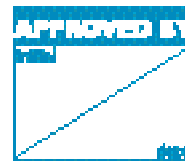
# Developers Beware:

## *Grading Your Development Site May Put You on the Hook for An Environmental Clean-Up*



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A California district court recently found a developer liable for contribution of clean-up costs under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") despite the fact that the developer had nothing to do with the initial disposal of hazardous substances and was not even aware that the hazardous substances had migrated onto his development site prior to his grading and excavating of the site. *See United States v. Honeywell International, Inc.*, 2008 WL 508503 (E.D. Cal. Feb. 22, 2008). In *Honeywell*, the defendant, Charles C. Bruner purchased an undeveloped parcel in 1978 which he developed into the Vista Ray Subdivision. During development, he hired contractors to grade the property and excavate it for roads, utilities and lots. He owned the site until 1982. The Vista Ray Subdivision was located near what later became the Central Eureka Mine Superfund Site in Amador County, California. Apparently, between 1944 and 1989 erosion caused contaminated soils to migrate from the mines onto the Vista Ray Subdivision property. Between 1960 and 1977, the eroding areas of the mines were partially vegetated, thereby preventing some erosion. Nonetheless, when the United States Environmental Protection Agency tested the soils at the Vista Ray Subdivision in 1995, it discovered arsenic levels exceeding federal standards.

As the *Honeywell* court explained, CERCLA allows responsible parties to obtain contribution from other responsible parties for clean-ups of contaminated sites. *See* CERCLA § 113(f). The party seeking contribution must show that (1) there is a **"release"** or **"threatened release"** of **"hazardous substances"** at a **"facility,"** (2) the party seeking contribution has incurred necessary response costs (*e.g.* clean-up costs consistent with federal standards), and (3) the party from whom contribution is sought is a responsible party under CERCLA § 107(a).[1] One of the listed classes of responsible parties set forth in CERCLA § 107(a)(2) extends liability to anyone who owned or operated development property at which there was a disposal of hazardous substances.[2]

A developer who owned a site at the time of a disposal may be liable under CERCLA even though he "'did not introduce the hazardous substances into the environment in the first place.'" *See Honeywell*, 2008 WL 508503 at *5. This is because a developer's disbursement of soils containing hazardous substances (through grading and excavating the property) is a disposal under CERCLA. *See id.* at *6. A more important caution, however, is that the innocent landowner defense available under CERCLA does not apply when the release is foreseeable. *See id.* at *7. The *Honeywell* court held as follows:

> Any argument that the release of materials is an unforeseeable consequence of the residential development of raw land is simply untenable. To the contrary, **it is eminently foreseeable that development of such land would result in a release of whatever substances, hazardous or not, were in the soil.**

*Id.* (emphasis added). It is irrelevant that the developer did not foresee that there were hazardous substances in the soil at all, because, according to the *Honeywell* court, a developer has actively caused the release of hazardous substances by grading and excavating the property. *See id.* at *8. Therefore, the developer has no defense under CERCLA's strict liability regime.

*Honeywell* should serve as an important lesson for developers. More than a decade ago, the Eleventh Circuit Court of Appeals, which is the federal appellate court in Georgia, held a general contractor liable for contribution costs under CERCLA based on the contractor's disbursement of contaminated soils during grading and excavation of a development site. *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1510-12 (11th Cir. 1996). It is imperative that developers hire competent environmental consultants to perform environmental due diligence on a prospective development site.

[1] The bold terms are defined in CERCLA as follows:

"Hazardous substance" is broadly defined as substances designated under various federal laws but does not include petroleum or natural gas. CERCLA § 101(14).

"Facility" means "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." CERCLA § 101(9).

"Release" is also broadly defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." CERCLA § 101(22).

[2] The term "disposal" is given the same meaning under CERCLA as it is under the Solid Waste Disposal Act: "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." SWDA § 1004.

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