

BEYOND ENVIRONMENTAL DUE DILIGENCE

Lead-based Paint, Asbestos & Mold

DBA Environmental Law Committee Seminar
December 15, 2015

Presented by:
Daniel A. Brown, Esq.



Land Ownership Liability

- **CERCLA or Superfund**

- Comprehensive Environmental Response, Compensation and Liability Act of 1980
- Enacted to provide funding for the cleanup of abandoned hazardous waste sites across the country.
- Provides “joint and several liability” among 4 classes of responsible parties.
- Amended in 1986 and 2002 to clarify defenses.

CERCLA Responsible Parties

- **Current owners and operators** of contaminated property (whether or not the contamination occurred during their ownership or operation)
- **Former owners and operators** of contaminated property that either owned or operated during the time that the property became contaminated
- **Arrangers or Generators** - persons that arranged for the disposal of hazardous substances at the property.
- **Transporters** - persons that transported hazardous substances for another to the property and chose the property for the place of disposal.

Defenses to CERCLA Liability

- **Innocent landowner defense**
 - a person who takes title to contaminated property after the release, disposal or placement of hazardous substances on, in or at the property, and at the time of acquisition, the person had no reason to know that hazardous substances were released, disposed of or placed on the property.
- **Contiguous property owner defense**
 - a person who owns property that is contiguous to and that is contaminated by a release of a hazardous substance from a property that is owned by an unrelated person.
- **Bona fide prospective purchaser defense**
 - person that acquires ownership of a contaminated property after January 11, 2002 and establishes that disposal of hazardous substances on the property occurred prior to the acquisition.

Qualifying for a Defense

- To qualify for any of the landowner defenses to CERCLA liability, the person must prove by a “preponderance of the evidence” that he/she:
 - made “**all appropriate inquiries**” into the previous ownership of the facility in accordance with generally accepted good commercial and customary standards and practices; and
 - **took reasonable steps** to: i) stop any continuing release; ii) prevent any threatened future release; and iii) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances.

42 U.S.C. § 9601 (35)(A) & (B)

All Appropriate Inquiry (“AAI”)

- In defining “good commercial and customary practice” for conducting environmental site assessments, the goal is to identify **recognized environmental conditions**.
- **REC** means “the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, ground water, or surface water of the property.”

Initial Property Assessment

- Phase I Environmental Site Assessment (“ESA”)
 - Review of all available records
 - Physical inspection of the site
 - Interviews with people familiar with the site’s history of use
 - Determine if there is the potential for the presence of contamination
 - If a potential for contamination is found, proceed with Phase II ESA

Determine Extent of Contamination

- Phase II ESA
 - Sampling of soil, soil vapor, groundwater, surface water and/or sediment to determine
 - the extent of contamination
 - the types and probable sources of contamination
 - Determine the level of risk to humans and the environment associated with the measured contamination
 - Decide whether contamination must be cleaned up

Limitations of AAI

- Focuses on past releases of hazardous substances.
- Does not take the place of an environmental compliance audit for ongoing operations at industrial, manufacturing or commercial properties that emit air or water pollutants, or that generate hazardous waste.
- Does not require any investigations regarding ***asbestos***, radon, ***mold***, wetlands, ***lead based paint*** or vapor intrusion on the site.

Lead Based Paint

- Federal Requirements
 - Consumer Product Safety Commission (“CPSC”) banned use of lead based paint in new consumer products.
 - Department of Housing and Urban Development (“HUD”) regulates lead based paint exposure in public housing.
 - USEPA requires notification of lead based paint hazards in residential buildings.
 - Occupational Health & Safety Administration (“OSHA”) regulates employee exposure to “lead”

Lead Based Paint

- **In 1977, CPSC defined "lead-containing paint" to include:**
 - all surface-coating materials for consumer use that contain lead in excess of 0.06 % by weight of the non-volatile content (weight of the dried paint film).
- **In 1978, the following consumer products were banned in the US.**
 - Lead-containing paint.
 - Toys and other articles intended to be used by children that are treated with lead-containing paint.
 - Furniture treated with lead-containing paint.

Lead Based Paint

- Department of Housing and Urban Development ("HUD")
 - 1990 Guidelines for Hazard Identification and Abatement in Public and Indian Housing" required the owners of buildings used for public housing to test for the presence of lead-based paint in the building.
 - If the lead level in the paint sample is greater than 0.5% by weight or approximately 5,000 parts per million (ppm), the owner is required to abate the lead hazard.

