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**AN OVERVIEW OF
HAZARDOUS MATERIALS-RELATED
STATUTORY AND REGULATORY
CONCERNS FOR CONTRACTORS**

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AN OVERVIEW OF HAZARDOUS MATERIALS-RELATED STATUTORY AND REGULATORY CONCERNS FOR CONTRACTORS

I. RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA") - 42 U.S.C. §6901 et seq.

A. The Resource Conservation and Recovery Act ("RCRA") is a landmark Federal law passed in 1976 that created a system for regulating the generation, storage, treatment, transportation and disposal of hazardous waste.

1. What are hazardous wastes:

a. Hazardous wastes are defined by Federal and State regulations.

b. Two types of hazardous waste:

1. characteristic hazardous waste
2. listed hazardous waste

2. Characteristic wastes are wastes that are hazardous because their inherent properties satisfy one or more tests developed by U.S. EPA for evaluating solid wastes. These tests are known as ignitability, corrosivity, reactivity, and toxicity.

a. An ignitable hazardous waste is typically a liquid with a flashpoint of less than 140 degrees (e.g., paint thinner, paint waste, degreasers, solvents).

b. A corrosive waste is usually an aqueous solution with a pH of less than 2 or greater than 12.5, i.e., acids and bases (e.g., rust removers, cleaning fluids, battery acids)

c. A reactive waste is a waste that is capable of reacting violently or explosively (e.g., cyanide, plating waste, bleaches, waste oxidizers).

d. A toxic hazardous waste is any waste which contains certain chemical contaminants above established regulatory limits (e.g., materials containing high concentrations of heavy metals, such as mercury, cadmium or lead).

3. Listed wastes are wastes that are on one of 4 lists of materials considered hazardous by U.S. EPA.

- a. F listed wastes (wastes from non-specific sources);
 - b. K listed wastes (wastes from certain industries or industrial processes);
 - c. U listed wastes (discarded commercial chemical products); and
 - d. P listed wastes (acutely hazardous wastes).
4. Contractors may come into contact with various types of hazardous wastes such as contaminated soil, lead and chrome from painting operations, and buried drums containing hazardous wastes. Typical construction materials that are classified as hazardous include: paint (containing naphtha, solvents or heavy metals such as lead), solvents, thinners, cleaning fluids (carbon tetrachloride, ethanol, toluene, kerosene, MEK), acids and bases, some adhesives, pesticides, herbicides, some curing and sealing compounds.
5. The transportation, storage, treatment and disposal of hazardous waste is governed by Federal and State law.
1. Hazardous waste must be treated and disposed of at a facility permitted or licensed for that purpose by the State or Federal government.
 2. Hazardous materials that are being used for their intended purpose can be stored indefinitely. However, once the material is no longer usable, the material is considered waste and time restrictions apply.
 3. Municipal sanitary landfills and infectious waste disposal facilities are prohibited from storing, treating, or disposing of hazardous waste.
 4. Companies or individuals that transport hazardous waste must be licensed to transport such material.

The requirements for hazardous waste transporters include:

- a. Obtaining an EPA identification number
- b. Complying with the Hazardous waste manifest system (a form used to track the movement of hazardous waste, which includes such information as name and address of generator, transporter and destination facility; waste quantity; description of waste; emergency contact person)

- c. Complying with RCRA requirements and DOT regulations
- d. Complying with additional state requirements

B. Lead-Based Paint Waste Exclusion

Building contractors who work on pre-1978 residential dwellings, like single family homes, apartment buildings, row houses, military barracks, and college dormitories, frequently encounter lead-based paint (LBP). They routinely generate LBP waste during lead abatement, remodeling, or rehabilitation work on these residences. The waste consists mostly of building parts, such as doors, window frames, painted woodwork, and paint chips. Under U.S. EPA's lead-based paint waste exclusion, contractor-generated LBP waste may be disposed of as household waste, i.e. in a solid waste landfill, provided that it does not exceed 5 mg/l when tested using the Toxic Characteristic (TCLP) test. LBP waste exceeding 5 mg/l is still considered a hazardous waste subject to RCRA and must be taken to a hazardous waste landfill.

C. Penalties

1. The penalties for violating Federal and state hazardous waste laws are severe.
 - a. Civil Penalties
 1. Any person who violates a Federal hazardous waste law or regulation is liable for a civil penalty of up to \$27,500 per day for each violation.
 - b. Federal Criminal Penalties
 1. A knowing violation of a hazardous waste law or regulation may also be a criminal offense. Violators face anywhere from 2 to 5 years in prison and fines of up to \$50,000.
 2. A person who knowingly places another in imminent danger of death or serious bodily injury can face up to 15 years in prison and a \$250,000 fine. A corporation can be fined up to \$1,000,000.
 - c. States also impose criminal and civil penalties for violating state hazardous waste laws. In Ohio, for example, civil penalties range from \$10,000 to \$27,500 per day per violation. A reckless violation of a hazardous waste law or regulation may also be a criminal offense. Criminal penalties in Ohio can range anywhere from 2 to 4 years in prison with fines of \$10,000 to \$50,000.

- d. In the area of environmental enforcement, each day of every violation usually constitutes a separate violation. Thus, the possible penalties for most violations can be extremely large.

D. Clean up Costs

Not only are there civil and criminal penalties for violating hazardous waste laws, but a facility can be required to pay the costs of cleaning up any contamination resulting from a violation. These clean-up costs can be significant.

E. Contractor Exposure Scenarios

Contractors use numerous hazardous substances which, when disposed of, are considered hazardous waste. In addition, they may be considered the generator, as well as the transporter, of substances resulting from their (or a sub's) operations at a facility. A short list of these exposures include: liability as a result of improper handling of wastes (failure to properly characterize waste, improper preparation of a manifest, improper storage or treatment of wastes), improper transporting of waste (failure to use registered transporter), and improper disposal of waste at an unpermitted facility.

II. COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT ("CERCLA") – 42 U.S.C. §9601 et seq.

- A. In 1980, Congress passed CERCLA, also known as Superfund. The law gives the government the power to respond to toxic chemical spills, to clean up hazardous waste sites and to prosecute those responsible for releases of hazardous waste.

