



# Brownfield Basics

2018 BROWNFIELDS CONFERENCE NAME  
AND LOCATION GOES HERE

# Brownfield Basics

- Speakers

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# Introductions

Panelists

Topics



# Overview of Legal Landscape

- Federal and state statutes impose liability for brownfields sites
- Liability issues for soils, groundwater, wastes, and other contaminants
- Enforcement (civil and criminal) for failure to comply with laws
- Liability concerns drove the passage of Act 2, Act 3 and Act 4





# Overview of Legal Landscape

## Federal Laws



# Comprehensive Environmental Response Compensation and Liability Act (Superfund)

- Imposes retroactive, joint and several liability for owners/operators and those in chain of title
- Elaborate and expensive process if caught in CERCLA web – including cleanup costs and costs for natural resources damages
- Amendments created liability protections for:
  - » **Innocent Owners**
  - » **Prospective Purchasers**
  - » **Adjacent Landowners**



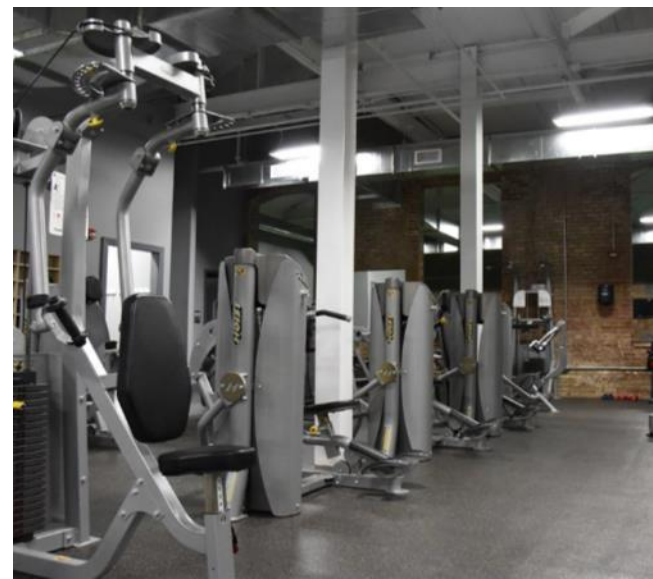
# RCRA Resource Conservation and Recovery Act

- Imposes “cradle to grave” regulation of “hazardous wastes”
- Regulates treatment, storage and disposal of hazardous wastes
- Typical hazardous wastes at sites include solvents, heavy metals (soils/groundwater), certain structural debris with contaminants (lead paint)
- If hazardous wastes are present on sites, RCRA may impose additional obligations on remediators
- RCRA also contains requirements for USTs



# TSCA Toxic Substances Control Act

- Imposes requirements on use, manufacturing, handling, treatment and disposal of certain substances that create “unreasonable risk” to health and the environment
- Typical TSCA substances found at sites include asbestos and polychlorinated biphenyls (PCBs)
- TSCA substances are subject to strict compliance with regulations (handling/removal)





# Clean Water Act

- CWA requires permits for discharges of pollutants to surface waters
- Section 402 requires NPDES permits for point source discharges
- Section 402 regulates stormwater from industrial activities and construction projects
- Section 404 requires permits for discharges to wetlands, including those associated with road crossings