Lead Based Paint

- Residential Lead-Based Paint Hazard Reduction Act of 1992.
 - Congress directed HUD and EPA to promulgate rules to protect children and other vulnerable people from the effects of lead poisoning in residential housing.
 - Congress directed OSHA to further protect worker safety in jobs involving lead exposure.

Lead Based Paint

- The lead problem in residential housing units.
 - EPA estimated that 1.7 million (9%) of American children had unsafe levels of lead in their blood.
 - 64 million dwellings (all built before 1978) contained some lead-based paint.
- In 1996, HUD and EPA jointly adopted rules concerning lead-based paint that applies to most sales and rentals of residential housing built before 1978 ("target housing").

Lead Based Paint

- Owners of “target housing” are required to:
 - Provide each prospective purchaser or tenant with an EPA-approved "lead hazard information pamphlet"
 - Disclose to prospective purchasers and tenants the presence of any known *lead-based paint hazards*
 - Disclose to sales and leasing agents the presence of any known *lead-based paint hazards*.
 - Provide each prospective purchaser or tenant with any available related records or reports concerning the *lead-based paint hazards*.

Lead Based Paint

- Definition of “lead-based paint hazards”
 - Any condition that causes exposure to lead from lead-contaminated dust, soil, deteriorated paint, or other conditions which would result in adverse health conditions.

Lead Based Paint

- Exemptions to notification rule:
 - Foreclosure sales;
 - Leases of target housing that have been certified to be free of lead-based paint by a certified inspector;
 - Short term leases with a duration of 100 days;
 - Renewals of leases where the landlord has previously disclosed all required information and no additional information has come to light.

Lead Based Paint

- This law requires notification only. It does not require owners to conduct a lead-based paint evaluation of the housing or perform any remediation activities.
- Each prospective purchaser has 10 days to inspect the property to perform a lead-based paint risk assessment.
- Each sales or rental agent must inform the seller or lessor of the lead-based paint regulatory requirements and must either ensure that the seller or lessor complies, or personally ensure compliance.

Lead Based Paint

- Since 1994, lead-based paint abatement activities must be performed by a trained and certified abatement contractor.
- The regulations do not require any person to inspect for and abate lead-based paint. However, if such abatement is performed, it must be in accordance with the abatement rules.
- Abatement does not include renovation and remodeling unless it is primarily intended to permanently eliminate lead-based paint hazards.

Lead Based Paint

- "Lead abatement" means a set of measures designed and intended to eliminate lead hazards, including:
 - Removal, encapsulation, or enclosure of lead hazards;
 - Replacement of lead-contaminated surfaces/fixtures;
 - Removal or covering of lead-contaminated soil;
 - Preparation, cleanup, disposal, and post abatement activities associated with the abatement.

Lead Based Paint

- "Lead abatement" *does not mean* activities designed to temporarily reduce lead hazards, such as:
 - Vacuuming surfaces with a high efficiency particulate air (HEPA) filter;
 - Cleaning surfaces of a structure with a lead-specific or high-phosphate detergent;
 - Wet-scrubbing no more than two square feet of a floor, wall, or ceiling surface to remove peeling, chipping, chalking or cracking paint prior to repainting.

Lead Based Paint

- Ohio's Lead Abatement Program (ORC Chapter 3742)
 - Generally prohibits the application of any lead-based paint on or inside any structure.
 - Prohibits any individual from employing any other individual to perform lead abatement work on any structure unless that individual holds a valid license issued under ORC 3742.05
 - Requires a license to perform a lead inspection or a lead risk assessment, act as a lead abatement contractor, or act as a lead abatement project designer.

Lead Based Paint

- Ohio's Lead Abatement Program
 - Does not apply to any individual performing lead abatement on his/her private residence.
 - Similar to the federal program in that owners are not required to inspect for the presence of lead-based paint, but if inspection or abatement is undertaken, it must be done in accordance with the program standards.

Lead Based Paint

- Potential Legal Claims
 - Landlords may be liable on the theories of nuisance or negligence for personal injuries related to lead poisoning if:
 - Landlord knew or should have known that tenants would be exposed to deteriorating lead-based paint at the leased property,
 - Landlord did nothing to remedy the situation,
 - Tenant incurred personal injury from lead poisoning or some related chronic ailment.