- 1. Hazardous substances include over one thousand chemicals and materials, the list of which can be found in the Code of Federal Regulations at 40 CFR Section 302.
- 2. The persons who may be held responsible under CERCLA, i.e., Potentially Responsible Parties ("PRPs"), include:
 - a. Current Owner/Operator of the contaminated site.
 - b. Owner/Operator of the site at time of disposal. A construction contractor's excavation and spreading of creosote-contaminated soil was found by the courts to be "disposal" of a hazardous substance for purposes of imposing liability as an "operator".
 - c. Persons who generate, arrange for the disposal, transportation, treatment, or dispose of hazardous substances. Disposal can mean the movement, dispersal, or release of hazardous substances onto

property during excavations and fillings. A contractor who excavated contaminated soil and spread it over clean portions of a construction site was found to be a liable "transporter" of a hazardous substance under CERCLA.

- d. Person who accepted hazardous substances for transport to a disposal/treatment facility.
3. Liability is strict, joint and several. Any responsible party can be held liable for the entire cost of responding to the release. The fact that the conduct of the PRP was lawful and not negligent is not a defense to being held liable for the costs of responding to a release.
 4. Defenses are extremely limited—acts of war, acts of God, and acts or omissions of a third party not in a contractual relationship :
- B. Reporting Obligations – Any person in charge of a facility must report, as soon as they have knowledge, of a release of a hazardous substance in reportable quantities. Reportable quantities are defined in 40 CFR Section 302.4. A contractor may qualify as a person in charge of a facility for reporting purposes.
- C. Cost Recovery– A person who incurs qualifying response costs, i.e., clean up/remediation, may seek recovery from other PRPs.
- D. Penalties
1. Civil Penalties - \$27,5000 per day, per violation;
 2. There are criminal penalties for failure to report the release of hazardous substances in reportable quantities.

III. TOXIC SUBSTANCES CONTROL ACT ("TSCA") - 15 U.S.C. §2601 et seq.

- A. TSCA was enacted in 1976 to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of "chemical substances." TSCA is only likely to impact contractors in two areas: Polychlorinated Biphenyl Compounds (PCBs) and mixtures of substances that contain PCBs; and lead-based paint.
- B. PCBs
1. PCBs are mixtures of synthetic organic chemicals. Due to their non-flammability, chemical stability, high boiling point and electrical insulating properties, PCBs were used in hundreds of industrial and commercial applications including electrical, heat transfer, and hydraulic equipment; as plasticizers in paints, plastics and rubber products; in

pigments, dyes and carbonless copy paper and many other applications. More than 1.5 billion pounds of PCBs were manufactured in the United States prior to cessation of production in 1977. They are most frequently encountered today in old transformers, capacitors, hydraulic fluids, and solvents.

2. The storage and disposal of PCBs and PCB items is regulated by TSCA.
 - a. PCB's can be stored for up to one year before disposal, provided that the storage facility meets certain requirements mandated by the regulations promulgated under TSCA.
 - b. The only legal methods for disposing of PCB's is by incineration at a permitted facility or in a licensed chemical waste landfill.
3. Generators, storers, transporters and disposers of PCBs must obtain a USEPA-issued identification number and maintain detailed records (including paper manifests) that track the storage, transportation and disposal of PCB materials.

C. Lead-Based Paint

1. Lead-based paint hazards and lead dust clean up levels in most pre-1978 housing and child-occupied facilities are regulated by TSCA.
2. Lead-based paint abatement, risk assessment and/or inspection contractors must comply with training and certification requirements established under TSCA.

D. Penalties

1. Civil Penalties - \$27,500 per day per violation
2. Criminal Penalties - \$27,500 fine / up to 1 year in prison

IV. CLEAN AIR ACT - 42 U.S.C. §7401 et seq.

- A. The federal Clean Air Act was enacted in 1970 and substantially amended in 1990. Its requirements that relate to hazardous contaminants that are most likely to impact contractors are those pertaining to asbestos. Any building constructed through the late 1970s is likely to have asbestos in the insulation, duct work, and piping. Asbestos was also used in wall board, plaster, floor tile, and as roofing material and external siding. The requirements pertaining to asbestos are found in the federal regulations containing the National Emission Standards for Hazardous Air Pollutants ("NESHAPs"), Asbestos Standard, 40 CFR Part 61, Subpart M; Demolition and Renovation.

B. The Asbestos NESHAP

1. Notification is required prior to renovation or demolition involving friable Asbestos Containing Material ("ACM") in specific amounts. Prior to such activity the owner must thoroughly inspect the building.
 - a. Demolition or renovation requires full notification if the project involves:
 1. 260 linear or 160 square feet of friable ACM.
 2. a minimum of 35 cubic feet of facility components containing friable ACM, where length or area could not be measured previously.
 - b. If demolition involves less than above amounts of friable ACM reduced reporting requirements apply.
 - c. Typically, notice to USEPA or the state environmental agency must be postmarked at least 10 working days before removal of ACM.
2. The responsible parties—which include the owner and contractor--are responsible for ensuring compliance with asbestos removal requirements.
3. Training and licensing issues for contractors and workers performing the demolition or removal
4. Work practices are regulated.
5. Both the owner and the contractor may be liable for violations.
6. ACM is categorized.
 - a. Friable ACM – can be pulverized by hand pressure.
 - b. Category I nonfriable ACM – asbestos containing packings, gaskets, floor tiles, shingles.
 - c. Category II ACM – other material containing greater than 1% asbestos.

C. Other Applications of the Clean Air Act

1. Asphalt batch plants—Under state and federal law, hot mix asphalt plants may need to obtain a permit because they emit significant levels of particulate matter and hazardous gaseous volatile organic compounds

(VOCs), some of which are known or suspected carcinogens. Some emission control device is typically required to reduce particulate emissions from the mixer. In addition, state agencies may further regulate asphalt plants through nuisance laws because of odors created by heating slag used in asphalt production.