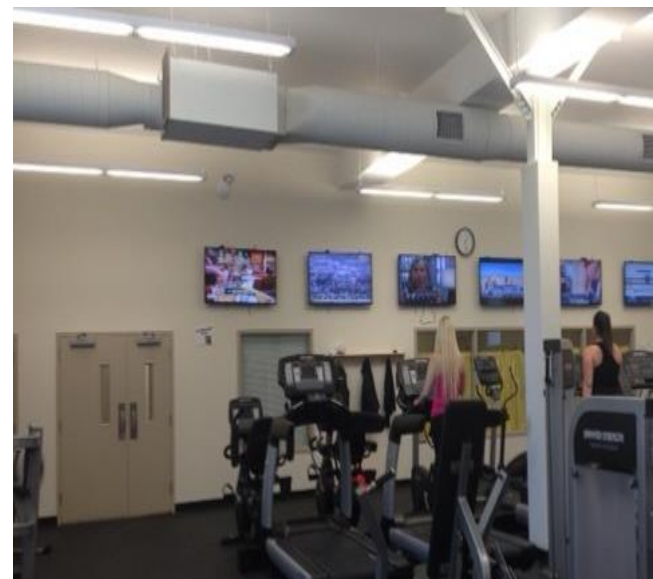


# Endangered Species Act

- ESA imposes prohibition on taking/ harming/harassing endangered species
- More and more, redevelopment sites/ projects are encountering ES
- Examples include Bog Turtle, Indiana Bat and certain plant species
- Studies may be necessary to avoid impacts



# Overview of Legal Landscape State Laws



# Clean Streams Law

- CSL is PA's equivalent to the Clean Water Act
- Requires permits for discharges of pollutants
- "Pollutant" defined very broadly
- Erosion and sedimentation control; stormwater and point source discharges
- DEP's "catch-all" enforcement statute for unpermitted discharges
- Joint permitting process with feds for wetlands
- CLS includes regulation of groundwater





# Solid Waste Management Act

- State equivalent to RCRA
- Regulates both solid and hazardous waste
- Presence of solid/haz waste requires study
- Section 405 requires a description in every deed with a conveyance of property where hazardous waste has ever been disposed
  - Description of surface area size, location and types of wastes disposed



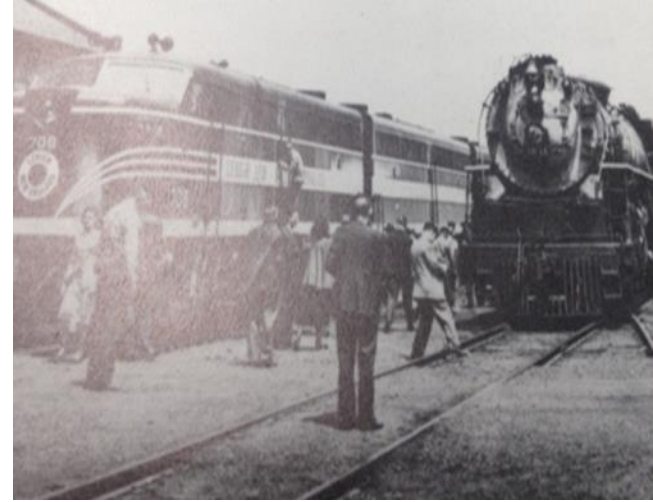
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Proposed Site Layout

Job No. Date

# Pennsylvania Storage Tank and Spill Prevention Act

- Regulates most underground and aboveground storage tanks
- Suspected or confirmed releases must follow the corrective action process (“CAP”) in Chapter 245 of the Pennsylvania Storage Tank regulations



# Hazardous Sites Cleanup Act

- PA's version of federal Superfund Law
- Equivalent liability provisions
- Section 512 requires every deed for the conveyance of property on which a hazardous substance has ever been disposed to provide a description and acknowledgment of the hazardous substance disposal
  - Should include surface area size and exact location and description of the type of hazardous substance disposed



# Common Law Liability

- Various theories of common law liability
  - Nuisance
  - Negligence
  - Trespass
  - Property valuation
- Various damage claims
  - Personal injury
  - Property damage
  - Vapor intrusion damages





# Due Diligence and Environmental Disclosure



# ASTM 1527-13

- As of November 6, 2013 the ASTM1527-13 standard was published.
- Note that E 1527-13 is officially recognized by USEPA as sufficient to meet AAI until USEPA issues its final rule (End of 2013)

## Key Changes

- *Recognized environmental condition* was simplified and clarified
- *Historical REC* was clarified.
- *Controlled REC* definition was added.
  - Developed to categorize certain RECs as currently managed to a regulatory standard that does not permit unrestricted property. Sites with Engineering and/or Institutional controls.
- *De minimis condition* was clarified to make clear that RECs that require management or restrict use are still RECs.
- **Consideration of vapors- Definition of migration altered.**
- *Indoor air quality* non-scope item has been clarified as limited to air quality unrelated to a Superfund release