Lead Based Paint

- Potential Legal Claims
 - Sellers of residential real property in Ohio must fill out a Residential Property Disclosure Form required by ORC 5302.30.
 - The form requires the seller to disclose any actual knowledge of lead-based paint (and other hazardous substances) on the property. OAC 1301:1-4-10.
 - Failure to disclose this information is fraud.

Lead Based Paint

- Cost of cleaning up lead-based paint on a building's exterior may be recovered under CERCLA. *ABD Associates Limited Partnership v. American Tobacco Co.*, DC MNC, No. 1:91-415 (6/26/95).
- Homeowner may be liable under the Resource Conservation and Recovery Act (“RCRA”) for the cost to clean up lead-based paint pressure blasted from a house. *Duckworth v. Barrios*, DC Ela, No. 94-0515 (4/25/95).

Lead Based Paint

- Disposal of Lead-Based Paint Wastes
 - Paint chips may be considered **hazardous waste** if the level of **lead exceeds 100 ppm (0.01%)** in the actual waste sample.
 - To legally dispose of hazardous waste, the generator must have a hazardous waste generator identification number from Ohio EPA. This is a task that a qualified renovation contractor should handle.

Asbestos

- Asbestos is a naturally occurring mineral with many useful qualities, including:
 - High tensile strength with flexibility.
 - Resists corrosion & chemicals
 - Poor conductor & effective insulator (hot & cold)
- When asbestos fibers are inhaled deep into the lungs, they can cause serious illnesses, including mesothelioma and cancer.
- For that reason, USEPA banned most future uses of asbestos after 1978.



Historic Uses of Asbestos

- **ROOFING & SIDING** - roofing felts, shingles & tiles, siding shingles (transite)
- **WALLS & CEILINGS** - sprayed-on fireproofing plaster & joint compound, cement sheet, textured paints.
- **FLOORS** - tile & sheet flooring, mastic adhesives
- **PIPES & BOILERS** - cement pipe & fittings, preformed & block insulation, corrugated sheets, paper tape, putty, plumbing joints
- **OTHER BUILDING PRODUCTS** - gaskets, packing, cement, insulation

Asbestos Roof Material



Asbestos Attic Insulation



Asbestos Pipe Insulation



Asbestos Ceiling Tile Adhesive



Asbestos Floor Tile



Asbestos Regulations

- National Emission Standards for Hazardous Air Pollutants (“NESHAP”)
 - Intended to protect environment from emissions of airborne asbestos particles.
 - Implemented through regulations on demolition of structures.
- OSHA Asbestos Handling Standards for Commercial and Industrial Buildings
 - Intended to protect building occupants.

Asbestos NESHAP Rules

- Determining rule applicability
- Notification requirements
- Demolition and renovation procedures for asbestos emission control
- Waste handling and disposal requirements

Determining Rule Applicability

- Is the work a renovation or demolition?
- Does the work involve a “facility”?
- If so, conduct a thorough inspection of the facility

What is a “Facility”

- A “facility” includes any institutional, commercial, public, industrial or residential structure, **installation**, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative), *but excluding residential buildings having four or fewer dwelling units.*
- An “installation” is any building or structure or group of buildings or structure under the control of the same owner or operator.

“Isolated” Single Family Home Exemption

- EPA 1995 clarification of intent
- Isolated, single family home (including residential structure with four dwelling unit or less) is not subject to the asbestos NESHA regulations
- Instance where municipality is demolishing a single family home which is not part of a larger project and which does meet the definition of an installation
- Demolition of the home not subject to asbestos NESHA
- No “isolated” single family home exemption for large projects

Loss of Residential Exemption

- More than one residential building on the same reno/demo site that are under the ownership or control of the same owner or operator **ARE NOT** exempt.
- Residential structures demolished (or renovated) as part of commercial or public project lose their residential exemption and must comply with the NESHAP.

Multiple Residential Structures under Common Ownership = Installation



Regulated Asbestos-Containing Material (RACM)

- Friable asbestos material
- Category I nonfriable asbestos-containing material that has become friable
- Category I nonfriable asbestos-containing material that will be or has been subjected to sanding, grinding, cutting or abrading;
- Category II nonfriable asbestos-containing material that has a high probability of becoming or has become crumbled, pulverized, or reduced to a powder by forces of demolition or renovation.

