



Drawing an Environmental Line in the Sand

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By Stephen Fauer

A recent discussion with a prospective client reminded me of a common practice among some commercial property owners/landlords. In this instance, the individual said he is about to sign up a new tenant who will operate an auto body shop and that he is not concerned about environmental issues. He began to explain how auto body shops are run differently today; they use fewer noxious chemicals, they are environmentally conscientious, etc.

I concurred with his view of the way auto body shops are run today. They do use fewer hazardous chemicals, and many of their systems are self contained.[1] But unless you are going to strictly monitor the auto body shop's operations, how will you know that they are operating in an environmentally diligent fashion at all times? It only takes one errant move to create an expensive environmental liability.

That is when I suggested to this prospective client that they draw an "Environmental Line in the Sand." An Environmental Line in the Sand is my metaphor for distinguishing between impacts created by a tenant and those that may be vestigial. When the tenant moves out, you do not want to engage in a contentious disagreement about potential impacts and who is responsible for addressing those impacts. Such situations can become litigious. So the following is ESA's pre-tenancy strategy designed to protect landlords.

Your Attorney's Role

First your attorney will draw up a lease. The lease should specify, to some degree, what is known about the property's current environmental condition.[2] This presupposes that the landlord either has a piece of property known to be free of environmental impacts or a parcel in which impacts have been investigated and remediated and is therefore proven to be clean. If the landlord does not know the current environmental status or condition of his property, ESA suggests that they undertake some form of due diligence or sampling investigation to determine a baseline status. Even if impacts are discovered, it is important to distinguish between these pre-existing impacts versus impacts your new tenant may cause.

Your attorney may want to incorporate various elements about the tenant into the lease. Examples of items that could be included are: a description of site operations, the kinds of equipment that will be brought on site and where it will be used or installed, lists of chemicals (raw materials) they use, where those chemicals will be used on site, and how they will be stored. Determine if the tenant will generate any chemical waste materials, regardless of whether those wastes are hazardous or not. The lease should stipulate compliance with all relevant regulations including Right to Know, OSHA rules, and other pertinent environmental statutes.

A determination should be made up front concerning the tenant's potential Industrial Site Responsibility Act (ISRA) applicability. If they are deemed to be ISRA-subject, this should be specified in the lease. The tenant must give the landlord adequate notification prior to moving or terminating the lease. Their notification should allow ample time for environmental compliance, as needed.

[1] ESA is currently working on a case where a self-contained, state of the art degreaser was used. It was located in a room with a single-pour concrete floor. There were no seams in the floor and the concrete was in excellent condition. Notwithstanding these facts, NJDEP contends that vapors from this degreaser could penetrate the concrete, thereby requiring through-the-concrete samples! ESA is currently contesting this ruling. The point is that things that seem innocuous may, in fact, pose environmental threats. Right or wrong, this is the way things are.

[2] I am not an attorney, and neither ESA nor I dispense legal advice. It is incumbent upon readers of this essay to speak with their attorneys to determine the legal relevance of the suggestions made herein and the applicability to their own situations.

The Landlord's Role

Each landlord is responsible for managing his or her property and tenants in a way that will serve everyone's best interests. As a businessman, I strongly believe that knowledge is power; and if you own a property it is best to know the environmental conditions on your property. I assure you that not all parties agree with this belief. But in the vast majority of cases, little good accrues from being environmentally ignorant of one's property.

I often hear people say, "I am not under any regulatory mandate. So why should I spend money on an environmental investigation?" or, "The more I know about environmental conditions on my property, the more I will have to do. I prefer to defer these costs."

So many things are wrong with those beliefs that I almost don't know where to begin, so let me list a few reasons why one should consider being environmentally proactive.

1. Prices are not getting any cheaper. It is almost always true that environmental work done today is less expensive than doing that work in the future.
2. Time obscures memory. What did you do on site last year? Or ten years ago? Or forty years ago? Fresh memories provide more valuable information.
3. People die. When former owners or employees pass away, you have lost a source of valuable information.
4. As I said earlier, knowledge is power. I am convinced that property owners should know more about their properties than their tenants or prospective purchasers. This normally requires that some form of due diligence be performed and, depending upon those findings, it may also require some amount of sampling. And in some cases ESA even recommends that the property owner perform their own due diligence in advance of the due diligence that will be performed by a prospective purchaser! Failure to do this means you may be surprised by the purchaser's findings during the sale and/or out-negotiated.
5. With the advent of the Site Remediation Reform Act (SRRRA) and its attendant LSRP program, NJDEP is freeing up more inspectors. ESA knows of some businesses that have been inspected who never before saw a NJDEP inspector. It is reasonable to assume that spot inspections will increase and the potential for fines will also increase. Therefore, more than ever, it pays to be environmentally compliant. And it follows that landlords should ensure that their tenants are environmentally compliant.
6. Finally, I am privy to cases where a property owner consciously chose to do nothing to address an environmental situation; they subsequently passed away, and left an impacted property to their children. Their children were then saddled with a problem they did not cause and literally inherited. Even if the children want to pursue insurance recovery (see my September e-newsletter, Other People's Money at www.asksa.com), information about these old insurance policies probably died with the parent.

How Does the “Environmental Line in the Sand” Work?

Based upon the intended use of the space, the landlord may want to perform some baseline sampling to document conditions prior to the tenant's occupancy.

Staying with the example where the prospective tenant is going to operate an auto body shop, here are some questions that need to be asked. What kinds of materials will they use? What kinds of materials might be generated? What

kinds of systems will be installed, where will they be installed, and how and where will they be exhausted?

Typical raw materials used by body shops include paints, motor oil, grease, and a degreasing agent. Waste materials are also used such as motor oil, scant amounts of waste paint, and possibly some other forms of solvent. Here are a few questions that need to be asked: Where will the raw materials be stored? Where will the waste materials be stored? What are the conditions of the flooring in the rooms where these materials will be used? Are all floors solid, intact, and without cracks, fissures, and floor drains? Through which door will raw materials be brought in and through which door will waste materials exit? Does the tenant intend to perform their own baseline sampling? How and where will the exhaust system operate? Where on the exterior of the building will the exhaust system vent be installed?

Let's assume that no baseline sampling is performed. By virtue of at least having asked all of these questions, the landlord will have already established a rudimentary "Environmental Line in the Sand". And having done so, if there is any reason to suspect that the tenant created some environmental impacts to the property, there will be a basic means to establish responsibility. But if you perform baseline sampling and analyze the samples in accordance with the chemicals to be used by your tenant, your "Environmental Line in the Sand" becomes that much more legible and powerful.

As one might infer, this subject can become very complicated depending on the nature of the tenant. Some tenants are so obviously benign that this form of inquiry is unnecessary. Yet other tenants may have an operation that mandates that every one of these steps be taken. In the final analysis, ESA recommends that you discuss these issues with your environmental consultant and with your attorney to arrive at a decision that makes the most sense.

Regards,
Stephen