2. Fugitive Dust—When particulate matter (dust) generated at a construction site becomes airborne, it may be regulated. A permit is not usually required, but the contractor must take minimum control measures to prevent or reduce the fugitive dust. For example, in Ohio it is unlawful to operate a source of fugitive dust without taking reasonably available control measures, such as applying water to areas where construction operations are generating dust, and placing covers on open vehicles that are carrying materials likely to become airborne.
3. Highway construction activities—At least in Ohio, heavy highway construction activities, such as abrasive blasting on bridges, bridge deck preparation, and cement and asphalt cutting, require special control measures. See, Ohio EPA Engineering Guide #57.

D. Penalties

1. Civil Penalties - \$27,500 per day per violation
2. Criminal Penalties – Prison sentence of up to 5 years and fines

V. **THE CLEAN WATER ACT – 33 U.S.C. §1251 et seq.**

The Clean Water Act prohibits discharge of harmful quantities of oil or hazardous substances into navigable waters of the U.S. Such discharges must be reported to federal, state and local officials promptly. Substantial civil and criminal penalties may be imposed for failure to report as well as for the discharge itself.

VI. **RELEASE REPORTING OBLIGATIONS**

Release reporting obligations are imposed by a number of different federal and state statutes. Whether a release is required to be reported, and by and to whom, is dependent on the type of chemical involved, the amount released, whether the release is into the air, water or land, the state where the release occurs, whether it is a one-time or continuous discharge, the SIC code of the industry involved, and other factors. The material below is intended only to summarize the highlights of the reporting requirements. Legal counsel should be consulted in the event of a release to determine the reporting, corrective action and other legal requirements applicable to the situation.

A. Oil Spills

U.S. EPA (and the states) require that spills of oil to navigable waters or adjoining shorelines must be reported. Owners and operators of facilities (which include any building or physical structure (including motor vehicles) that discharge oil in significant quantities must report the spill. USEPA has determined that reportable spills include those that:

1. violate water quality standards
2. cause a sheen upon, or discoloration of, the water surface or shoreline
3. cause a sludge or emulsion to be deposited beneath the water or on the shoreline

B. Hazardous Substances Releases

1. Scope—The emergency notification requirements of CERCLA and EPCRA ("Emergency Planning and Community Right to Know Act of 1986) apply to releases of most hazardous substances into the environment—including air, water, land, and groundwater. If a spill remains inside a facility and does not enter the environment, it does not need to be reported under CERCLA or EPCRA if it will only "result in exposure to persons solely within the boundaries of the facility."
2. Reportable Quantities—Releases of any hazardous substance listed in CERCLA regulations in an amount equal to or greater than the "reportable quantity (RQ)", and all "extremely hazardous substances" listed under EPCRA must be reported.
3. Where to Report—Depending on the substance involved, the amount, and whether it was in transit at the time, reporting may have to be made to:
 - * National Response Center (800-424-8802)
 - * US Department of Transportation
 - * State Emergency Response Commission
 - * Local EPCRA Emergency Coordinator
 - * Other State-required officials
4. Follow-up Reports—Prompt written follow-up reporting is required. State and local governments may require information in addition to that required by USEPA.
5. Penalties—Civil and criminal penalties can be imposed both by federal and state authorities in amounts up to \$27,500 per day for a first violation.

VII. APPLICATION OF ENVIRONMENTAL LAWS TO CONTAMINATED OR POTENTIALLY CONTAMINATED SITES (BROWNFIELDS)

Brownfields are abandoned or underused properties that are contaminated (or perceived to be) with hazardous substances or petroleum. Brownfields can be found at a 500-acre steel mill site or a one-quarter acre former gas station. Brownfields are everywhere - they are not just in large urban areas, but in small towns as well. The U.S. General Accounting Office estimates that between 130,000 – 450,000 contaminated sites exist across this country, with an estimated clean-up cost of \$650 billion.

A. Why contractors should care about brownfields

Brownfields are a very sizeable potential business opportunity for traditional construction work, such as demolition, excavation, site utility and road work, and construction of new buildings. In addition, brownfields offer some opportunities for specialty contract work, such as asbestos and lead abatement, implementing soil and ground water remediation plans, and constructing engineering barriers to contamination at these sites.

A primary barrier to redeveloping brownfields is the liability that owners and prospective owners face under the law, which renders them potentially responsible for enormous cleanup costs regardless of whether they actually caused the contamination at the site. Another significant barrier is the enormous cost uncertainty in cleaning up these sites, which was, in part, the result of uncertain or unreasonable cleanup standards.

All of the six states that comprise USEPA, Region 5 – Ohio, Michigan, Indiana, Illinois, Minnesota, and Wisconsin – have brownfields or voluntary cleanup programs, the gist of which are described in an appendix to this paper. The brownfields programs attempt to spur redevelopment through promises of liability protection to site owners and prospective owners who follow the assessment and cleanup requirements of these programs. Also, the programs provide more flexible and reasonable cleanup standards to participants. In addition, the states

and the federal government offer grants, low-interest loans, tax incentives, and other financial incentives to encourage municipalities, private developers, and others to cleanup and redevelop these properties, and place them back into productive economic use. As a result, brownfields present contractors with a sizeable business opportunity.

However, contractors performing work at brownfields must recognize and address a number of potential legal challenges and other risks associated with such projects. Failure to plan for brownfields related issues can turn a potentially profitable job into a major liability.

B. The risks of working at a brownfield project

Many of the risks at a brownfield project are the same faced by a contractor on any project. A profitable job depends on properly estimating the cost of the required work and avoiding unexpected and costly delays in completing the project. As discussed below, brownfields can present some unique issues with properly estimating the scope of work and completing the job in a timely manner. Brownfields also present substantial potential liability concerns if contractors, or their subcontractors, fail to comply with environmental laws. Finally, brownfields present more than the typical worker health and safety concerns. The following hypothetical illustrates these potential difficulties.

The project site is a 25-acre brownfield, which was the site, over the years, of numerous operations on several parcels, including an auto repair and gas station, a metal plating operation, an industrial drum cleaner, a major warehouse for a chemical distributor, and a power plant for a now defunct utility. Demolition of two large buildings is required, in which it is estimated that substantial amounts of lead and asbestos containing materials are present. The project requires hauling off-site at least 20 tons of soil that is unsuitable for the location of the new buildings.

