

University of Houston Law Center

**Superfund Liability and Brownfields Redevelopment
Course #5297**

SYLLABUS

**Scott A. Sherman
Adjunct Professor**

Fall 2018

Brownfields: Environmental Law and Strategy

Instructor

Scott A. Sherman, JD
(713) 320-2879; sasherman@uh.edu

Class Time

Wednesday, 5:30pm – 7:30pm

Course Description and Objectives

From surplus property transactions to urban redevelopment efforts, the risks posed by historical contamination at abandoned or underutilized sites can impede community revitalization initiatives and the real estate marketplace at large. This course will address the liability, regulatory, and redevelopment challenges presented by the federal Superfund law (Comprehensive Environmental Response, Compensation, and Liability Act or CERCLA). The course also will explore reforms to the U.S. EPA's Superfund program that seek to promote the cleanup and redevelopment of brownfield sites and the role of state Voluntary Cleanup Programs.

These topics, for the purposes of course presentation, will be analyzed in four sections: "Superfund Liability and Brownfield Protections", "Environmental Due Diligence", "Negotiating with Federal and State Regulators" and "Transaction and Revitalization Strategies". Each course segment will introduce students to a substantive evaluation of the core Superfund issues presented and offer insights into the legal concepts, regulatory programs, deal documents, and remediation approaches available to environmental lawyers and community leaders to manage these challenges.

During the course of the semester, students will be given two short, practical writing assignments related to the subject matter (e.g., preparing comments to a regulatory agency or legislative committee or drafting an advocacy piece relating to a Superfund cleanup or a brownfield project). The final assignment will be the preparation of a client memorandum analyzing the CERCLA issues in a community revitalization initiative or a real estate project and making a recommendation on whether - and if so, how - to proceed with the project notwithstanding the challenges presented. The final project should be approximately 15 – 20 pages. The instructor will work closely with each student on their work. Grades are based on written work during the semester. There is no final examination.

Completion of the course will position students to identify and analyze issues under the federal Superfund law, to evaluate their impact on community revitalization efforts and private sector real estate projects, and to manage the challenges presented. Additionally, students should gain an understanding of the respective roles and goals of government regulators, community leaders, and landowners in Superfund and brownfield efforts.

Required Text and Other Materials

Casebook: CERCLA (Litigator Series), LandMark Publications, 2016.
Electronic publication available through Amazon (est. cost - \$5.99)
Materials: As noted in Course Outline below and made available on course web page.

Assignments

I. Early- and Mid-Term Assignments

Examining Superfund and Its Application to Contaminated Properties

Requirement: The early- and mid-term assignments each will take the form of an approximately 3-5 page document designed to examine the Superfund statute and related regulatory programs and their impact on the cleanup and redevelopment of contaminated properties. The instructor will work with students in the selection of their topics and format of their documents.

Description: The first document will be in the form of formal comments submitted to a legislative committee or a regulatory agency concerning a proposed change to the statute or a change in the federal Superfund program. Students are free to choose any issue drawn from the recommendations of the U.S. Environmental Protection Agency, Superfund Task Force (U.S. EPA, July 2017).

The second document will be an advocacy piece relating to a Superfund cleanup or a brownfield project. Students are free to choose any issue. Examples include: questions and concerns about the adequacy of the cleanup, the long-term oversight of the reuse of the property, the awarding of tax or financial incentives, fast-tracking permitting and other regulatory approvals, worker and neighborhood safety during the cleanup, gentrification, and continued commercial/industrial use amidst the lack of greenspace.

II. Final Course Assignment

Doing the Deal: Successful Management of Environmental Issues in a Brownfield Project

Requirement: The final course assignment will take the form of an approximately 15 - 20 page client memorandum analyzing CERCLA and regulatory issues in a community revitalization initiative or a brownfield project and presenting options for resolving those challenges.

Description: The final course assignment will ask each student to identify, evaluate, and manage environmental issues in a real estate project. Students may choose any real estate scenario and environmental matter in which they are interested and are free to draw from actual deals, hypothetical developments, or open policy issues.

In tackling the environmental issue presented, students should consider - at a minimum - the following: What human health concerns/natural resources impacts are presented? What is the relevant body of law or regulations? What governmental bodies will you have to deal with? What is the impact of the environmental issues on the parties to the transaction and/or the

surrounding community? What types of professionals should be added to the project team and what role will they play? And finally - Is the deal worth doing in spite of the environmental obstacles?

The client memorandum should at a minimum:

- describe the project, its physical conditions, and general market considerations
- discuss the environmental issues presented at the site
- identify and discuss the relevant environmental statutes and regulatory programs
- analyze the potential impact of the issues (see the preceding paragraph)
- evaluate how you would deal with the obstacles presented, including costs, timing, market perception, community concerns, project feasibility, government regulators, investors, etc., and
- state your course of action and reasons for doing so.

Students will have the option of turning in their final assignment on or before the final exam date for this course.

III. Participation

Current Environmental Issues - Roundtable Discussion

Requirement: Lead class in the discussion of a current environmental topic. Participate in discussion prompted by classmates' presentations. No written requirement.