What does Friable mean?

- material containing >1% asbestos.
- when dry, can be crumbled, pulverized, or reduced to a powder by hand pressure.
- typically found in thermal system insulation, fireproofing, plasters and ceiling tiles.

Conducting an Inspection

- The inspection should locate, identify, and evaluate the presence, condition and quantity of asbestos materials in the structure.
- If the combined amount of RACM is at least 260 lin. ft. on pipes, 160 sq. ft. on any other component or 35 cubic ft. (threshold amounts):
 - all RACM must be removed prior to a demolition or renovation, and
 - the notification, emission control/work practices, handling and disposal requirements will apply.

Notification requirements

- Every demolition or renovation of a facility requires an original notification be submitted when the amount of RACM stripped, removed, dislodged, cut, drilled or disturbed will meet or exceed the threshold amounts.
- The notification must be postmarked, delivered or received at ***least 10 working days before*** the RACM activity begins.
- The Regional Air Control Agency (“RAPCA”) receives this notification in Montgomery County.

Demolition & Renovation Procedures

- RACM removal
- Adequate wetting
- No visible emissions

RACM Removal

- All RACM must be removed from a facility being demolished or renovated before any activity begins that will break up, dislodge or disturb the materials, or preclude access to the materials for subsequent removal.

Adequate Wetting

- RACM must be sufficiently mixed with or penetrated by liquid to prevent the release of particulates.
- During an emergency demolition, all portions of a facility that contains RACM must be adequately wetted during wrecking operations and remain adequately wet until collected for disposal in accordance with the waste handling and disposal requirements

Failure to Adequately Wet



Waste handling and disposal requirements

- Proper containers and/or liners
- Signs and labels
- Disposal

Proper Containers & Liners

- After wetting, all Asbestos Containing Waste Materials (“ACWM”) must be sealed while wet in durable leak-tight containers or wrapping.
- Acceptable asbestos containers are durable plastic liners, plastic asbestos waste disposal bags, reinforced leak-tight boxes and steel, plastic, or fiberboard drums.

Signs & Labels

- All ACWM containers and wrapped materials shall be labeled with asbestos danger markings.
- All ACWM containers and wrapped materials that are to be transported off site shall be labeled with the name of the waste generator and the location at which the waste has been generated.
- Specifically marked asbestos danger warning signs must be displayed on transport vehicles during loading and unloading of ACWM.

Signs & Labels



ACWM Disposal Requirements

- Only Category I nonfriable ACWM that is in good condition, and has not been sanded, grinded, cut, abraded, crumbled, pulverized, or reduced to powder, can go to a licensed construction and demolition debris (C&DD) landfill.
- All Category I and Category II asbestos-containing debris is prohibited from being recycled.

Do Ohio EPA Regulations Apply to My Project?



*** NO ***

- If Structure has ALWAYS been residential
- If Structure contains ≤ 4 residential units
- If Demolition/Renovation is NOT part of “facility” or “installation”

Removal cost for typical 2 story house

- \$8-12K for demo
- \$3-5K for asbestos survey / abatement / disposal
- Average total cost: \$12-15K

Landfill Costs for ACM Disposal

- C&DD LF - \$475 - \$525/40 cu. yd. roll-off box
- MSW LF - \$650 - \$850/40 cu. yd. roll-off box
- RACM LF - \$1,100 - \$1,200/40 cu. yd. roll-off box

OSHA Asbestos Regulations

- Intended to significantly limit the occupational exposure to asbestos fibers (worker safety).
- Building owners and managers must take a number of actions during “removal activities” if “asbestos containing materials” (“ACM”) or “presumed asbestos containing materials” (“PACM”) are present in their buildings.

OSHA Asbestos Regulations

- ACM is defined to be any material containing 1% or more (by weight) of asbestos.
- PACM is defined to be all thermal system insulation and sprayed-on, troweled-on or otherwise applied surfacing material in buildings constructed prior to 1981, until they are proven to contain less than 1% asbestos.

OSHA Asbestos Regulations

- PACM includes:
 - thermal pipe insulation,
 - boiler insulation,
 - ceiling tiles and insulation,
 - floor tiles,
 - roofing materials.