One of the new buildings requires excavation to 15 feet for a basement, and excavation is required through a substantial section of the site to replace old utility and sewer lines.

On a clean site, the site preparation contractor would typically estimate the amount of soils that are unsuitable to build on and plan to haul it off-site, and possibly, reuse the material as fill at another site. The potential liability for hauling contaminated dirt to another site—or even relocating it onsite—is a problem common to a brownfield site. Another potential problem is estimating the cost to manage and properly dispose of the soil waste. The type of contaminants (and the concentrations they are found in), and whether they will be taken off-site can have an enormous potential impact on the contractors' cost to perform.

For instance, soils contaminated with polychlorinated biphenyls (PCB's) are potentially regulated under the federal Toxic Substances Control Act, lead-contaminated soil under Superfund (CERCLA), and petroleum contaminated soil ("PCS") by yet another set of laws and regulations. The handling of hazardous waste-contaminated soils involves yet another statutory scheme, the Resource Conservation and Recovery Act ("RCRA"). Very specific (and expensive) management, transportation, and disposal requirements exist for hazardous wastes, PCS and PCBs. In the hypothetical above, all of the contaminants may be present at the site. Failure to account for costs that may be associated with addressing these materials at all in a bid, or only partially, is a probable disaster for the contractor.

Potential delays are abundant in the hypothetical. Has the owner provided enough information to estimate the nature and amount of hazardous waste-laced soil present at the site, and how much of it will have to be disposed of off-site? What are the nearest locations to which the soil may be taken? Is a license required from U.S.DOT (or State agencies) to transport the material? How much contaminated soil will need to be disturbed by the planned construction

activities? Does the owner, or the contractor, have to obtain a permit or other authorization from the state environmental agency prior to disturbing or managing contaminated dirt on-site? How is the soil to be managed? If the contractor has a standard "compliance with all applicable laws" provision, has the owner shifted the burden to the contractor for any delays encountered due to a failure to obtain a proper permit.

Are any phases of the work dependant on receiving approval of plans (e.g., remedial plans) from the state environmental agency? If the state takes six months to approve a remedial plan that precludes much of the work from proceeding, a contractor may be entitled to a time extension from the owner, but the standard clauses will not typically require the owner to compensate the contractor for delay damages that are beyond the owner's control. Therefore, understanding the specific brownfields program, if any, that the owner is participating in may help the contractor better anticipate the sequence of events that impact its work.

In addition, state environmental agencies can exercise their authority to shut down project sites where violations of environmental laws have occurred and may recur. As a result, non-compliance with environmental laws can result in delay damages to other contractors on the project and may cause the owner to assess liquidated damages.

The hypothetical also raises potential environmental liability concerns for the contractor. Are the workers performing the demolition at the site properly trained and certified to work with asbestos and lead? Is the demolition contractor properly staffed with certified or licensed lead and asbestos abatement designers, inspectors, and workers to successfully complete the project? Do the bid documents require proof of proper licensing and certification to be considered "qualified"? What is the demolition contractor's history with handling these materials-have they performed such work without receiving Notices of Violation from the state or federal

environmental authorities? Is the site preparation contractor able to determine from the contract documents where contaminants are present, at what levels, and whether specific environmental laws will apply to planned construction activities? If the answer to any of these questions is negative, the general contractor and its subcontractors have cause for concern.

Potential environmental law violations will not necessarily be limited to the violating subcontractor, but can apply to the general contractor in control of the job site as well. Not only can substantial civil penalties be imposed for violating these laws, but criminal penalties can also attach.

Finally, brownfield sites present new worker safety concerns beyond the rules for protective trenching and proper scaffolding. The hypothetical site presents potential exposure to workers of lead and asbestos dust, to contaminated soils that becomes airborne during construction activities, to vapors from volatile chemicals in the soil and groundwater, and to contaminated groundwater brought to the surface, among others.

C. How contractors can lessen the risk of working at a brownfield site

Proper information and planning is a necessity to reduce the risk of a brownfields project. Reviewing contract clauses and modifying them, if necessary, to fit the brownfields scenario is crucial. Hiring the necessary expertise to evaluate and perform the project is essential.

Obtaining full information about the site and having the expertise to make use of it, prior to bidding on the project, can reduce the risk of underbidding, of unexpected delays, and environmental compliance problems. Contractors need to know the type of contaminants that are present, the location and extent of the contamination, and what environmental laws will apply, or potentially apply, to planned construction activities. Contractors need to hire the necessary environmental legal and technical expertise to know what environmental obligations apply based

upon available site information, any options available to avoid triggering environmental requirements, and what relevant questions remain unanswered by available information.

Some of the appropriate questions to ask and answer include:

- **Is the contractor, or its subcontractors, responsible for implementing a site remedial plan?**
- **If no, how does the work of the contractor, and its subcontractors, relate to or impact the remedial plan and the remedial contractor?**
- **Is the owner participating in a state voluntary cleanup program that provides liability protection from the federal Superfund law, and others?**
- **What, if any, time limitations, are attached to the state voluntary cleanup program?**
- **What are the requirements of the brownfield program that impact the contractors' performance?**
- **What other environmental laws apply to performing the work required at the site, and what obligations does each trigger?**
- **Does the owner (or others) need to receive a review, permit or approval from the state and/or federal environmental agency before the work, or some aspect of it, may proceed?**
- **Is the contractor responsible for moving dirt that is (or may be) contaminated as part of the project?**
- **Is the contractor required by law or its contract to notify the owner and/or government authorities if a release of contamination is discovered during the project? Under what circumstances? Does the contract address this issue?**
- **Does the contractor or its subcontractors need a permit or other authorization from government agencies prior to moving contaminated dirt at a site?**
- **Does the contract contain a typical "compliance with all applicable laws" provision? If yes, the contractor must know whether permits or notices are required, and, especially, whether the contract provides for compensation and time extensions if delays are incurred in obtaining government approvals?**
- **Do the contractor and its subcontractors know the type, location and amount of contaminants at the site that it/they are responsible for managing?**