# All Appropriate Inquiry

- The All Appropriate Inquiry (AAI) final rule was effective on Nov. 1, 2006.
  - The ASTM E1527-05 and ASTM E2247-16 (Phase I) satisfies the statutory requirements for the conduct of AAI until the deadline.
  - ASTM released the new standards and practices, ASTM E1527-13, which incorporates the AAI requirements.
    - October 6, 2014 EPA eliminates E1527-05 to “reduce any confusion” as to the appropriate standard.



# All Appropriate Inquiry

- The new standards clarify the requirements necessary to establish the innocent landowner defense under CERCLA.
- For the first time since the enactment of CERCLA in 1980, persons may purchase a known contaminated property without being held liable for cleanup.





# All Appropriate Inquiry

CERCLA – Bona Fide Prospective Purchaser & Innocent Owner Defenses provide exclusion from owner/operator liability if:

- Disposal occurred prior to purchase
- **Purchaser complied with AAI standards (due diligence)**
- Required notices provided by purchaser
- Appropriate care exercised by purchaser
- Cooperation by purchaser
- Purchaser complies with institutional controls



# All Appropriate Inquiry

- Purpose of AAI is to identify:
  - Current/past land uses
  - Current/past uses of hazardous substances
  - Prior activities that may have caused releases of hazardous substances
  - Current/past remediation to address past and on-going releases of hazardous substances
  - Engineering and institutional Controls
  - Nearby properties that could impact the property



# All Appropriate Inquiry

- Environmental Professional (EP) EP must conduct or oversee AAI
- AAI Report components:
  - Compare Fair Market Value to Purchase Price
  - Search for recorded cleanup liens
  - Search for deed restrictions and institutional controls
  - EP Opinion and Declaration
  - Interviews of past/present owners, operators & occupants
  - Review site history/records
  - Visual site inspection
  - Consider commonly-known/reasonably ascertainable information
  - Identify and address data gaps
  - Some components are client responsibilities



# Phase I Assessments

- Non-intrusive assessment of properties
- File reviews, site reconnaissance, interviews
- Review neighboring properties, e.g., dry cleaners
- Consider proximity of possible source areas, e.g., leaking storage tanks
- RCRA & Superfund sites
- Required by most lenders





# Phase II Assessments

- Media sampling, i.e., soil, groundwater, air
- Nature and extent of contamination
  - Surface soil impacts
  - Groundwater impacts
  - Indoor air impacts
- Comparison to applicable standards
- Determine need for additional characterization and possible remediation

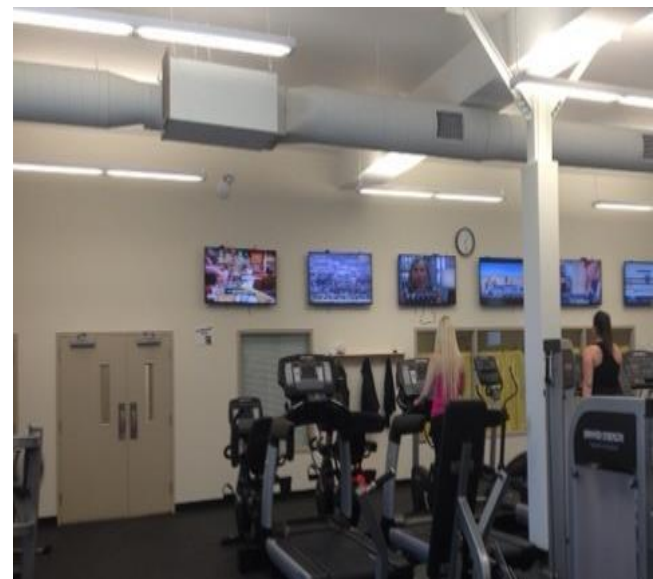


# PA's Brownfields Program



# Overview of Act 2

- Acts 2, 3 & 4 passed in 1995
- Act 2 – Land Recycling and Environmental Remediation Standards Act provides for cost effective cleanups to uniform standards
  - Dependent on future use
- 3 cleanup standards
- Cleanups may rely on:
  - Engineering controls (e.g. caps)
  - Institutional controls (e.g. land/GW restrictions)
  - UECA secures these restrictions



