

Real Estate Environmental Considerations

Paul T. Jacobson



SpencerFane®

The Basics: Environmental Due Diligence Statutory Framework

- Statutory framework for environmental liabilities involving “contamination”
 - Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) – also known as the “Superfund” statute
 - Underground Storage Tanks
 - Wetlands and Endangered Species
 - Voluntary Cleanup / Brownfields Programs



CERCLA Overview

- CERCLA is remedial rather than regulatory: focus on remediation of past activities
- CERCLA provides for the cleanup of sites polluted by toxic and hazardous wastes
- Applies to certain classes of liable parties including:
 - Current owners/operators
 - Owners/operators at the time of a release
 - Persons who *arrange* for disposal of waste at a facility
 - Persons who transport waste for disposal at a facility

CERCLA Liability

- Liability arises when there is a release of a hazardous substance into the environment and someone spends money to respond.
- Retroactive, joint and several, and strict
- Potentially Responsible Parties are liable for investigation and remediation of releases of hazardous substances
- Limited defenses
- CERCLA does not address releases of petroleum products

CERCLA Defenses

- Defenses are very limited:
 - Act of God / Act of War
 - Contiguous Property Owner
 - Bona Fide Prospective Purchaser
 - Innocent Landowner
- Defenses have statutory threshold criteria and continuing obligations.
- Defenses share ‘Common Elements’ but also have key differences.

Common Elements of CERCLA Defenses

- Threshold Criteria
 - Made All Appropriate Inquiry
 - Is not a potentially responsible party and has no affiliation with any other person/company who is a potentially liable party
- Continuing Obligations
 - Comply with land use restrictions and institutional controls
 - Take reasonable steps with respect to hazardous substances on property
 - Provide cooperation, assistance and access
 - Comply with informational requests and administrative subpoenas
 - Provide all legally required notices



Key Differences of CERCLA Defenses

Bona Fide Prospective Purchaser	Innocent Landowner	Contiguous Property Owner
Can apply to owner of a “source” property	Can apply to owner of a “source” property	Cannot apply to owner of a “source” property (only owners of contiguous properties)
Applies only to purchases after January 11, 2002	No date restrictions (can apply to past owners)	No date restrictions (can apply to past owners)
Can apply to purchasers who had knowledge of contamination	Must buy land WITHOUT knowledge of contamination, after AAI	Must buy land WITHOUT knowledge of contamination, after AAI
Subject to a § 107(r) Windfall Lien	Not subject to a lien	Not subject to a lien

Environmental Due Diligence

- Why Does it Matter?
 - Assess environmental liabilities
 - Qualify for broader liability protection
 - Craft contract provisions
- When Do You Need to Do It?
 - Prior to purchase
- What Does it Require?
 - All Appropriate Inquiry
 - Consider other matters that impact value
 - May need compliance review

All Appropriate Inquiry (AAI)

- Applicable standard depends on time of purchase
 - For any purchase since November 1, 2006, only acceptable standard is compliance with AAI Rule
 - ASTM E-1527-13 Phase I Environmental Site Assessment recognized as satisfying AAI
 - ASTM just issued E-1527-21
- AAI must be performed by individual who meets AAI rule's definition of Environmental Professional
- Environmental Professional must generate a report addressing the required elements, identifying data gaps and including an opinion on the condition of the property

AAI Continued

- ASTM E1527-13 includes assessment of whether vapor intrusion risk constitutes a “recognized environmental condition”.
- ASTM E-1527-21 includes additional issues like PFAS.
- AAI rule does not require invasive sampling *per se*.
- Sampling (or Phase II) may be necessary based on data gaps.
- Phase II assessment will impact cost and timing of due diligence.

AAI Continued

- AAI Rule defines the “shelf life” of a Phase I Environmental Assessment.
 - Report valid only if created or updated within the past year.
 - Certain aspects must have been performed or updated within the previous 180 days.
 - AAI rule provides for transferability of a Phase I – for example from a seller to a buyer who may wish to seek protection.

