



## **TENANT SELECTION - 9 STEPS TO REDUCE YOUR LIABILITIES Environmental Damages, Claims, Fines Who Pays? Protect Yourself!**

**LANDLORDS BEWARE!** Commercial and Industrial Property Owners continue to face financial risk from environmental contaminants to their properties caused by their tenants. Under EPA's Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), property owners (not tenants) are the "potentially responsible party (PRPs)" whose deep pockets often fund environmental cleanup costs.

**KNOW YOUR TENANT!** Under the joint and several liability provisions of CERCLA if the tenant is insolvent, property owners can be held solely liable for the entire cost to cleanup a site. This can occur regardless if the contamination happened many years in the past from prior tenants, from current or more recent tenants, and from contamination which the property owners did not cause.

### **Claiming ignorance is not a solution!**

CERCLA "third party defense" is where the PRP establishes that the release of hazardous substance was solely by the act or omission of a 3rd party with whom the PRP had no contractual relationship. This 3rd party defense requires the PRP to exercise due care with respect to the hazardous substance and take precautions against foreseeable acts or omissions by the 3rd party. The courts have routinely ruled that this is not a valid defense since a lease constitutes a contractual relationship. The burden of proof is on the property owner to demonstrate that it took precautions against foreseeable acts or omissions of its tenant.

### **Nine Steps to Minimize Property Owners Liabilities.**

1. **Perform a Phase I Environmental Site Assessment...** A Phase I identifies the presence of recognized environmental conditions (RECs) that may have an adverse environmental impact on your property and satisfies one of the requirements to qualify for the innocent landowner defense under CERCLA.  
Make sure you hire the right environmental professional and know the limitations of the Phase I.
2. **Complete a Baseline Environmental Assessment prior to tenant occupancy...** Remediate RECs such as asbestos and lead-based paint prior to tenant leasing. Have an environmental professional evaluate the property or the tenant space. Keep photographic documentation of the site. Make sure your site specific baseline data forms the basis of the *how clean is clean standard* when the tenant leaves.
3. **Notify your tenants in writing, of the presence, location and condition of RECs in their work space and develop a site-specific plan for RECs on your property to manage these materials safely in-place...** All renovations which potentially disturb REC's should be reviewed and approved by the property owner. Failure by the tenant to adhere to these notifications/plans should result in the tenant being responsible to cleanup the site to the landlords satisfaction and to meet the established *how clean is clean standard*. Remember, cleanup standards can differ from state-to-state and city-to-city and depending upon the use of the site.
4. **Verify the financial stability of your tenants...** Shifting the responsibility for hazardous cleanups to the tenants affords no benefits if the tenant cannot meet their financial obligations. Review the prospective tenants financial statement prior to leasing; establish escrow funding if needed for potential cleanup costs..
5. **Investigate the tenants proposed operations including the amount and degree of toxicity of hazardous substances used and waste generated...** Have an environmental professional review the tenant's Material Safety Data Sheets for the chemicals/products used in their space along with chemical hygiene plans and provide a professional opinion concerning their environmental risk. The lease should require tenants involved in hazardous substance activity to maintain specific insurance coverage for such activities. Lease conditions should include the property owners as additional insured with the tenants policy acting as primary coverage and the property owners policy not contributing.
6. **Update/Amend your lease clauses/language...** A simple clause prohibiting the manufacturing, storage, disposal, transportation and use of hazardous substances on the premises is a good start. Property owners should also have the right of entry for inspection purposes and be promptly notified of any correspondence or violations from federal, state or local environmental regulatory agencies.
7. **Consider adding more teeth to your leases...**
  - a) Require an indemnity clause to reimburse the property owner for cleanup costs.
  - b) Limit tenant claims for damages such as loss of customers or business interruption.
  - c) Water damage and mold must be covered.
  - d) Public relations and proprietary information requirements need to be defined.
  - e) Require a decommissioning plan with estimated cost value
8. **Periodically reinspect tenant space...** AET recommends the owner's trained maintenance staff perform a walk through inspection of the tenant space on at least a monthly basis. Have your environmental professional develop an inspection checklist and train your maintenance staff in what to look for. Keep documentation to serve as a benchmark by which to measure the environmental impact of your tenants activities.
9. **Have your tenant provide you with a clean bill of health before leaving**

**About our organization:** AET has 29 years of contracting/consulting experience assisting our clients in facility planning, renovations, demolition, redevelopment and site restoration. AET routinely prepares project work plans and performs project oversight to minimize the cost and contingent liabilities associated with for new construction, renovations and demolition projects. Make AET your first point of contact for your consulting/contracting needs. Call us now at 610-891-0114 or 1-800-9696-AET.

**Need more information regarding your demolition projects, Email Alan Sutherland, CIH, CHMM at [a.sutherland@aetinc.biz](mailto:a.sutherland@aetinc.biz).** We provide nationwide services; phone consultations are free. Check out the full range of environmental contracting/consulting services we provide at our website at [www.aetinc.biz](http://www.aetinc.biz).

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