# Overview of Act 2

- Contains notification and reporting requirements (including public notice)
- Provides broad liability protections
- Act 2 cleanup standards apply to all PA cleanups
- Key documents include:
  - Regulations found at 25 PA Code Chapter 250
  - DEP's Technical Guidance Manual





# Overview of Act 3 – Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act

- Limits environmental liability of:
  - Lenders
  - Economic development agencies (EDAs/IDAs)
  - Fiduciaries
  - Non-profits created by EDA's (and conservancies)
  - Municipalities
- Liability typically limited to only that which was directly caused or made worse entity



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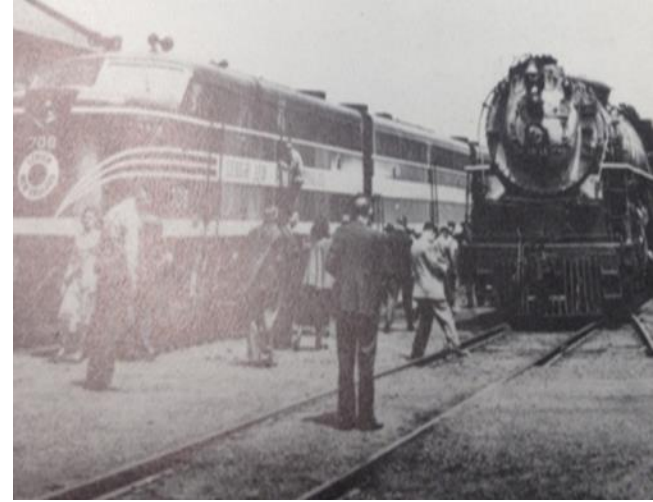
Proposed Site Layout

Job No. Date

# Amendments to Act 3

## ▪ Enhancements include:

- Liability protections for:
  - Claims under common law
  - Property damages
  - Diminution of property claims
  - Natural resources damages
  - Economic loss
  - Bodily injury or death (e.g., toxic torts)
- Protections cover officers, directors, agents, members, employees and consultants specifically protected



# Overview of Act 4 – Industrial Sites Environmental Assessment Act

- Not a liability protection statute
- DEP provide grants to municipal entities to assess industrial site
- Loans available to “innocent” applicants for remedial actions



# Three Cleanup Standards Available in Act 2

- Remediation may involve one or a combination of:
  - Background Standard: Contamination present but not related to a release at the site
  - Statewide Health Standard: Medium specific concentrations (soil and water)
  - Site-specific Standard: Risk based approach – pathway elimination





# Combination of Act 2 Cleanup Standards

- By “Site”
  - One property may have more than one site (aka area of concern)
- By media
  - Different standards can be applied to groundwater and soil
- By substance
  - Can apply any one of the standards to each substance



# General Act 2 Procedures

- Publish Notice of Intent to Remediate
- Characterize Extent of Contamination
- Develop Site Conceptual Model
- Establish Points of Compliance
- Remediate Contamination
- Demonstrate Attainment
  - Background
  - Statewide
  - Site Specific



# Special Industrial Areas

- Orphaned sites, Enterprise Zones or Keystone Opportunity Zones
- Baseline Remedial Investigation
- Address Immediate, Direct or Imminent Threats
- Deed notice is required



# Liability Protections of Act 2

- Act 2 protections by operation of law upon approval of Final Report
- Confers liability protection upon remediators and future owners and operators
- Liability relief includes claims for:
  - Remediation under state law for identified contamination
  - Suits for further cleanup for identified contamination





# Limitations of Liability Protection in Act 2

- Does not specifically cover federal statutes
  - MOU with Region 3 provides additional protection for EPA claims
- Doesn't cover third party common law suits
  - Toxic torts
- Doesn't cover substances not identified/approved by DEP in Final Report



