” “toxic pollutants,” or words of similar import under any environmental law; and (3) any other chemical or other material or substance, exposure to which is prohibited, limited, or regulated by any governmental entity under any environmental law.

“Licenses” means all licenses, permits, certificates of authority, authorizations, approvals, registrations, franchises, and similar consents granted or issued by any governmental entity.

“NPL” means the National Priorities List under CERCLA.

“Permits” means any licenses, permits, franchises, certificates of authority, or orders, or any waiver of the foregoing, issued by any governmental entity.

“Release” means any release, spill, emission, leaking, pumping, injection, deposit, disposal, discharge, dispersal, leaching, or migration into the indoor or outdoor environment, including the movement of hazardous materials through ambient air, soil, surface water, groundwater, wetlands, land, or subsurface strata.

Representations:

Environmental matters. The company and each of its subsidiaries has obtained all licenses that are required under applicable environmental laws in connection with the conduct of the business or operations of the company or such subsidiary. Each of such licenses is in full force and effect, and each of the company and the subsidiaries is in compliance in all material respects with the terms and conditions of all such licenses and with all applicable environmental laws. In addition, except as set forth in [Schedule ____] (with paragraph references corresponding to those set forth below),

- 1. no writ, judgment, decree, injunction, or similar order of any governmental entity has been received, no environmental claim has been served, no penalty has been assessed and no investigation or review has been received, or to the company's knowledge, no such claim, investigation, or review is pending or threatened by _____, any governmental entity with respect to any alleged failure by the company or any of its subsidiaries to have any license required under applicable environmental laws in connection with the conduct of the business or operations of the company, or any of its subsidiaries or with respect to any generation, treatment, storage, recycling, transportation, discharge, disposal, or release of any hazardous material generated by the company or any subsidiary, and, to the company's knowledge, there are no facts or circumstances in existence that would reasonably be expected to form the basis for any such writ, judgment, decree, injunction, order, environmental claim, penalty, or investigation;**
- 2. neither the company nor any of its subsidiaries owns, operates, or leases a treatment, storage, or disposal facility requiring a permit under the RCRA, as amended, or under any other comparable state or local law; and, without limiting the foregoing, to the company's knowledge, (a) no polychlorinated biphenyl is present; (b) no asbestos or asbestos-containing material is present; (c) there are no underground storage tanks or surface impoundments for hazardous materials, active or abandoned; and (iv) no release of hazardous material has occurred in violation of any environmental law at, on, or under any site or facility now or previously owned, operated, or leased by the company or any of its subsidiaries;**
- 3. neither the company nor any subsidiary has transported or, to the company's knowledge, arranged for the transportation of any hazardous material to any location that is (a) listed on the NPL under CERCLA; (b) listed for possible inclusion on the NPL by the EPA in CERCLIS or on any similar state or local list; or (c) the subject of enforcement actions by federal, state, or local governmental entities that may lead to environmental claims against the company or any of its subsidiaries;**
- 4. no hazardous material generated by the company or any of its subsidiaries has been recycled, treated, stored, disposed of, or released by the company or any of its subsidiaries at any location in material violation of any environmental law;**

5. **no oral or written notification of a release of a hazardous material has been made by the company or any of its subsidiaries, and no site or facility now or previously owned, operated, or leased by the company or any subsidiary is listed or proposed for listing on the NPL, CERCLIS, or any similar state or local list of sites requiring investigation or cleanup;**
6. **no liens have arisen under or pursuant to any environmental law on any site or facility owned, operated, or leased by the company or any subsidiary, and no federal, state, or local governmental entity action has been taken or, to the company's knowledge, is in process that could subject any such site or facility to such liens, and neither the company nor any subsidiary would be required to place any notice or restriction relating to the presence of hazardous materials at any site or facility owned by it in any deed to the real property on which such site or facility is located; and**
7. **there have been no environmental investigations, studies, audits, tests, reviews, or other analyses conducted by, or that are in the possession of, the company or any of its subsidiaries in relation to any site or facility now or previously owned, operated, or leased by the company or any of its subsidiaries that have not been made available to the investors prior to the execution of this agreement.**

C. Representations and Warranties of Sellers/Due Diligence Access/Indemnification

1. [3.29] Example 1

Definitions:

“Buyer’s due diligence” (access and investigation) — subject to the terms of the confidentiality agreement, from the date hereof until the closing, upon reasonable notice, the company shall, and shall cause its respective officers, employees, agents, representatives, accountants, and counsel to, afford the officers, employees, and authorized agents, representatives, accountants and counsel of purchaser reasonable (but nonintrusive) access during normal business hours upon reasonable notice to the offices, properties, plants, other facilities, books, and records of or relating to the business and to those officers, directors, employees, agents, representatives, accountants, and counsel of the company who have knowledge relating to the business; provided, however, that the purchaser and its officers, directors, employees, and authorized agents, representatives, accountants, and counsel shall not unreasonably interfere with the business and operations of the company. Nonintrusive access shall not include the collection of soil samples, soil borings, or groundwater samples, or the performance of structural, engineering, geotechnical, or environmental inspections or tests (collectively, “sampling activities”) from, or at, the company’s offices, properties, plants, and other facilities, including, but not limited to, the company’s owned real property and leased real property. In no event shall purchaser perform any sampling activities without the prior written approval of sellers, which shall not be unreasonably withheld, conditioned, or delayed. Any sampling activity by purchaser shall in no way materially interfere with or disrupt the business and operations of the company.

“Environmental claim” — any and all administrative, regulatory, or judicial actions, suits, orders, demands, claims, notices of violation, investigations or proceedings, or requests for information involving any person alleging liability arising out of or resulting from (1) alleged noncompliance with any environmental laws or environmental permits; or (2) the alleged presence, migration, or release of, or exposure to, any hazardous substances at any location.

“Environmental laws” — all laws, environmental permits, governmental orders, or legally binding agreements relating to the use, management, or disposal of hazardous substances or to pollution or protection of endangered species, natural resources, human health, or the environment.

“Environmental permits” — permits that are or have been required under or are or have been issued pursuant to environmental laws.

“Governmental authority” — the government of the United States or any foreign country or any state or political subdivision thereof and any entity, agency, body, or authority exercising executive, legislative, judicial, regulatory, or administrative functions of or pertaining to government.

“Governmental order” — any legally binding order, writ, judgment, injunction, decree, stipulation, award, or determination of any governmental authority.

“Hazardous substance” — any and all substances or wastes that have been defined or classified as hazardous, toxic, or harmful pursuant to any environmental laws or that are regulated pursuant to such environmental laws, including petroleum and each of its chemical constituents and by-products, urea formaldehyde foam insulation, polychlorinated biphenyls, and asbestos in any form.

“Knowledge,” “to the knowledge,” or “known,” and words of similar import — with respect to any matter in question, the actual knowledge of a person after making due and reasonable inquiry of such matter, which shall include due inquiry of any person having primary responsibility for such matter.

“Law” — any law, ordinance, code, statute, rule, regulation, order, judgment, injunction, award, or decree of any court, arbitrator, administrative agency, regulatory body, or authority and governmental body or authority, whether federal, state, local, or foreign.

“Legal expenses” — reasonable attorneys’, accountants’, investigators’, and experts’ fees and expenses reasonably sustained or incurred in connection with the defense or investigation of any losses.

“Liabilities” — any and all debts, liabilities, guarantees, commitments, and obligations, whether fixed, contingent or absolute, asserted or unasserted, matured or unmatured,

liquidated or unliquidated, accrued or not accrued, known or unknown, due or to become due, whenever or however arising (including whether arising out of any contract or any tort based on negligence or strict liability) and whether or not the same would be required by GAAP to be stated in financial statements or disclosed in the notes thereto.

“Material adverse effect” — any fact, event, change, development, or effect that, individually or together with any one or more other facts, events, changes, developments, or effects, is materially adverse to (1) the assets, operations, capitalization, results of operations, or financial condition of the company; or (2) the ability of sellers to consummate the transactions contemplated by this agreement.

“Permits” — all permits, approvals, consents, registrations, licenses, certificates, variances, or other authorizations granted by or obtained from any governmental authority.

“Release” — any actual or threatened release, spill, emission, leaking, dumping, injection, pouring, deposit, disposal, discharge, dispersal, leaching, or migration into or through the environment (including ambient air, surface water, groundwater, land surface, or subsurface strata) or within any building, structure, facility or fixture.

“Remedial action” — any action required under any environmental laws to (1) clean up, remove, treat, or in any other way address any hazardous substance or other substance in the environment; (2) prevent the release or threat of release or minimize the further release of any hazardous substance or other substance so it does not migrate or endanger or threaten to endanger public health or welfare or the environment; or (3) perform pre-remedial studies and investigations and post-remedial monitoring and care.

