

**What's the Risk?  
A Private Practitioner's View  
2011 WV Brownfields Conference  
Morgantown, WV**

**September 14, 2011**

*PRESENTED BY*

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# All Appropriate Inquiries

- When?
  - Before closing.
- Who?
  - Qualified professional.
- The AAls proposal –
  - Red flag: “Efforts will be made to interview both past and present owners and occupants of the subject property.”
- The AAls or Phase 1 Site Assessment –
  - Data gaps.
  - Recognized Environmental Conditions.



# WV Voluntary Remediation Program

- Limited environmental liability protection from further remediation liability to the state.
- Bar against citizen suits and contribution actions for contamination identified in an approved Voluntary Remediation Agreement.
- Enforcement shield that is triggered upon the good-faith filing of an application.
- Certificate of Completion issued by the WVDEP, which provides limited liability protection.



# Who is protected under the WV VRP?

- Remediators.
- Current or future owners or operators of the site
- Site developers
- Successors or assigns of any person to whom the liability protection applies.
- Public utilities.
- Remediation contractors.
- Licensed remediation specialists.
- Lenders.
- Persons requesting or performing a site assesment.



# Uniform Environmental Covenant Act

- When?
  - Adopted in 2005 by the WV Legislature.
- What does it do?
  - Establishes a legal framework to create, modify, enforce or terminate a real estate instrument to restrict the use of contaminated property or to impose affirmative obligations under state law and preclude the application of common-law rules.
- How does it help manage the risks?
  - Land-use covenants under the WV VRP are environmental covenants under UECA.
  - Underground storage tank releases.

# CERCLA MOA

- When?
  - February 24, 2010.
- Who?
  - U.S. EPA Region 3 and WVDEP.
- What?
  - Offers liability protection for anyone cleaning up contaminated properties in WV under the WV VRP from actions brought by U.S. EPA under CERCLA.
- Exceptions?
  - Yes.
- Ineligible sites?
  - Example: RCRA sites.
- Caveats?
  - “Deemed” approved language in WV VRP.



# Greater Reasonable Steps for BFPP

- “The pre-purchase “appropriate inquiry” by the bona fide prospective purchaser will most likely inform the bona fide prospective purchaser as to the nature and extent of contamination on the property and what might be considered reasonable steps regarding the contamination - - how to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, and natural resource exposures. Knowledge of contamination and the opportunity to plan prior to purchase should be factors in evaluating what are reasonable steps, and could result in greater reasonable steps obligations for a bona fide prospective purchaser. Because the pre-purchase “appropriate inquiry” performed by a contiguous property owner or innocent landowner must result in no knowledge of the contamination for the landowner liability protection to apply, the context for evaluating reasonable steps for such parties is different. That is, reasonable steps in the context of a purchase by a bona fide prospective purchaser may differ from reasonable steps for the other protected landowner categories (who did not have knowledge or an opportunity to plan prior to purchase). Once a contiguous property owner or innocent landowner learns that contamination exists on his property, then he must take reasonable steps considering the available information about the property contamination.”

Source: Common Elements at 11.

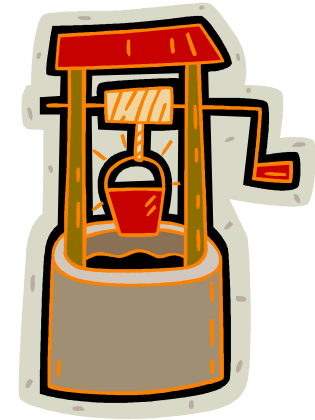
# Timing



- Reasonable steps include
  - Acting in a timely fashion
  - Taking “immediate” steps to properly dispose of hazardous waste discovered on the property.
- Failure to exercise due care
  - Taking no steps.
  - Taking more than a year after discovery of hazardous materials to erect a barrier to avoid further migration.
  - Taking 9 years to restrict access after becoming aware of contamination.
  - Doing nothing over a course of 10 years while various environmental agencies investigated the site.

# Contaminated Groundwater

- Reasonable steps do not include
  - Conducting GW investigations
  - Installing GW remediation systems
- Exception:
  - Property contains a GW well, and
  - The existence or operation of this well may affect the migration of contamination in the affected aquifer.



Source: EPA Final Policy Toward Owners of Property Containing Contaminated Aquifers, 1995.