# Limitations of Liability Protection in Act 2 - Reopeners in Act 2

- Protection revocable if:
  - Fraud
  - Previously unknown contamination discovered
  - Remediation method failed
  - Level of risk changes (changed exposure/uses)
  - Engineering or institutional controls fail



## Doing the Deal



# Valuing the Property

- Items Which Could Affect Value:
  - Fear of the unknown
  - Liability
  - Property use limitations
  - Change in regulations
  - Cost overruns
  - Stigma
  - Vapor intrusion issues
  - Long-term stewardship (engineering & institutional controls)





# Managing Risk - Buyer-Seller Agreement – Consent Order

- 3 Party Consent Order and Agreement (COA)
  - Seller – remediation obligations with deadlines
  - Buyer – allow access, maintain engineering controls, record agreement and restrictions with the deed
- Buyer receives some liability protections prior to the remediation being complete through a covenant not to sue
- Once remediation complete, all parties receive full Act 2 protection



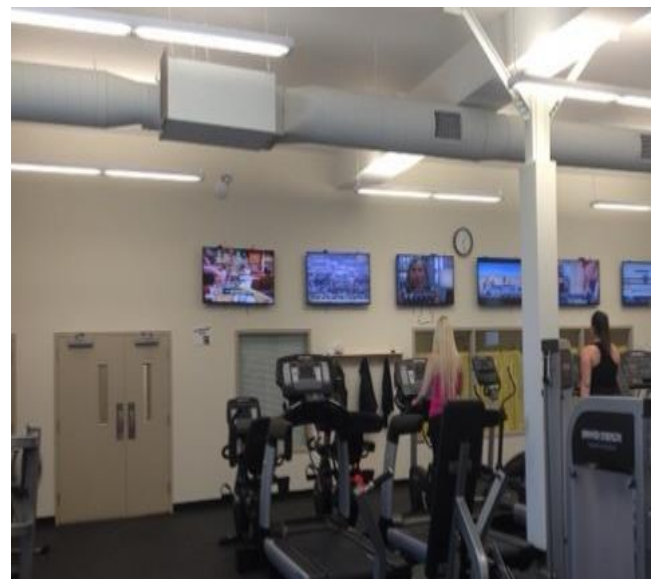
# Managing Risk - Buyer-Seller Agreement – Consent Order

- Downsides:
  - Only formal protection is DEP's covenant not to take enforcement action against new owner
  - Does not encompass third party statutory suits or federal action
  - Full Act 2 defenses not valid until full Act 2 protection is conferred through approval of Final Report
- Nevertheless – very useful tool for property deals



# Managing Risk – Sales Agreements

- Access to conduct due diligence
- Property description
- Representations and warranties
- As is purchase?
- Releases of liability
- Indemnifications
- Insurance products (limited)
- Incorporation of Act 2 protections



# Managing Risk – Environmental Insurance

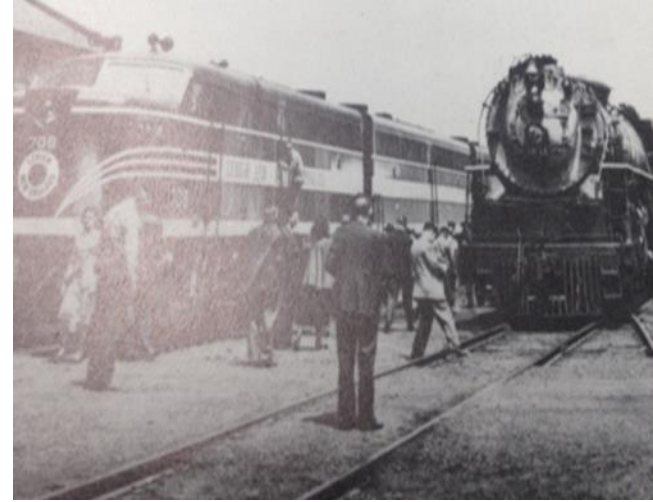
- Types of insurable risks
  - Known vs. unknown
  - Regulatory changes
  - Costs beyond Act 2
  - Risks during construction/development
  - Third-party risks (torts/property damage)
  - NRDs
  - Defense costs
  - Indemnifications
- Types of policies
  - Pollution Liability Policy
    - Covers remediation expenses beyond that required by Act 2
    - Losses from “pollution conditions” (e.g., migration/offsite disposal/general liability/torts)
  - Contractor Liability
  - Cost Cap Policy (No longer offered by most carriers)
    - Typically covers costs of remediation in excess of estimated amounts
- Limitations
  - Policy limits (depends on contract)
  - Large deductibles (depends on contract - \$100,000 range)
  - Known condition exclusions for building materials and know contamination
- Availability and Cost Issues