Representations and Warranties:

Environmental Matters. Except as set forth in [Schedule _____]:

a. Except as would not reasonably be expected to have a material adverse effect, the company (including the company’s assets, operations, and business) has not previously been and, to seller’s knowledge, is not now in violation of or noncompliant with any environmental laws or environmental permits.

b. The company possesses, and has previously possessed, all environmental permits that are required for the operations of the company, each is valid and in good standing, and the company has not been advised by any governmental authority of any actual or potential change in the status or terms and conditions of any environmental permit. All applications for renewal, extension, reissuance, or modification of environmental permits, or related submissions to any governmental authority, have been made in a complete and timely manner, and the company has no reason to believe that such application(s) will be denied, in whole or in part. [Schedule _____] contains a description of all environmental permits currently held by the company in connection with the operation of its business, properties and assets, and identifies the nature, duration, and renewal dates of and the issuing governmental entity with respect to each environmental permit.

c. The operation of the company's business does not involve the generation, usage, release, transportation, treatment, storage, or disposal of any hazardous substance; no underground storage tanks or surface impoundments are located at, on, or under any property owned, leased, or used by the company in the operation of the business.

d. To the seller's knowledge, and except as would not reasonably be expected to have a material adverse effect, there has been no release of any hazardous substance at, on, or under any property or facility currently or formerly owned, operated, or leased by the company, or at any adjacent or off-site location, that has formed or could reasonably be expected to form the basis of any environmental claim against the company.

e. To the seller's knowledge, there are no environmental claims pending or, to the knowledge of the sellers, threatened against the company. The company has not retained or assumed, either contractually or, to the seller's knowledge, by operation of law, any liabilities or obligations that have formed or could reasonably be expected to form the basis of any environmental claim against the company.

f. No environmental law imposes any obligation on the company arising out of or as a condition to the purchase or sale of interests or assets as contemplated by this transaction or other related transaction, including any requirement to modify or to transfer any permit or license, or any requirement to file any disclosure statement, notice, or other submission with any governmental authority, the placement of any disclosure statement, notice, acknowledgment, or covenant in any land records, or the modification of or provision of notice under any agreement, consent order, or consent decree.

g. To the seller's knowledge, the company has delivered to the buyer true and complete copies and results of any reports, studies, analyses, tests, or monitoring possessed or initiated by the company pertaining to any hazardous substance in, on, or under any property owned, leased, or used by the company in the operation of the business, or concerning compliance by the company or the business with environmental laws.

Indemnifications:

Indemnification by the seller for environmental claims.

a. Only to the extent that an environmental claim is based on an environmental liability that is not a "known environmental liability," as that term is defined below, each seller, jointly and severally, shall indemnify and hold harmless the buyer's indemnified persons from and against, and shall reimburse the buyer's indemnified persons for, any and all losses arising out of, based on or in any way relating to any environmental claim arising under any of the environmental laws or any remedial action arising pursuant to any of the environmental laws including, but not limited to, investigation, remediation, treatment, or cleanup of any hazardous substance that is reasonably shown to have been or is present, released, or disposed of prior to the closing date on properties now or previously owned or leased by the company, or which is reasonably shown to have migrated or been discharged or transported from such properties prior to the closing date, in violation of environmental laws, and is at a level or levels which may cause a material adverse effect.

b. “Known environmental liabilities” shall mean those liabilities known by or communicated to officers, employees or agents of the company or the seller on or before the closing date, including the potential environmental liabilities identified in [Schedule _____], and those liabilities that the buyer discovered, or should have reasonably discovered, from any sampling activities buyer performed prior to closing.

2. [3.30] Example 2

To consummate the transactions contemplated hereunder, the seller jointly and severally makes the following representations and warranties:

Environmental Matters.