- **Are the soils or other wastes classified as "hazardous", and to what extent (quantity, location, hazardous waste identification number, etc.)?**
- **What, if anything, do state and federal laws require in terms of the management and storage for each of the waste materials generated at the site?**
- **Will the movement of soils at the site create new or different environmental risks – e.g., lead contaminated soil several feet underground will be placed in a surface pile that can cause stormwater runoff or exposure to airborne particles.**
- **Do the contractors' and subcontractors' insurance policies cover work at a brownfields site and any remedial or compliance problems that may result from the negligence of a contractor or subcontractor?**
- **Will the contractor or subcontractors be taking contaminated dirt off-site? What laws apply to its storage, transportation, and disposal?**
- **Do the contractor and subcontractors need licensing or certification to perform any of the work at the site, and are those necessary licenses or certifications in order?**
- **Do the contractor and its subcontractors have proper health and safety plans in place to protect workers from exposure to contaminants?**

The questions identified above do not present an exhaustive list by any means, but do identify some of the more common issues that should be considered as part of planning work at a brownfield site.

The need to review contract clauses and documents for clarity and applicability in the context of a brownfield site cannot be overemphasized. Most contracts are not written with an expectation of contamination, but with contamination as an unexpected event. Therefore, the provisions should be revised to better fit the expectations of the parties. Further, special clauses regarding environmental notices, permits and approvals, and compensation for potential delays arising out of these reviews, should be negotiated into the contract, to the extent possible.

Some examples are in order of how standard contract clauses can negatively impact a contractor at a brownfield site.

The standard differing site conditions clause provides for compensation for type 1 and type 2 differing site conditions. A type 1 condition is one that is different than that represented by the contract documents, where that difference is the cause of damage. A type 2 condition is a condition that the contractor could not reasonably expect to find at the site, and the presence of that unexpected condition is the cause of damage.

In the context of a brownfield project, a type 2 differing site condition is a more difficult argument because contaminants are the norm and are expected. A contractor at a brownfield is more likely to be entitled to compensation by arguing a type 1 condition. To successfully do so, the contractor must evaluate what the owner is representing in the contract documents about the site conditions, and what the owner is not representing.

Are environmental assessments made part of the contract documents or presented for the bidders to rely upon? If not, serious concern is raised about the viability of a type 1 differing site condition argument. Does the owner, or the site assessment itself, provide disclaimers about relying on the assessment documents? If so, how does that impact a claim for compensation under the differing site conditions clause? These questions need to be asked and answered before bidding a brownfield project.

It is recommended that bidders require the owners to agree in writing that Phase I and Phase II site assessments are part of the contract documents, and that bidders can rely upon them for assessing the scope of work and the cost to perform. If only a Phase I assessment is provided, or even less, then the owner is forcing the contractor to become an environmental site assessor, which must be reflected in the time and cost to perform.

The problem with only being provided a Phase I assessment, or no assessment information at all, is that the contractor must fully evaluate the potential contaminants at the site,

prior to bidding, to adequately price the job. As a practical matter, sufficient time to perform an adequate Phase I or Phase II assessment will not exist prior to bidding. An adequate Phase I and Phase II assessment can cost tens of thousands of dollars and take several months to perform – an investment no contractor will make with only the prospect of an award. Therefore, serious consideration must be given to walking away from the project and not bidding it if the owner is not providing complete and competently performed environmental assessments for the contractor to rely upon.

An additional cause for concern is recent modifications to Site Inspection and Investigation clauses, many of which are now obligating contractors to perform a complete site evaluation, including, if necessary, intrusive sampling, testing, and other evaluations. In the context of a brownfield site, the shift of this responsibility from the owner to the contractor is alarming indeed. The lesson: read the Site Inspection or Investigation clauses very carefully and obtain clarification before bidding that the owner is not shifting the assessment of existing environmental conditions to the bidders. It is one thing to provide bidders with prior site assessments and make them responsible for determining the significance of that information. It is quite another to disclaim site assessment information and render the contractor responsible for virtually any condition discovered at the site.

In dealing with worker safety issues, a site with hazardous substances presents the need for a hazard communications program, which includes proper training of personnel exposed to hazardous chemicals on the job. Worker health and safety plans should be devised to protect against site specific risks.

Finally, no substitute exists for hiring sufficient qualified and trained personnel to properly plan for and complete the job. For example, if a lead abatement is being performed in

Ohio, each worker that is performing in an area where lead exposure may occur must be properly trained and certified to perform lead abatement work. The subcontractor should be required to prove to the general contractor that it has the necessary certified personnel to handle the size of the project. Both before and after contract award, consultation with environmental consultants, environmental counsel, and construction counsel may be advisable to avoid compliance problems with health and safety laws, environmental laws, and contract requirements.

D. Conclusion

With the advent of brownfield grant and loan programs throughout the country, brownfield sites will continue to be a significant source of work and profit for contractors, provided that the contractor proceeds with full awareness of the potential environmental problems and the ways it can minimize avoid or minimize them.

ILLINOIS BROWNFIELD PROGRAM

Are there any laws related to brownfield cleanup and redevelopment?

- Illinois EPA has what is known as a site remediation program (SRP, at 35 Ill. Adm. Code 740). The Illinois SRP allows private and municipal parties to clean up sites and receive Illinois EPA approval and release from further responsibility.

What steps can be taken to avoid enforcement and liability?

- Participants in the Illinois SRP are called remediation applicants who pay the Illinois EPA for oversight services.
- The city or private owners work with an environmental consultant to make sure that reports and plans required under the SRP are properly prepared and implemented.
- Participants in the SRP use what is known as the tiered approach to corrective action objectives (TACO), a new method in Illinois for developing objectives based on the risk of exposure to contaminants.
 - TACO is Illinois' risk based cleanup approach—instead of the predecessor approach, which was to clean up soil and ground water to the maximum extent possible. TACO allows institutional controls on land uses and ground water uses, engineering controls, and barriers to contamination, such as sidewalks and parking lots.
 - How do participants use TACO?
 - ◆ Owners must identify the extent and concentration of chemicals at the site
 - ◆ Owners must develop remediation objectives using TACO by conducting a risk assessment
 - TACO has three tiers:
 - ◆ Tier 1 is the most conservative and does not consider site specific conditions
 - ◆ Tiers 2 and 3 allow for site specific remediation objectives, which are usually less stringent than the Tier 1 objectives, but equally protective of human health
- Once TACO is satisfied, the owner in the cleanup program requirements are met, the owner receives an NFR letter.
- Municipalities are able to pass local ground water ordinances to limit ground water use for drinking water purposes and excluding an exposure pathway to protect human health
- At the end of the process, the Illinois EPA issues a No Further Remediation (NFR) letter for the property
- The NFR letter must be recorded on the property title and contains terms and conditions for keeping the property protected of public health, safety, and the environment.