Requirements of Phase I

- Interviews with present owners/operators
- Reviews of historical sources of information and federal, state, tribal, and local government records
- Visual inspection of property and adjoining properties
- Commonly known or reasonably ascertainable information
- Degree of obviousness of contamination and ability to detect contamination
- Clear & concise final conclusions



Beyond the Phase I

- Phase I Assessments do not cover all environmental issues.
 - Typical non-scope items:
 - asbestos, radon, lead-based paint, lead in drinking water, mold, wetlands, endangered species, historic and architectural resources
 - Other issues not covered:
 - Property for development
 - Existing buildings
 - Operating businesses

When to Consider Non-scope Items

- Investigation of non-scope items depends on a number of factors, such as:
 - Does the property contain hydrological features? (if so, consider a wetland investigation)
 - Is the area known for high levels of radon? (if so, and the property includes ground floor residential units consider radon investigation)
 - Does the project involve federal financing? (if so, there may be requirements to address non-scope items)
- Decision to investigate non-scope items is within the discretion of the user based on its own risk tolerance and requirements of the specific transaction

Phase II Investigations

- When is a Phase II needed?
- Before authorizing a Phase II, consider scope and how results may impact decision making/reporting obligations
- Work with environmental professional to scope Phase II to address specific property concerns

Environmental Issues Beyond CERCLA

- Endangered Species Act
 - Prohibits federal agencies from jeopardizing the continued existence of species listed as threatened or endangered.
 - Also protects endangered or threatened species from development on private land.
- Clean Water Act – wetlands protection
 - Permits required to dredge or fill into wetlands next to federal waters.

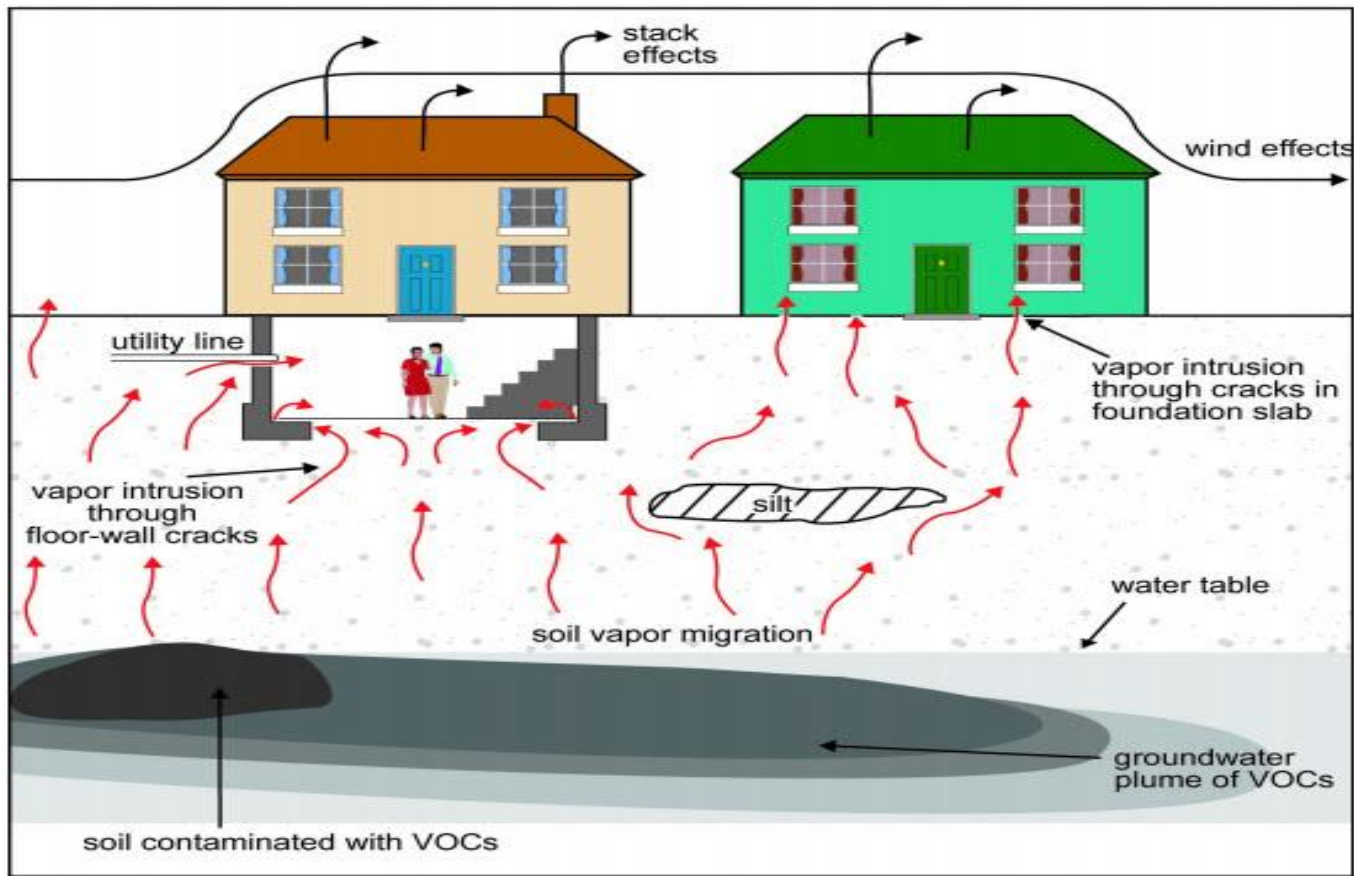
Underground Storage Tanks (UST)