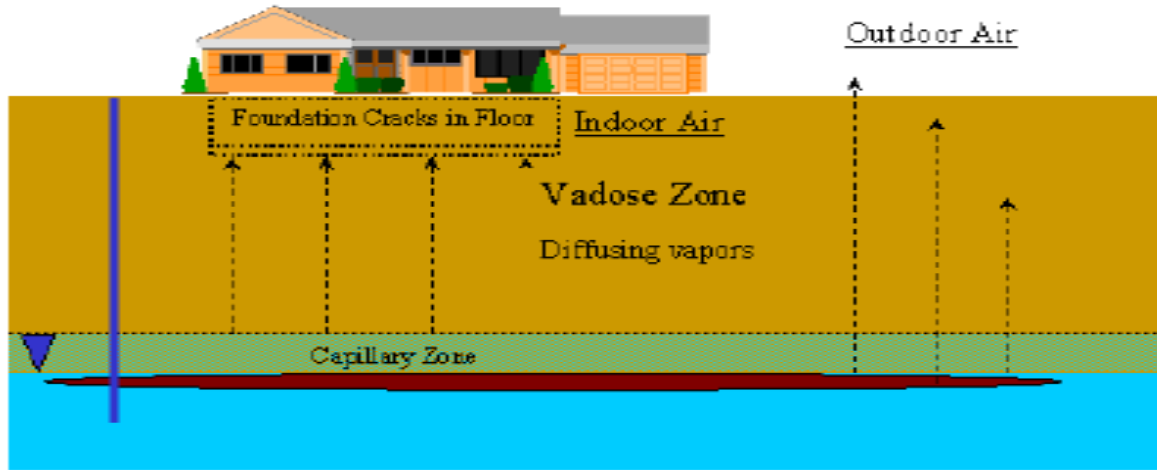
# Managing Risk – Technical Aspects

- Good Redevelopment Strategy
  - Understand the environmental conditions before finalizing site master plan
  - Get agency buy-in before completing site investigations and planning
  - Include all appropriate programs, e.g., Act 2, tanks, storm water, solid waste
  - Consider impact of long-term stewardship requirements
  - Include everyone in the discussion
- Assemble Experienced Team
  - Legal support
  - Technical support
  - Financial support



# What is Vapor Intrusion?

- Vapor Intrusion is the migration of volatile organic chemicals (VOCs) from the subsurface into overlying structures.



# Vapor Intrusion

- EPA Issued two Final Subsurface Vapor Intrusion Guidance Documents in 2015:
  - OSWER Technical Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air (OSWER Publication 9200.2-154)
  - OSWER Technical Guide for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites (EPA 510-R-15-001)
- PADEP Vapor Intrusion Technical Guidance Update:
  - PADEP Land Recycling Program Technical Guidance Manual for Vapor Intrusion into Buildings from Groundwater and Soil under Act 2 (Document # 261-0300-101; Draft, June 13, 2016)
  - Final Guidance Document became effective January 18, 2017



# Long Term Stewardship

- What are activity and use limitations (AULs)
  - Engineering controls
  - Institutional controls
- Pros and Cons of AUL's
- Role of environmental covenants
  - Uniform Environmental Covenants Act (UECA)
  - Chapter 253
  - PA Activity and Use Registry





**Questions??????**