# Limiting Public, Environmental, and Natural Resources Exposure

- Reasonable step:
  - Erecting warning signs and fences.
- Failure to exercise due care:
  - Doing nothing to curb known trespassing.
  - Failing to take any action with regard to possible exposure to the surrounding residents.
  - Taking 9 years to restrict access to the site.
  - Failing to erect signs or hire security personnel.



# Buried Drums

- Reasonable steps, at a minimum, include
  - Segregating and identification of potential hazards.
  - Containing the possible hazard.
- Due care exercised
  - Allowing state environmental authority access.
  - Immediately contacting EPA and starting cleanup operations.



# Underground Storage Tanks

- Enforcement Option.
- Voluntary Remediation Option.
- Uniform Environmental Covenant Option.

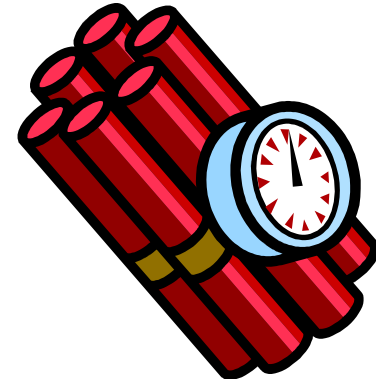


# Caps and Berms



- Reasonable steps, at a minimum, include
  - Maintaining caps, berms, or other substance migration controls.
  - Taking actions to prevent migration.
- What if a prior owner has responsibility for maintenance of the system?
  - At a minimum, the current owner should give notice to the person responsible for the containment system and the government.

# Live Ordnance



- Due care exercised
  - Ceasing all activity in the area.
  - Removing all property for sale in the area.
  - Securing the site.
  - Hiring a firm to perform the removal of the ordnance as recommended by the Army Corps of Engineers.

Source: *R.E. Goodson Const. Co., Inc. v. International Paper Co.*, 2006 WL 4916336 (D.S.C. 2006).

# Acid Mine Drainage



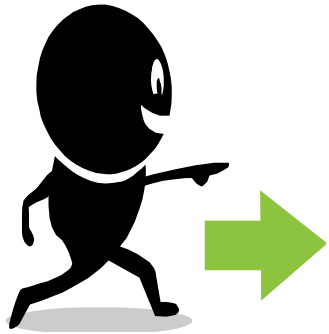
- Due care exercised
  - Taking remedial measures aimed at stopping the release of acid mine drainage.
  - Causing the 1.8 parcel to be capped to reduce the creation of acid mine drainage.

Source: *United States v. Iron Mines, Inc.*, 987 F. Supp. 1263 (E.D. Cal. 1997).

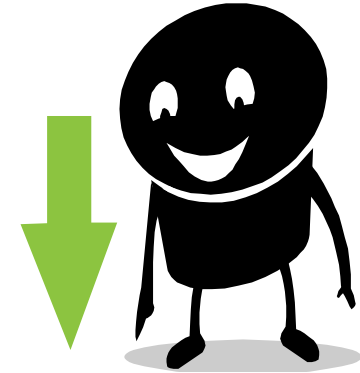
# Notification of Government Officials

- Reasonable step:
  - Notifying U.S. EPA, WVDEP, and local officials.
- Failure to exercise due care:
  - Failing to report contamination to U.S. EPA and waiting 2½ years until notifying the state environmental agency.

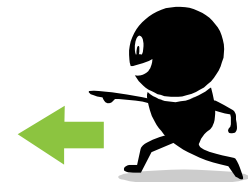




# Government Orders



- Reasonable step:
  - Following orders, instructions, or suggestions of EPA or other environmental authorities.
- Failure to exercise due care:
  - Failing to obtain the approval of EPA or other environmental authorities and/or to follow or comply with their instructions.





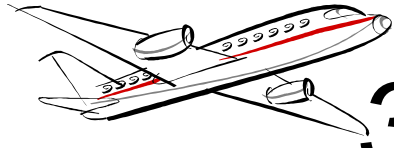
# Investigation of Site



- Reasonable step:
  - Assessing the extent of the contamination.
  - Performing videotaped inspections of city wells to assess the threat of subsequent release.
  - Hiring an engineer to test the soil, document the risk of flooding, and estimate the cost of any necessary remedial efforts.
- Failure to exercise due care:
  - Taking no steps to ascertain the extent of contamination.
- What if the government is actively investigating the site?