What sources of state funding and assistance are available for brownfield projects?

- Illinois EPA has a new Brownfield redevelopment grant program, which provides financial assistance to municipalities for Brownfield cleanup and redevelopment activities. The money can only be used by local governments to determine where Brownfield sites are located and to perform assessment work at a specific site or sites.
- The brownfield development grants are worth a maximum of \$240,000 per municipality
- The Illinois EPA can also perform redevelopment assessments for communities, using U.S. EPA funding, to perform such an assessment on behalf of the community. The local government entity must own the property or obtain permission from the owner, and have a documented interest in developing the property.
- Illinois also has an environmental remediation tax credit that allows a private company or an individual to obtain an income tax credit for certain environmental cleanup costs (for up to 25% of costs).
- Illinois Brownfield Redevelopment Loan Program – a revolving low-interest loan program (¼ market rate, not less than 2.5%) that provides funds to municipalities and the private sector for the environmental assessment and cleanup of brownfields. Loan limit of \$500,000 per applicant and \$120,000 for site assessment activities; \$1 million per project.

How can you learn more about brownfield projects in Illinois?

- For information about brownfield grants, loans, and other assistance: Steve Colantino, Illinois Environmental Protection Agency, Office of Brownfields Assistance, 1021 North Grand Avenue East, P. O. Box 19276, Springfield, IL 62794-9276, (217) 785-3497.
- For information regarding assessment and cleanup options: Greg Dunn, Site Remediation Program, Unit Manager, Greg.Dunn@epa.state.il.us.
- The number for Illinois' voluntary site remediation program is 217-782-6760.

INDIANA BROWNFIELD PROGRAM

Are there any laws that relate to brownfield cleanup and redevelopment?

- The Indiana code sections regarding liability for contaminated property include, IC (Indiana code)13-22, IC 13-23, IC 13-24-1, IC 13-25-4, and IC 13-25-5. Indiana's Voluntary Remediation Program was established in 1993 at IC 13-25-5.

What steps can be taken to avoid enforcement and liability?

- Participants enter an agreement with IDEM to clean up the contaminated property.
- Participants can terminate their participation by notifying VRP staff in writing.
- To participate in the Brownfield Program, a local unit of government must contact the Brownfield Program for assistance. Indiana has a state version of Superfund Program known as the Indiana Hazardous Substance Response Trust Fund Law.
- Indiana Department of Environmental Management's (IDEM), Indiana Brownfield Program, performs several functions:
 - IDEM has a Voluntary Remediation Program (VRP) which offers certificates of completion and covenants not to sue.
 - A voluntary remediation agreement is entered to participate in the VRP, which defines the obligations of the applicant and IDEM;
 - ◆ The agreement requires:
 - A site investigation report.
 - A remediation work plan.
 - A remediation completion report.
 - Program guidance and requirements are provided for each of these components.
 - Public participation is required by the VRP and the remediation work plan must be subject to a 30-day public notice and comment.
 - Within 60 days of approval by IDEM of a remediation work plan, the applicant has 60 days to proceed with implementation of the plan or notify IDEM of its intent to implement.
 - Standards for cleanup are included in the program and have three different levels:
 - ◆ General performance standards
 - ◆ Quantitative risk-based standards that are generic to all sites
 - ◆ Site-specific risk-based standards
 - Upon completing the remedial work plan, remediation completion report must be filed and contain sampling results to confirm cleanup criteria have been met
 - After the cleanup is completed successfully, IDEM issues a Certificate of Completion and the Governor's Office offers a covenant not to sue. These documents provide assurance the remediated release will not be subject to future IDEM enforcement action.

What sources of funding and other assistance are available for brownfield projects?

- IDEM, in conjunction with the Indiana Development and Finance Authority, offers financial assistance in the form of grants and low-interest loans. Low interest loans (2.5% - 3.0%) are given to local government entities for remediation from a \$15 million revolving loan fund. Grants of up to \$50,000 per applicant (total of \$500,000 annually) are provided for Phase I and Phase II site investigation (reimbursement for prior work is not allowed). 100% cost match required by local entity.
- Local units of government can receive at no charge, a Brownfield Environmental Assessment from IDEM, which seeks to answer questions regarding potential cleanup costs and environmental liability.
- Indiana has an abandoned tank community assistance program, whereby local government entity who has involuntarily taken responsibility for a property with abandoned underground storage tanks may receive financial assistance from this fund.
- Indiana has a Petroleum Remediation Grant Incentive Program, which awards up to \$250,000 per site per applicant per round, and is made available to municipalities, towns, and counties. The first round of the PRGI application funds began in August, 2002.

How can you learn more about brownfield projects in Indiana?

- Regarding loan and grant funds: Calvin Kelly, (317) 233-4332
(e-mail: ckelly@idfa.state.in.us);
Sarah Westrick at (317) 233-4332
(e-mail: westrick@idfa.state.in.us).
- Brownfield contacts regarding Brownfield Program requirements include Gabriele Hauer, Section Chief Brownfields, Site Investigation, An Abandoned Landfields Program, 100 North Senate Avenue IGC-North, Indianapolis, IN 46204, (317) 233-2773, toll-free: 1-800-451-6027, ext. 32773.
E-mail: ghauer@dem.state.in.us
- Indiana Department of Environmental Management, Brownfield Coordinator, 100 North Senate Avenue, P. O. Box 61015, Indianapolis, IN 46206-6015. Telephone: (317) 308-3058.
E-mail: drw@opn.dem.state.in.us.
Web address: www.state.in.us/idem/land/groundfields.
- Legal and liability issues: Thomas W. Baker, Attorney, Office of Legal Counsel, 100 North Senate Avenue IGC-North, Indianapolis, IN 46204, (317) 233-1207, toll-free: 1-800-451-6027, ext. 31207.
E-mail: tbaker@dem.state.in.us

MICHIGAN BROWNFIELD PROGRAM

Are there any laws related to brownfield cleanup and redevelopment?

