



Property Owners:

Protect yourself with a sound environmental management program

Keeping an Eye on Tenants

Property owners have enough headaches without assuming liability for the environmental missteps of their tenants. Yet, if you, as an owner, do not take certain preventive measures, liability and costly cleanups might land right in your lap. This is especially true if a tenant engages in activities that involve the handling of environmentally sensitive materials. Such businesses include printing and auto repair shops, dry cleaners, machine shops, and any operation involving paint, coating or degreasing.

What's the risk for property owners?

Under the strict liability provisions of Superfund, property owners are potentially liable for cleanup costs on the same legal basis as the tenant who caused the problem. Recent amendments to Superfund give owners some protection against this risk but only if they meet certain conditions, including the exercise of "appropriate care" to stop or prevent further contamination.¹ While this provision is still new and untested in court, it is prudent for property owners to take a few simple precautions that could prevent expensive problems from occurring in the future.

Here are five steps you can take to protect yourself from liability created by the environmental lapses of your tenants.

I. Write a strong lease

It pays to anticipate life's worst outcomes, because the worst might just happen. And more important, preparing for the worst can often prevent problems before they start. You can start off on the right foot by including clauses in your lease agreement designed to protect your interests, such as these suggested by the Building Owners and Managers Association:

- Require prior approval before tenant renova-

tion and also require approval of contractors.

- Be sure tenants have adequate insurance to pay for environmental clean-up, if necessary.
- Restrict incompatible uses, especially those that involve hazardous materials not currently part of the tenant's business.
- Limit changes to the use of space.
- Specify indemnification for contamination caused by the tenant or those acting on their behalf.
- Include the right of the landlord to enter and inspect, including testing. Require a pre-departure inspection that also allows testing.

The lease is your most potent tool for protecting yourself and allocating responsibility between the owner and the lessee—before problems occur.

Attorney Gerald Tenner of Marks, Marks and Kaplan recommends that the indemnity and related environmental provisions extend beyond termination of the lease. "This must be clearly stated," he warns, "so the owner is protected from problems that are only discovered after the lease is terminated and the tenant moves out."

Mark Richmond of Katz, Randall, Weinberg & Richmond also suggests that:

- The tenant should be obligated to provide copies of letters, permits and agreements with regulatory authorities.
- The lease should prohibit installation of above or below ground tanks.
- The landlord should be able to perform or control the cleanup of problems caused by the tenant at the tenant's cost.
- Any cleanup of a tenant-caused problem should result in a No Further Remediation letter without institutional controls or engineered barriers.

(Continued)

¹ See *The Carlson Report*, "President Bush Says Changes in Superfund Liability will Accelerate Brownfield Development," March/April 2002, available at www.carlsonenv.com.

II. Commit to regular inspections.

An old management adage says it's not what you expect; it's what you inspect that matters. That's certainly true when it comes to keeping track of how your tenant's use of your property might affect its environmental health. An important step in minimizing your chances of taking on liability is to routinely monitor your tenants' actions regarding the use, storage, and disposal of hazardous materials.

Regular inspections should begin by performing a baseline test or evaluation to establish the environmental condition of the property. Ideally this inspection will take place before the tenant occupies the space. Establishing the environmental condition of the property prior to tenancy is essential because even if a court decides a tenant is responsible for contamination, the owner may be unable to prove the extent of the tenant's liability without having an established baseline. After a baseline test has established the environmental health of the property, regular monitoring can effectively identify new environmental contamination as well as assess who is responsible.

Monitoring needn't be a major burden on either the owner or tenant. Assessments can be brief and non-disruptive and still offer an accurate picture of environmental conditions. Regular monitoring offers strong protection should your situation ever result in litigation.

III. Develop a specific monitoring protocol that fits the risk

Make sure that you are monitoring for all possible dangers, especially those most often associated with your tenant's industry. Inspections should focus on whether the tenant is handling environmentally sensitive materials in safe ways.

Different industries pose different dangers. Ed Garske, Vice President at Carlson Environmental says, "We make a point of monitoring chemical processing sites twice as frequently as we would other sites. And if we have identified an issue, we increase the frequency of visits."

IV. When you find problems, take action.

Just documenting a problem is not enough. If you let a situation slide by, your tenant's problem may become your own. Once you become aware of an environmental offense, you have a responsibility to see that it is dealt with properly. If your lease indicates clearly that your tenant is responsible for cleaning up environmental problems they cause, you will be in a better position to act swiftly when a problem is identified. In addition to fixing the current problem, you may need to have the tenant take additional safety precautions, change methods of

handling materials, or find better disposal methods.

V. Hire knowledgeable and reliable

experts to guide you. You don't have to know every environmental rule and regulation that applies to your tenant's business as long as you are working with experts who do.

An Integrated Approach.

At Carlson Environmental, we have created an integrated approach to managing environmental property risks called The Environmental Preparedness Program™. This program consists of the following elements:²

- **Establish an Environmental Baseline.** The Phase I is the industry standard that documents "Recognized Environmental Conditions" that may reduce the value of a property or impact its future use. Typically relied upon prior to the purchase of a property, this report, and any follow-up investigations, can be used to create a baseline of evidence against which future site activities can be measured.
- **Evaluate *New Tenants*** to determine if their operations could pose environmental problems for the owner.
- **Evaluate *Existing Tenants*** periodically to ensure compliance with lease agreements and use of best management practices.
- **Evaluate *Outgoing Tenants*** prior to termination of the lease. Visit the facility to assess the impact of the tenant on the building and environs.
- **Manage Known Liabilities** Proactively if you own or manage property with known environmental conditions such as asbestos containing building materials, or if your property is involved in a government-approved cleanup program. Create a management program to ensure that existing conditions are not made worse.
- **Draft Lease Provisions that Anticipate Problems.**
- **Make Sure Insurance Coverage is Adequate** to address unknowns.
- **Keep Good Records** in order to avoid complications when refinancing or selling property in your portfolio.

For further information from Carlson Environmental, Inc.:

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² In addressing legal and insurance issues, Carlson works with established experts in each area.