# Stopping Continuing Releases and Preventing Threatened Future Releases

- *3000 E. Imperial, LLC v. Robertshaw Controls*, 2010 WL 5464296 (C.D. Cal. Dec. 29, 2010).
- *500 Associates, Inc. v. Vermont American Corp.*, 768 F. Supp. 914 (W.D. Ky., Feb. 7, 2011).
- *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 746 F. Supp. 692 (Oct. 13, 2010), *modified*, 2011 WL 2119234 (D.S.C. May 27, 2011).



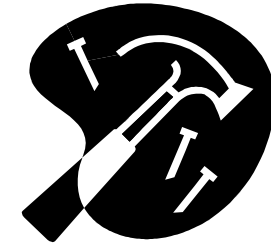
# 3000 E. Imperial, LLC



- Former aircraft and missile valve manufacturing site.
- Steps taken
  - Hire an environmental consulting firm to conduct an investigation, which included taking soil and water samples.
- Investigation reveals
  - The ground was contaminated with TCE and benzene
- Following further investigation
  - The environmental consultant reports that TCE was detected in samples from underground storage units on the property.
- Steps taken
  - One month later, the contents of the underground storage units were removed and placed into twenty 55-gallon drums.
  - These drums were then removed from the property.



# 500 Associates



- Former saw-and-tool manufacturing facility.
- Steps taken
  - On-site inspection, review of records of operations and permits, and a discussion with the manufacturer's health and safety inspector.
- Audit reveals
  - Chromium contamination and manufacturer was registered LQG producing an average of 65,470 gallons of waste per day.
  - Manufacturer's safety inspector acknowledges only 1 spill of 100 gallons of nickel but denies any other releases.
- Next steps?
  - No soil sampling and testing
  - No review of available public records.

# 500 Associates (con't)

- Developer purchases the property.
- Next steps
  - Demolishing buildings in the area of the former manufacturing operations,
  - Moving concrete, and
  - Exposing soil.
- Developer enters into an agreement to sell the property.



# 500 Associates (con't)

- Prospective buyer
  - Hires a consulting firm to conduct an environmental audit, including
    - Review of public records and
    - Sampling of soil and groundwater.
  - Audit discloses contaminants in the soil and the GW.
  - Undertakes further investigation which confirms the presence of hazardous substances and soil sampling reveals contamination below the concrete floors that the developer demolished.
  - Provides the results to the developer.
- Next steps?
  - Hires another environmental consultant to conduct soil samples.
  - Soil samples confirm hazardous substances but this environmental consultant concludes that the source was another property.
  - Fails to report the results of any of the audits to the state.
  - Fails to take any remedial action.



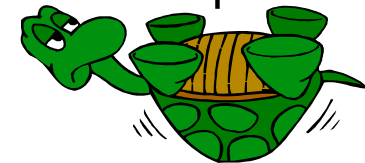
## Ashley II



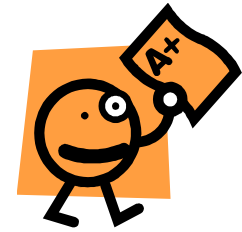
- Former fertilizer plant and container cleaning and storage facility.
- All disposals of hazardous substances must occur before site acquisition.
  - “It was not the court’s intention to hold that BFPP status can be defeated by continued leaching of contaminants through the soil.”
- AAI
  - Inconsistencies between the Phase I standards and relevant ASTM standards.
  - Held “inconsistencies lack significance,” explaining that: “What is important is that [the new owner] acted reasonably; it hired an expert to conduct an AAI and relied on that expert to perform its job properly.”

# Ashley II (con't)

- Environmental conditions
  - Cracked concrete pads with standing water.
  - Sumps which overflowed regularly and reached the cracks in the pads and the edge of the pads.
  - Debris pile.
  - Deteriorating crushed rock cover.
- Steps taken
  - Hired an environmental engineer to ensure that it complied with all BFPP requirements,
  - Provided security,
  - Conducted periodic inspections,
  - Fenced, gated, and posted no-trespassing signs,
  - Demolished the buildings but did not clean out or fill in the sumps leaving them exposed to the elements.
  - Removed the debris pile more than 1 year later.



# Ashley II (con't)



- What steps should the new owner have taken?
  - Clean out and cap, fill or remove the sumps.
  - Prevent the debris pile from accumulating on the site.
  - Investigate the contents of the debris pile.
  - Remove the debris pile in a timely manner.
  - Maintain the crushed rock cover.

# Questions?

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