a. The company has not transported, stored, treated, or disposed, nor has the company allowed or arranged for any third parties to transport, store, treat, or dispose of hazardous substances or other waste to or at any location other than a site lawfully permitted to receive such hazardous substances or other waste for such purposes, nor has the company performed, arranged for, or allowed by any method or procedure such transportation, storage, treatment, or disposal in contravention of any laws or regulations. Except as set forth in [Schedule _____], the company has not disposed, or allowed or arranged for any third parties to dispose of, hazardous substances or other waste upon property currently owned or leased by it or upon property previously owned or leased by it (the “previously held properties”), except as permitted by law. For purposes of this [Section _____], (1) “hazardous substance” or “hazardous substances” shall mean any substance or substances that are hazardous, and shall include, without limitation (A) those substances included within the definitions of “hazardous substances,” “hazardous materials,” “toxic substances,” or “solid waste” in any of the environmental laws, or so designated in accordance with any Environmental Laws; and (B) any material, waste, or substance that contains (i) any asbestos (friable or non-friable), (ii) any polychlorinated biphenyls in any concentration, (iii) any petroleum or petroleum product, (iv) any explosives, (v) any radioactive materials, (vi) any infectious wastes, or (vii) any material that must be removed from the real estate, the leasehold premises, or the previously held properties pursuant to any administrative order or enforcement proceeding or in order to place the real estate, the leasehold premises, or the previously held properties in a condition that is suitable for ordinary use, and (2) “environmental laws” shall mean all federal, state, and local environmental statutes and ordinances, and any rule or regulation promulgated thereunder, and any order, standard, interim regulations, moratorium, policy, or guideline of any federal, state, or local government, department, or agency pertaining thereto, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*; the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §1251, *et seq.*; the Clean Air Act, 42 U.S.C. §7401, *et seq.*; the Toxic Substances Control Act, 15 U.S.C. §2601, *et seq.*; the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §651, *et seq.*; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136, *et seq.*; the Marine Protection, Research, and Sanctuaries Act; the National Environmental Policy Act of 1969, Pub.L. No. 91-190, 83 Stat. 852; the Noise Control Act of 1972, Pub.L. No. 92-574, 86 Stat. 1234; the Safe Drinking

Water Act of 1974, 42 U.S.C. §300f, *et seq.*; the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795; the Hazardous Materials Transportation Act, Pub.L. No. 93-633, 88 Stat. 2156; the Refuse Act; the Uranium Mill Tailings Radiation Control Act and Atomic Energy Act and Regulations of the Nuclear Regulatory Agency; and all state and local counterparts of related statutes, laws, regulations, and orders and treaties of the United States (with any reference to any such environmental law or provision thereof, either in this section or elsewhere in this agreement, being deemed to include any amendment, extension, or successor thereof).

b. Except as set forth in [Schedule _____], the company is not causing there presently to occur, nor to the seller's knowledge is there presently occurring, a release of any hazardous substance on, into, or beneath the surface of any parcel of the leasehold premises, nor has the company ever caused there to occur, nor to the seller's knowledge has there ever occurred, a release of any hazardous substance on, into, or beneath any parcel of the leasehold premises or the previously held properties during the company's ownership or tenancy thereof. For purposes of this agreement, the term "release" shall mean releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, disposing, or dumping.

c. The company has not transported or disposed of, nor has the company allowed or arranged for any third parties to transport or dispose of any hazardous substance or other waste to or at a site that, pursuant to CERCLA or any similar state law, (1) has been placed on the national priorities list or its state equivalent, or (2) the USEPA or the relevant state agency has proposed or is proposing to place on the National Priorities List or its state equivalent; provided, however, that the foregoing representation and warranty, as it relates to the sites to which such third parties have transported or disposed of any hazardous substance or other waste, is made only to the knowledge of the seller. The company has not received properly served notice, nor do the sellers have knowledge of any facts that could give rise to any notice, that the company is a potentially responsible party for a federal or state environmental cleanup site or for corrective action under CERCLA or any other applicable law or regulation. The company has not submitted nor has the company been required to submit any notice pursuant to §103(c) of CERCLA, 42 U.S.C. §9603(c), with respect to the leasehold premises or the previously held properties. The company has not received any written or, to the seller's knowledge, oral request for information in connection with any federal or state environmental cleanup site. The company has not undertaken, nor has the company been requested in writing by any federal, state, or local governmental entity or any person or entity to undertake, any response or remedial actions or cleanup actions of any kind.

d. The company does not use any underground storage tanks located on the leasehold premises, nor are there any underground storage tanks on the leasehold premises. Except as set forth in [Schedule _____], there have never been any underground storage tanks on the leasehold premises or previously held properties during the company's ownership or tenancy thereof. For purposes of this [Section _____], the term "underground storage tanks" shall have the meaning given it in RCRA.

e. To the seller's knowledge, there are no laws, regulations, ordinances, licenses, permits, or orders relating to environmental or worker safety matters requiring the company to perform or pay for any work, repairs, construction, or capital expenditures with respect to the assets or properties owned or leased by the company.

f. [Schedule _____] identifies (1) all environmental audits, assessments, or occupational health studies undertaken by, to the knowledge of the seller, governmental agencies or the company or any of its agents with respect to the company's properties or business; (2) the results of any ground, water, soil, air, or asbestos monitoring undertaken by the company or any of its agents with respect to the leasehold premises or the previously held properties; (3) to the knowledge of sellers, the results of any ground, water, soil, air, or asbestos monitoring undertaken by parties other than the company or any of its agents with respect to the leasehold premises; (4) all written communications from environmental agencies within the past three years involving the company; and (5) all citations issued to the company within the past three years under OSHA.