- State-based programs which vary state to state
- Generally, requires UST owner to notify state if owner has any reason to suspect a release
- Varies from state to state, but most state regulators consider the owner of the property to be the owner of any UST on the property at time of purchase



Vapor Intrusion Overview

- What is it?
 - General term given to *migration of hazardous vapors* from any subsurface vapor source, such as contaminated soil or groundwater, through the soil and into an overlying building or structure. The vapors can enter buildings through cracks in basements and foundations, as well as through conduits and other openings in the building.
- Common Potential Sources
 - Paint thinners
 - Gasoline (gas stations, auto repair)
 - Chlorinated solvents (dry-cleaning chemicals)
 - Parts washing or degreasing activities
 - Chemical manufacturing



<https://www.epa.gov/vaporintrusion/what-vapor-intrusion>

Property for Development

- Federal, state and local rules may limit development of property or increase the cost.
 - Wetlands / Waters of the United States
 - Endangered Species
 - Ability to Obtain Necessary Permits
 - Open Space / Zoning

Operating Businesses

- ESA's do not inform buyers of an acquisition's current operational environmental compliance and management performance
 - Environmental Compliance Management System Assessments can fill this gap
- May need a Compliance Review
 - What permits does a facility have or need?
 - Is the facility in compliance?
- Need to Assess Transferability of Permits
 - This will impact the timing of a transaction
- Audit Privilege for New Owners
 - Benefits available to parties that voluntarily disclose and work with EPA to achieve compliance



Allocating Environmental Liabilities

- What to do when you find something and still want to go forward.
 - Representations and warranties accompanied by indemnities
 - Stand-alone indemnities for known problems
 - Retention of specific environmental liabilities by the Seller or assumption of liabilities by the Buyer
- Approaches for indemnities:
 - Link breaches to representations and warranties
 - Sellers: limit exposure for breach of contract by including materiality limitations, time limits
 - Buyers: expand liability (e.g., cover attorneys fees)
 - Separate stand-alone indemnity for compliance, remediation, and lawsuits
 - Sellers: limit existing or known liabilities and certain types of claims
 - Buyers: have indemnities for anything not listed in the disclosure
 - Treat indemnities like assets (survival dates, dispute resolution, indemnified 3rd-party claims)
- Accompany with a release

Risk Based Corrective Action

- Both Missouri and Kansas have implemented risk-based corrective action programs
 - Allow cleanup to a standard appropriate to the actual risk
 - Actual risk depends on current and future use
- Must have assurances for ongoing health & safety
- Both states use environmental use controls to record future use limitations on the deed
- No further action letter will specify necessary conditions

KS Contaminated Properties Redevelopment Act

- KS Contaminated Properties Redevelopment Act
 - Provides environmental liability release
 - Only applies to property acquired on or after July 1, 2016
- Certificate of Environmental Liability Release (CELR)
 - Issued to perspective purchaser or owners
 - Non-transferable
 - State liability only
- Act Establishes Contaminated Property Redevelopment Fund
 - Loans and grants to municipalities at Brownfields redevelopment projects

KS Contaminated Properties Redevelopment Act

- Eligibility for CELR
 - Property must be contaminated (exclusions: radon, lead-based paint and asbestos);
 - Applying entity is not the responsible party for the identified contamination; and
 - Not eligible for cleanup by another program.
- KDHE has 15 days to make a determination following receipt of complete application.
- Certificate holders have future obligations.



QUESTIONS?

