I. LANDLORD’S RESPONSIBILITY FOR ENVIRONMENTAL CONDITION OF LEASED PROPERTY

A. Liability Based on Status

1. Tenant and Landlord may have joint and several liability for cleanup under CERCLA because of status as operator and owner, respectively (42 USC Sec. 9607 (a)(l), 9601(20)(A)).

2. Tenant may also be responsible as an owner if it subleases or maintains control or responsibility for the use of the premises

3. Landlord cannot contract away to Tenant its potential liability to the government.

4. Both Landlord and Tenant may be strictly liable, with responsibility arising despite no affirmative or intentional engagement in hazardous activities.

5. Although liability is joint and several, apportionment may be applied based on degree of fault.

B. Liability Based on Defects in Premises

1. Tenant may be able to invoke “innocent landowner” defense to CERCLA liability for pre-existing conditions if contamination predated Tenant’s lease and if the requisite investigation was conducted and contamination was not discovered. But Tenant’s liability—including liability for cleanup—may continue to exist under other statutes including RCRA (42 USC Sec. 6973).

2. Landlord would be responsible to Tenant for defects created by Landlord and, depending on law relating to “quiet possession” and similar considerations, may be responsible for other pre-existing conditions and contamination caused by other
tenants.

3. Of particular concern to Tenant may be indoor air quality (chemical fumes, cigarette smoke, radon, ozone) and asbestos-containing materials (ACMs). Both Landlord and Tenant will be obligated to comply with applicable reporting and removal requirements for ACMs. Based on new stance of Environmental Protection Agency, removal is unlikely to be required (and in fact may not be recommended) unless the asbestos is friable and cannot be properly encapsulated in place.

4. Generic “as-is” clause is unlikely to be a defense to Landlord’s environmental liability to third parties, or to Tenant under CERCLA (although it may be a defense to some common law claims by Tenant). In any event, it would not, without more, impose indemnity responsibility on Tenant.

C. Practical Considerations

1. Contamination on property may not become manifest until long after the lease has terminated—at which time its cause may be difficult to determine. Under CERCLA, this greatly benefits the Tenant at the expense of the Landlord.

2. Tenant may be sole purpose corporation or otherwise judgment proof or bankrupt. Whoever has the deepest pocket is the most attractive target.

3. Landlord is easier target for government and other third parties, particularly in multi-tenant projects.

4. Super lien may affect Landlord’s title.

5. Tenant may have less incentive to act expeditiously, especially if lease terminated or premises abandoned.

D. Releases and Waivers

1. Absent specific provisions, it may be difficult to imply a contract or right to reimbursement from Tenant other than an equitable indemnity under certain facts.

2. Tenant should accept possession of the premises “as is” and subject to all (specified) environmental contamination, in part to prevent future disputes about when property was contaminated. If data exists relating to the environmental condition of the property, any analysis or report should be furnished to Tenant and/or attached to the lease as an exhibit. Baseline data describing the contamination status at a specific point in time may prevent a future dispute. (Of course, a “clean” report at time of lease execution does not assure there are no problems at that time—only that they were not discovered.) In general, see Sample provisions labeled Samples A, B, C and D attached.

3. A general release by Tenant may not release Landlord from liability to Tenant under CERCLA unless it so specifies. Tenant and Landlord should specifically
provide for limitation of liability.

4. Either party with sufficient bargaining power may obtain release from the other’s claims against it for any damages arising from hazardous materials contamination, even that party’s right of contribution against the other under applicable law.

5. In any case, some written understanding as to the apportionment of liability or process for apportioning it for both known and later discovered toxic or hazardous substance contamination should be executed.

II. MINIMIZING LANDLORD’S LIABILITY

A. Avoidance of Environmental Problems

1. Clearly, Landlord can no longer realistically lease only to tenants with no use of hazardous materials. Almost no tenants, at least in the industrial or R&D context, present pristine circumstances. Landlord must, however, consider the type of user in determining to what extent protections must be negotiated, e.g., biotech, other industrial, commercial uses.

2. Prior to lease negotiation, Landlord should obtain detailed information concerning Tenant’s use of hazardous materials (see attached sample of Hazardous Materials Questionnaire). Landlord will uncover what the Tenant is doing, what materials it is working with and what permits are required and have been obtained. Do the economics of the transaction justify the potential risks?

3. Landlord may conduct an independent background check on the history of Tenant’s uses and responsibility, including contacting prior landlords, submitting information requests to federal governmental agencies under the Freedom of Information Act (5 USC Sec. 552) and to state and local agencies, e.g., California Government Code Sections 6250-6268. Local offices of the Environmental Protection Agency and OSHA, as well as other applicable state and local departments, may be useful information sources.

4. Landlord may impose strict use restrictions: it may be advisable to broaden environmental restrictions beyond requirement of compliance with government regulations to absolute restrictions against using or disposing of hazardous substances except as specified (and approved).

5. Maintenance and cleanup requirements are critical, but Tenant will want to restrict covenant to maintain or clean-up to those items resulting from Tenant’s use, storage or disposal. Violations of lease should include deviation from prescribed procedures in use or handling of hazardous materials.

6. Tenant using hazardous materials will be required to comply with laws providing for mitigation and emergency response plans in event of a release, as well as
requiring employee training plans and directions to independent contractors as appropriate. Landlord should receive copies of applicable filings.

7. Landlord will also want to provide for monitoring of compliance with covenants during lease term, including environmental audits. As a practical matter, these continuing covenants will permit Landlord to look to Tenant when Tenant and its assets are available. Monitoring also serves a preventive function, e.g., before a corroded tank leaks, or Tenant’s poor maintenance and cleanup practices cause damage. Landlord may also have duty to monitor for compliance with certain safety programs and National Institute of Health guidelines for biotech tenants.

8. Landlord should require Tenant’s regular reporting of usage, storage, disposal of hazardous materials, and independently monitor and cross-check the information for consistency with other information available from permits and the like. Lease may provide for express reaffirmation, at least annually, of representations and warranties relating to hazardous materials usage.

9. It is critical to note that the more responsibilities a Landlord assumes and information it receives, the fewer defenses may be available. Thus, Landlord might instead require Tenant to monitor and submit reports, including audits by independent consultants acceptable to Landlord. Otherwise, Landlord may become liable for violations of law identified in reports and not acted on and Landlord may also have obligation to report.

10. Notice from Tenant should be required if there are any changes in hazardous materials used on the premises or if Tenant becomes aware of environmental problems, even if not resulting from Tenant’s use, see, e.g., California Health & Safety Code requirements that tenants give notice to landlords of any release on the leased property, and that both owner and tenants warn each other and their respective employees that building contains ACMs.

11. Landlord should require Tenant’s submittal of copies of licenses and other permits, Tenant’s responses to reporting obligations, and workers’ compensation reports on an ongoing basis in order to monitor proper status, e.g., the “Business Plans” that are required of certain hazardous materials users under California Health & Safety Code Section 25500-25521. Permits also help confirm that uses have not changed.

12. If not otherwise covered, Landlord may specifically require Tenant’s compliance with information requests from government authorities.

13. Landlord should have right (but not obligation) to participate in any negotiations with government, neighbors or other claimants regarding environmental condition of, releases from, or cleanup of the property.

14. Landlord may further restrict activities of subtenants/assignees, particularly if the use clause is relatively broad based on Landlord’s reliance on original Tenant’s particular uses. Such restrictions may be particularly important when the law