3. [3.31] Example 3

Representations and Warranties: Environmental Matters

a. For purposes of this agreement, "hazardous substances" means (1) hazardous substances as that term is defined by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, and the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.*; (2) hazardous wastes as that term is defined by the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795, and the Environmental Protection Act; (3) _____ as that term is defined by [other state environmental statute]; and (4) hazardous or toxic chemicals, materials, or substances within the meaning of any applicable federal, state, or local law, regulation, ordinance, or requirement (including, without limitation, consent decrees and administrative orders), all (1 – 4) as amended or hereafter amended. Hazardous substances shall also include, but not be limited to, (1) crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute); (2) any radioactive material, including but not limited to, any source, special nuclear or by-product material, as defined at 42 U.S.C. §2011, *et seq.*, as amended or hereafter amended; and (3) asbestos in any form or condition.

b. Except as stated in [Schedule _____], the property (including the groundwater thereunder), the improvements thereon, and the use and operation thereof, are currently in compliance with all applicable federal, state, and local laws, regulations, ordinances, and requirements (including, without limitation, consent decrees and administrative orders) relating to health, safety, and protection of the environment, and possesses and is in compliance with all permits required thereby.

c. Except as stated in [Schedule _____], there are no hazardous substances on, in, or under the property (including the groundwater thereunder), and the property has never been used for hazardous substance generation (or manufacture, formulation, or production in any manner), transportation, treatment, storage, disposal, or handling in any manner.

d. Except as stated in [Schedule _____], the borrower has no reasonable basis to dispute the representations made by the owner in [Schedule _____], and the borrower's representations in this [Paragraph _____] are based on borrower's independent investigation of conditions on and around the property (including the groundwater thereunder).

e. Except as stated in [Schedule _____], with respect to the property, there have not been and there are not any past or present events, conditions, circumstances, activities, practices, incidents, or actions that (1) could reasonably be expected to interfere with or prevent continued compliance with, or (2) may give rise to any legal liability or otherwise form the basis of any claim, action, suit, proceeding, hearing, or investigation pursuant to any federal, state, or local law, regulations, ordinance, or requirement relating to health and safety and protection of the environment.

Covenants

a. From and after the closing date, hazardous substances shall be handled on the property only as stated in [Schedule _____]. Such handling shall be in compliance with all applicable federal, state, and local laws, regulations, ordinances, and requirements (including, without limitation, consent decrees and administrative orders) relating to health, safety, and protection of the environment, and all permits required thereby.

b. The borrower shall immediately notify the lender upon receipt of all written complaints, claims, demands, causes of action, inquiries, or notice of same, relating to the condition of the property, with respect to compliance with or potential liability under any federal, state or local law, regulation, ordinance, or requirement (including, without limitation, consent decrees and administrative orders) relating to health, safety, and protection of the environment.

Indemnification

The borrowers jointly and severally agree to indemnify, defend (with counsel reasonably acceptable to the lender), and hold lender and lender's affiliates, shareholders, directors, officers, employees, and agents free and harmless from any liability, loss, cost, or expense (including reasonable attorneys' fees and fees or costs incurred in investigating, preparing, defending against, or prosecuting any litigation, claim, action, suit, proceeding, or demand) incurred or suffered by them, any of them, directly or indirectly by reason of

- a. any misrepresentation or breach of any representation, warranty, covenant, condition, or agreement contained herein or in any document or instrument delivered to the lender by the borrower hereunder;
- b. the existence of any hazardous substances on, in, or under the property (including groundwater), or the seller's violation of any applicable existing or subsequently enacted federal, state, or local law, regulation, ordinance, or requirement (including, without limitation, consent decrees and administrative orders) relating to health,

safety, and protection of the environment, or by reason of the imposition of any lien for the recovery of any costs expended for or related to the cleanup, release, or threatened release of hazardous substances or related to the release or threatened release of hazardous substances; and the borrower, its successors, and assigns hereby waive, release, and agree not to make any claim or bring any cost recovery action from or against the borrower under CERCLA or any state equivalent, or any similar law now existing or hereafter enacted, for those liabilities now expressly assumed thereunder.

