

The Duty to Disclose Latent Environmental Hazards in Mineral Property Transactions

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§ 2.04. Common Law Duty to Disclose Latent Environmental Hazards in Mineral Property Transactions.

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§ 2.01. Introduction.

Mineral extraction activities conducted throughout the last century have created various conditions on the land that may be considered environmental hazards. Many of these conditions are latent – they are hidden and would not be discovered or anticipated through visual inspection of the property.

Federal and state statutes enacted over the past 20 years now address the potential environmental concerns created by and associated with mineral extraction, and require operators to implement controls to minimize or eliminate such concerns. However, these regulatory programs are primarily prospective and preventive in nature and often do not address past environmental contamination that may have occurred as a result of mineral extraction activities that predated the regulatory programs.

The most well known exception to this general rule is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which contains remedial response and liability provisions that apply to historic releases of hazardous substances.⁽²⁾

CERCLA has been used by the United States Environmental Protection Agency (EPA) to require current and past owners of properties, among others, to remediate some of the Nation's most severely contaminated sites, including sites contaminated by mining activities.⁽³⁾

CERCLA has also become a frequently used tool by current owners of properties to recover remediation costs in private cost recovery actions under Section 107(a) from prior owners and operators.⁽⁴⁾

The potential for liability under CERCLA for past contamination is a key consideration in the negotiation of warranties, releases, and indemnification provisions in agreements for the sale of properties that have previously supported mineral extraction activities.

In addition to CERCLA private cost recovery actions, purchasers of mineral properties may also seek to recover damages and/or response costs for existing contamination from prior owners and operators under common law theories. A claim for damages based upon fraud, misrepresentation, or negligence may be brought due to the alleged failure of the seller to disclose the existence of latent environmental hazards prior to the sale of the property. If a purchaser establishes that the seller failed to disclose latent hazards that were known to the seller, contract provisions intended to protect the seller from liability for past contamination may fail.⁽⁵⁾

Accordingly, it is critical that a seller of mineral properties take steps prior to and during a sales transaction to minimize the potential for such a claim to be made.

This Chapter examines the statutory, regulatory, and common law obligations that may be imposed upon an

owner of mineral property to disclose the existence of latent environmental contamination hazards to potential purchasers and regulatory authorities. The duty to disclose information or environmental conditions to regulatory authorities is being addressed because (1) purchasers can reasonably be expected to rely on information in agency files in performing a due diligence investigation of property; and (2) failure to comply with regulatory reporting duties could be argued to be a deceptive practice or a breach of any warranty that is given with respect to the seller's compliance with environmental laws and regulations. This Chapter also discusses the ability of a seller of mineral property to protect itself against future liability for existing contamination. This examination begins with a brief review of the nature of environmental hazards that may be associated with historic mineral extraction activities.

§ 2.02. Nature of Hazards.

[1] Contamination Associated with the Mineral Extraction Method.

Certain types of environmental contamination are inherently related to the method of mineral extraction that has been used. For example, land disposal or subsurface disposal of overburden, coal refuse, mineral processing wastes, and tailings can be expected to cause some amounts of soil and possibly groundwater contamination based upon the characteristics of the waste at issue.⁽⁶⁾

Although the contamination may not be readily apparent from visual inspection of the area, a potential purchaser of mineral properties should be on notice that such contamination may or would likely exist where the fact of the waste disposal is known. Similarly, one should anticipate that drainage from abandoned underground works may contain elevated levels of metals or other contaminants or be caustic or acidic.⁽⁷⁾

Because the nature of the mining activities will generally be known to a buyer of mineral property, these types of environmental concerns are not truly latent, and as discussed below, this will generally affect the duty of the seller to disclose the existence of any such concerns to a buyer of mineral properties.⁽⁸⁾

Oil and gas exploration activities are also associated with certain environmental concerns. These environmental hazards may include contamination of underground sources of drinking water due to reinjection of produced fluids, brine discharges, petroleum contaminated soil and pits, and the cleanup and remediation of abandoned well sites. Many of these activities have been largely unregulated in many states until the past few years.

One of the most significant current issues related to oil and gas production is the management and disposal of materials contaminated with naturally occurring radioactive material (NORM). Although NORM issues are not confined to the oil and gas industry, some states have promulgated specific regulations governing oil and gas activities affected by NORM.⁽⁹⁾

EPA is considering whether to promulgate national standards for NORM cleanup.⁽¹⁰⁾

In addition to regulatory issues, oil field NORM has been, and may continue to be the subject of significant toxic tort litigation.⁽¹¹⁾

The presence of NORM on producing properties may become a very significant aspect of mineral transactions.

[2] Contamination Caused by Ancillary Operations.