- Michigan's Natural Resources and Environmental Protection Act (Part 201) was amended in 1995, in part, to spur brownfield redevelopment.
- The key components of the Brownfields law in 1995 amendments regarding brownfields are:
 - Further causation-based liability system for owners and operators;
 - Baseline environmental assessment (BEA) provisions to provide liability protection to new owners and operators;
 - Due-care provisions to assure contaminated property is used safely; and
 - Land Use-based clean-up standards.

What steps are taken to avoid enforcement and liability?

- In Michigan, since the 1995 amendments, any person who is a new owner or operator of contaminated property can receive liability protection, provided they do two things:
 - Perform a BEA; and
 - Exercise due care.
- What are BEA's?:
 - BEA's are used to gather information about contaminated property, which is changing ownership and/or use to distinguish past contamination from any that might occur once a new owner acquires the property. Essentially, it is a phase one and phase two environmental site assessment.
 - The BEA must be done before or no more than 45 days after the date of purchase, foreclosure, or of becoming an operator of the company.
 - Results of the BEA must be disclosed to the Michigan Department of Environmental Quality.
- What is Due Care ?– Due care activities include:
 - Not allowing unacceptable exposure to contamination;
 - Not worsening the contamination; and
 - Protecting against the reasonably foreseeable acts of the third party such as trespassers.

What are some of the funding and assistance sources for brownfield projects in Michigan?

- Clean Michigan Initiative – Brownfield Redevelopment Grants – provides local government entities up to \$1 million per project with no local match requirements (and one grant per community per fiscal year); (economic redevelopment within 2 years of completing response activities is required). Applications accepted at any time. Completion of a pre-application form is 1st step in funding process.
 - Up to \$263 million may be used for environmental clean-up activities at contaminated properties to promote redevelopment.
 - \$40 – 60 million must be used at sites that present an "imminent and substantial endangerment" to human health or the environment.
- Renaissance Zones –
 - Administered by Michigan Economic Development Corporation – residents and businesses in selected urban and rural communities – virtually no state or local tax burden for those presently in a renaissance zone or moving into one.
- Tax Credits – up to 10% tax credit for eligible investments.
- Site Assessment Grants – available to qualified local units of government for environmental assessments of property with redevelopment potential; applications accepted at any time.
- Revitalization Loans – loans to local government entities at not to exceed 50% of prime rate (currently 2.25%); can be used for assessment, demolitions, and interim response costs.

How can you learn more about brownfield projects in Michigan?

www.deq.state.mi.us/erd/brownfields or www.deq.state.mi.us/erd - Websites for the Michigan Department of Environmental Quality, Environmental Response Division.

MINNESOTA BROWNFIELD PROGRAM

Are there any laws related to brownfield cleanup and redevelopment?

- Minnesota has a voluntary investigation and cleanup (VIC) program, and various other programs that address certain types of contamination or operations, including:
 - petroleum
 - pesticides for farming activities;
 - dry cleaning contamination.
- The voluntary investigation and cleanup program was created by the "Land Recycling Act of 1992" and provides technical assistance, as well as administrative and legal assurances to parties who want to investigate cleanup and return contaminated properties to productive use.

What steps are taken to avoid enforcement or liability?

- Persons not otherwise responsible for site contamination may be eligible for a liability release by performing an investigation and response actions approved by the Commission of Minnesota Pollution Control Agency (MPCA).
- A free initial meeting (one-hour) is provided by the MPCA staff to discuss potential VIC sites.
- The VIC program provides several functions:
 - provides guidance on site investigation;
 - reviews adequacy of site investigations;
 - approves cleanup plans;
 - provides assurances to participants in the form of:
 - Technical approval letters;
 - No action letters; and
 - Certificate of Completion.
- VIC is largely operated by use of a series of guidance documents.
- Public participation is not always required at these sites; but maybe required.
- VIC staff attempt to respond to submittals from VIC participants within 30-60 days.

What are some of the funding and assistance sources for brownfield projects?

- Funding the Minnesota Department of Trade and Economic Development has funding for grants to cities, housing and redevelopment authorities, economic development authorities, and port authorities to investigate and cleanup contaminated land.
- The MPCA has a site assessment unit, which has obtained U.S. EPA funding to conduct limited investigations at Brownfield sites that have reverted to city or county ownership due to tax forfeiture. Other programs exist for industry or category specific contamination problems.
- MPCA has a drycleaner fund (since 1995) to pay for the cleanup of soil, ground water, surface water contamination from drycleaning facilities.
- The Minnesota Department of Agriculture takes care of sites that have contaminated ground water, soil, or surface water from farming activities.

How can you learn more about brownfield projects in Minnesota?

- Jeanne Philipsen is the MPCA's brownfields projects' point of contact. Her telephone number is 651-296-7291. The point of contact for the petroleum investigation and cleanup program is Mark Koplitz at 651-296-7999.
- Department of Trade and Economic Development can be found at 1-800-657-3858 or 651-297-1291.
- Website for the voluntary investigation and cleanup program is: www.pca.state.mn.us/cleanup/vic.html. For the volunteer petroleum investigation and cleanup program it is: www.pca.state.mn.us/programs/vpicp.html.
- For general information about Brownfield redevelopment call: Gary Krueger, MPCA, 651-296-6319, toll-free 1-800-657-3864.

OHIO BROWNFIELD PROGRAM

Are there any laws regarding the cleanup and redevelopment of brownfields?

- Ohio has had a voluntary cleanup program since 1994 known as the Voluntary Action Program (VAP) (O.R.C. Chapter 3746).
- Certain parties are not eligible to use the VAP, including, active enforcement sites, national priorities list sites, and a few others that are subject to existing assessment or remediation obligations under federal or state law.