OSHA Asbestos Regulations

- “Removal activities” are defined to include most operations where ACM and/or PACM in a building component is disturbed, regardless of the reason for the disturbance, including maintenance, repair, renovation and demolition activities.
- Overlap with NESHAP regulations regarding renovations and demolitions.
- Extend further than NESHAP regulations to maintenance & repair activities.

OSHA Asbestos Regulations

- To assure avoidance of the OSHA asbestos regulations, the owner may choose to document that ACM is not present in one of three ways:
 - report from a previously performed asbestos inspection;
 - documentation of complete asbestos removal;
 - a new inspection conducted by a Certified Industrial Hygienist.

OSHA Asbestos Regulations

- When asbestos is shown to be present, the building owner must:
 - identify the location, amount, and type of ACM at the "removal" work site that may be disturbed;
 - perform an initial exposure assessment for affected workers;
 - notify employees of the building owner or outside contractors who may come into contact with ACM;
 - post signs at the entrance to work areas to allow people to avoid contact with ACM.

OSHA Asbestos Regulations

- When asbestos is shown to be present building owner must (continued):
 - notify tenants if potential disturbance of ACM will occur in their leased areas;
 - maintain work records;
 - employee training;
 - provide worker protections;
 - Class I, II, III, & IV protections
 - maintain Permissible Exposure Limits (“PEL”) within work areas.



Mold in the Environment

- Although there are over 100,000 different molds, experts assert that only about 50 are toxic to human health.
- Toxic molds are unique because they can produce nonvolatile chemicals known as mycotoxins.
- Mycotoxins can enter the body via inhalation, the most probable route, or through skin contact

Mold in Buildings

- Indoor mold infestation is typically found in buildings and homes suffering from chronic water intrusion.
- Modern structures constructed of synthetic building materials are tightly sealed, making it easy for water to become trapped behind interior walls, creating ideal breeding grounds for mold.

Mold Exposure

- Mold infestations not only cause physical damage to host buildings, often rendering them unusable, but can also pose serious health risks to the occupants.
- The adverse health effects are especially serious considering that Americans spend between 75 and 90 percent of their time indoors

No Mold Exposure Standards

- There are currently no federal, state, or local enforceable standards for the safe level of mold exposure.
- Rule of thumb regarding mold exposure:
 - Fungi should not be growing indoors.
 - Fungi levels should not be higher indoors than outdoors.
 - There are different species of indoor vs outdoor fungi.

Mold Exposure Impacts

- The impact molds have on human health depends upon:
 - the species involved,
 - the metabolic products being produced,
 - the amount and duration of exposure to the mold, and
 - ***the specific susceptibility of the person exposed.***

Common Indoor Molds

- The most frequent toxigenic molds to be found indoors are:
 - Alternaria
 - Aspergillus
 - Cladosporium
 - Penicillium
 - Stachybotrys Chartarum

Stachybotrys – Black Mold



Mold Exposure Impacts

- Stachybotrys is a greenish-black mold that grows on materials with a high cellulose and low nitrogen content, such as fiberboard and gypsum board.
- People exposed to Stachybotrys have reported headaches, sore throats, hair loss, flu symptoms, diarrhea, fatigue, dermatitis, and depression.

Mold Health Effects



Mold Exposure Litigation

- Common defendants in mold cases:
 - manufacturers of building components,
 - general contractors, HVAC, roofing, plumbing and grading contractors,
 - architects, engineers, and home building inspectors,
 - sellers of real estate, real estate agents, landlords, homeowners and condominium owners associations

Mold Exposure Litigation

- Typical causes of action in mold cases:
 - breach of contract,
 - breach of express or implied warranties,
 - negligence, misrepresentation & fraud
 - deceptive trade practices
 - breach of implied warranty of habitability,
 - product liability,
 - workers' compensation claims.

Mold Exposure Litigation

- Which causes of action are appropriate for you will be dependent upon:
 - the source of the water intrusion causing the mold proliferation,
 - relationship with the potential responsible party, and
 - when did the responsible party become aware of the problem.

Mold Exposure - Damages

- Property Damages.
- Personal Injury.
 - Need testimony from a medical expert showing causation between mold exposure and illness.
 - Expect “Daubert” challenge to medical expert because of unsettled science on mold exposure causation.

Questions?

- Land Ownership Liability
- Lead Based Paint.
- Asbestos.
- Mold.