Description: Each class will begin with a roundtable discussion of a current environmental issue in a Superfund matter or a brownfield project. The discussion will be student-led, with one student serving as the discussion coordinator. The coordinator will be responsible for picking the roundtable topic, identifying 1 - 2 relevant articles from the popular press, and presenting a short (5 minutes) overview of the matter presented. Following the coordinator's presentation, we will open up the discussion for questions, comments, and debate by the rest of the class.

Among other things, the roundtable discussion will seek to identify and analyze the following: What is the human health or natural resources concern? What has been the regulatory response? What is the impact on the real estate market and local community? What are the positions of the various interest groups? How does any of this impact interested stakeholders, e.g., developers, sellers of surplus properties, lenders, local governments, and design professionals (that is, clients)?

Through the roundtable discussion, students should gain a more thorough insight into substantive environmental topics; an understanding of the competing interests involved in the cleanup and redevelopment of contaminated properties; and additional perspectives on the formulation of government policies and real estate project approvals.

Evaluation and Grading

Final Assignment - 75%

Early- and Mid-Term Assignments - 15%

Roundtable Discussion and Class Participation - 10%

CAPS

Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the “Let's Talk” program, a drop-in consultation service at convenient locations and hours around campus. http://www.uh.edu/caps/outreach/lets_talk.html

Superfund Liability and Brownfields Redevelopment

Course Schedule

OPENING SESSION

Overview and Introductory Lecture (8/22)

Course Overview
Goals and Objectives
Syllabus Review
Lecture, "Superfund Liability and Brownfields Redevelopment"
Roundtable Discussion

SUPERFUND LIABILITY AND BROWNFIELD PROTECTIONS

CERCLA Liability; US EPA Enforcement (8/29, 9/5 & 9/12)

Topics: The National Priorities List (NPL)
CERCLA Liability and US EPA Enforcement Authorities
Liability of Property Owners for Historical Contamination

Cases: *CTS Corp. v. EPA*, 759 F.3d 52 (D.C. Cir. 2014)
General Electric Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010)

U.S. v. DuPont, 432 F.3d 161 (3rd Cir. 2005)
U.S. v. Capital Tax Corp., 545 F.3d 525 (7th Cir. 2008)

Hobart Corp. v. Waste Management of Ohio, 758 F.3d 757 (6th Cir. 2014)
Frey v. EPA, 403 F.3d 828 (7th Cir. 2005)

Online: CERCLA, Section 101(20), 105, 107(a)

CERCLA Liability: Exclusions to Promote Brownfields Redevelopment (9/19)

Topics: "Small Business Liability Relief and Brownfields Revitalization Act"
Bona Fide Prospective Purchasers (BFPPs)
Tenants as BFPPs
Post-Acquisition Obligations of Brownfield Purchasers

Case: *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013)

Online: CERCLA, Section 101(39), (40); 107(r)
US EPA, Guidance, "Tenants under BFPP Provision"
US EPA, Guidance, "Common Elements"

ENVIRONMENTAL DUE DILIGENCE

Due Diligence: Assessment of Contaminated Properties (09/26)

Topics: EPA, "All Appropriate Inquiries"
Phase I and Phase II Environmental Site Assessments

Online: CERCLA, Section 101(35)
ASTM E1527, "Standard Practice for Environmental Site Assessments"

Due Diligence: Negotiating the Purchase and Sale Agreement (10/3)

Topics: Structuring Transactions/Environmental Provisions in Deal Documents
Role of Environmental Counsel, Environmental Consultants

Online: Sample Brownfields Deal Documents

*** First Assignment due on or before the October 10 class.

NEGOTIATING WITH FEDERAL AND STATE REGULATORS

Site Cleanup: How Clean is "Clean" (10/10)

Topics: Risk-Based Cleanups
Institutional Controls and Deed Restrictions
Groundwater Contamination
Vapor Intrusion

Online: TCEQ, Texas Risk Reduction Program
US EPA, Policy, "Property Owners/Contaminated Aquifers"
Tex. Health & Safety Code, Chapter 361, Subchapter W
US EPA, Guidance. "Vapor Intrusion"

Case: *Voice of the Cornerstone Church Corp. v. Pizza Prop. Partners*,
(Tex. App.—Austin 2005)

State Voluntary Cleanup Programs (10/17 & 10/24)

Topics: State Voluntary Cleanup Programs ("VCP")
US EPA Deferral to State VCPs

Online: Certificate of Completion, No Further Action Letter
US EPA/State of Texas, Memorandum of Agreement
CERCLA, Section 128
Deferral Agreement, U.S. EPA and State of Nevada, Anaconda Copper
Mine (2018)

Federal and State Prospective Purchaser Agreements (“PPA”) (10/31)

Topics: Seeking a Covenant Not to Sue
Strategic Considerations and Stakeholders

Online: US EPA, Memorandum, “BFPPs/PPAs”
US EPA, Model Agreement, “BFPP Doing Work”

*** Second Assignment due on or before the November 7 class.

TRANSACTION AND REDEVELOPMENT STRATEGIES

Post-Remediation, Redevelopment Strategies (11/7 & 11/14)

Topics: Overcoming Stigma at Brownfield Sites
Strategies for Introducing the Public to Redeveloped Sites
Bifurcation of Contaminated Sites
Long-Term Access and Monitoring
Environmental Insurance

Online: US EPA, Harbor East (Baltimore, MD)

Case: *Houston Unlimited, Inc. v. Mel Acres Ranch (Tex. 2014)*