What steps can be taken to avoid enforcement and liability?

- Participants in the VAP do not have to notify the agency of their activities, but can proceed through the program utilizing private consultants who are certified in the program.
- The consultants known as certified professionals (CPs) issue what is known as a no further action letter, after determining that the volunteer has met the assessment and remediation requirements of the program.
- The assessment and remediation requirements are set forth in regulations in the Ohio Administrative Code (Chapter 3745-300).
- Once an NFA is issued by a certified professional, the volunteer may submit the no further action letter and all supporting documents to the Ohio EPA for a covenant not to sue. The Director of the Ohio EPA is required within certain time frames to issue the covenant not to sue upon receipt of a completed no further action letter (30 or 90 days, depending on the type of remedy relied upon at the site).

What sources of funding and other assistance are available for brownfield projects in Ohio?

- Clean Ohio. The Clean Ohio Fund legislation was passed in 2001, with the first award of funds in the spring of 2002, totaling over \$39 Million Dollars. Total funds available for Brownfield redevelopment are \$200 Million Dollars over four years. Grants are made to local government entities, for up to \$3 Million per project.
- Tax Abatement – 10 years of abatement on the difference between the assessed value of the property prior to the VAP cleanup and the value after the VAP cleanup.
- Tax Credit – Ten percent (10%) of eligible costs or \$500,000, whichever is less. Eligible costs include remediation costs, and property assessment costs. To be eligible, a VAP covenant not to sue is required.
- Community Assistance – Ohio EPA will perform a free technical assistance field sample and other assistance to local government volunteers in the VAP.

- Water Pollution Control Loan Fund – Low-interest loans available for projects that provide water quality benefits, including costs of property assessments, sampling, monitoring, laboratory tests, and actual site cleanup. Up to \$3 Million per project available . Loans paid over 20 years at a rate 175 points below the 20-year bond buyer General Obligation Bond Index. A 3.2% rate is available for short-term loans of up to 5 years.
- Ohio Pollution Prevention Loan Fund – Low-interest loans (2/3 prime rate) of between \$27,500 to \$350,000 to businesses and facilities with less than 500 on-site employees. Generally used for projects that result in "source reduction," which reduce the risks to public health, safety, and the environment, or as a second preference, in environmentally sound recycling.
- Ohio Water Development Authority – Loans to public and private borrowers for brownfield remediation require use of a VAP certified professional to direct the clean-up effort. Loan terms are negotiated on a case-by-case basis. The OWDA also provides borrowers with "credit enhancement" and loan guarantees to leverage loans by private lenders. OWDA also offers planning loans for Phase I and Phase II assessments at a proposed limit of \$500,000 per borrower.

How can you learn more about the brownfield projects in Ohio?

- Ohio EPA Contacts: Amy Yersavich, VAP Manager
E-mail: amy.yersavich@epa.state.ohio.us
Ohio EPA Website: www.epa.state.ohio.us/der/vap

WISCONSIN BROWNFIELD PROGRAM

Are there any laws related to brownfield cleanup and redevelopment?

- In 1994, Wisconsin created the Voluntary Party Liability Exemption, whereby parties can voluntarily conduct an environmental investigation and cleanup of a property. Wisconsin Section 292.15.

What steps can be taken to avoid enforcement actions or liability?

- Any interested person, even a party that caused the contamination, can use the voluntary program and its liability exemption:
 - To enter, a participant must pay a \$250 non-refundable application fee per site;
 - Advance deposit fee is also required before Wisconsin DNR can provide a technical assistance to the site (\$1,000 if property is one acre or less; \$3,000 if more than one acre). Action oversight costs can be substantially higher than the initial deposit, and are billed on a quarterly basis to the applicant.
 - Submit an application form (4400-178) to the Land Recycling Team contact in the local DNR office where the property is located, or contact 1-800-367-6076 (in-state long distance) or 608-264-6020 (out-of-state long distance or Madison area) for more information.
 - If you own the property, or caused a discharge, and discover a hazardous substance discharge, immediately notify Wisconsin DNR (See Section 292.11(2)), if you have not already done so.
 - Submit Phase I and Phase II Environmental Assessment Reports to DNR for approval (See Ch. NR 706).
 - Complete environmental investigation of all areas of concern.
 - Submit a remedial action options report to DNR for approval. (See Ch. NR 722).
 - Conduct clean up of on-site and offsite contamination.
 - Request a "Certificate of Completion".
 - A "Certificate of Completion" is received from the DNR which will not require the property owner or future owners to conduct any additional investigation or cleanup after the certificate is issued (for releases that occurred prior to the approval of the site investigation).

What funding sources and other assistance is available for brownfield projects in Wisconsin?

- Wisconsin recently authorized a Brownfield green space and public facilities grant program, which allows the DNR to award a total of \$1 Million to local governments for the 2001-2003 for remediation of brownfields where the end use will have a long-term public benefit.

- Brownfield Environmental Development Initiative (BEDI) grants - \$25 Million available in fiscal year 2002 – maximum grant is \$2 Million to eligible local governments (those receiving Community Development Block Grants from HUD). Grant funds can be used for acquisition, economic development, public facilities, infrastructure improvements, rehabilitation of property, demolition, and other brownfield redevelopment and cleanup activities.
- Wisconsin DNR provides \$1.7 Million annually for Brownfield Site Assessment Grants (SAG) to local government entities that did not cause contamination at a site, and when the responsible party is unknown, not capable of being located, or is financially unable to pay for the activities.
- Wisconsin DNR also administers three environmental loan programs, which consist primarily of low-interest loans to municipalities for the investigation and remediation of brownfields, to protect or improve drinking water facilities, and for waste-water treatment and urban runoff projects.

How do you find out more about Wisconsin brownfield projects?

See, www.dnr.state.wi.us/org.

ILLINOIS WEBSITE CONTACT INFORMATION

INDIANA WEBSITE CONTACT INFORMATION

MICHIGAN WEBSITE CONTACT INFORMATION

MINNESOTA WEBSITE CONTACT INFORMATION

OHIO WEBSITE CONTACT INFORMATION

WISCONSIN WEBSITE CONTACT INFORMATION