



Hazardous Waste Considerations In Real Estate Transactions

Public awareness of hazardous waste problems and environmental laws has created both obvious and unexpected liabilities in real estate transactions. To minimize risk, purchasers are advised to conduct an appropriate investigation into the history of activities and business practices associated with a piece of property before buying or leasing it. Otherwise, you could be accepting responsibility for hazardous waste contamination caused by someone else and you could be required to pay for cleaning it up.

Although commercial and industrial properties are more likely to be contaminated than residential or rural properties, many rural and agricultural properties can

also have significant contamination problems. You could be potentially liable for the cleanup of hazardous substances regardless of the type of property you buy or lease.

This report is directed toward anyone involved in real estate transactions; individual citizens, real estate brokers and agents, appraisers, lenders, attorneys, consultants, and developers. It identifies some common concerns regarding hazardous waste liability as it relates to property transactions and outlines investigative techniques commonly used to assess the potential for hazardous substance contamination at a site.

Caution!

This report does not, and is not intended, to state the circumstances under which liability will be imposed under state or federal law, nor does it establish a standard of due diligence or define appropriate inquiry for environmental site assessments.

“Due Diligence” and “Appropriate Inquiry” are terms used to designate the nature and extent of an environmental property assessment for a given site. To establish that a purchaser or lessee should not be liable for cleanup costs, that person must be able to show that they investigated the property fully before its purchase or lease and in doing so did not find any contamination. If the property inspection was not conducted with “due diligence” or if the purchaser did not conduct an “appropriate inquiry”, he or she may be held liable for cleaning up the property.

Hazardous Waste Laws: You Could Become Liable

In the 1980s, laws were passed requiring identification, investigation, and cleanup of sites contaminated with hazardous substances. These laws impose potential liability on property owners, lessors, lessees, and others involved in the management or purchase of properties that are contaminated and require cleanup.

Most hazardous waste cleanups in Washington are governed by two laws:

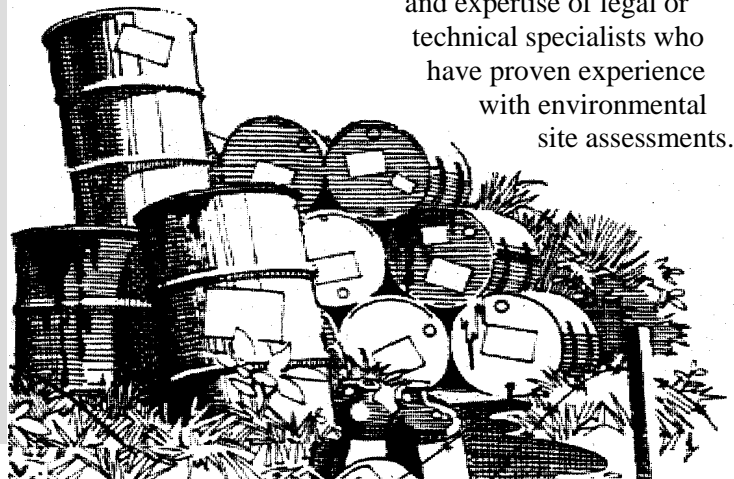
Federal: Comprehensive Environmental Response Compensation and Liability Act (CERCLA), commonly known as Superfund.

Washington State: Model Toxics Control Act (MTCA), Ch. 70.105D RCW, passed by voters in 1988 as Initiative 97.

Liability Under the Laws Is Far-Reaching

- ❖ You do not have to be responsible for all the contamination on your property to be required to pay all or part of the cost of cleaning it up.
- ❖ If you buy or lease a piece of property knowing it is contaminated, or do not conduct an adequate environmental site assessment before buying or leasing the property, you may be found liable for cleanup.

Environmental liability can be costly. Before entering into a purchase or lease agreement on property that could be contaminated, Ecology recommends that you seek the advice of professionals experienced in conducting environmental site assessments. The information contained in this report should not be used to replace the advice and expertise of legal or technical specialists who have proven experience with environmental site assessments.



Why An Environmental Site Assessment Is Needed: LIABILITY

An environmental site assessment of real property prior to transfer of title is not required by Washington state or federal law. In Washington state, environmental site assessments are being conducted by private individuals and companies in response to the strict liability imposed by hazardous waste laws.

The buyer of a piece of property assumes the rights and responsibilities of property ownership. Failure to look into the environmental status of property prior to its purchase will be interpreted to mean that the buyer is willing to accept the property "as is". For the unwary buyer this could include the cost of cleaning up contamination from hazardous substances.

Definition of Hazardous Substance and Hazardous Waste

Under the Model Toxics Control Act definition, "hazardous substances" could be almost any chemical or waste that could threaten human health or the environment. "Hazardous substances" include those substances that are "hazardous wastes."

However, for the purpose of this document these terms are used interchangeably.

Who Is Responsible ?

- ❖ Current owners or operators of facilities
- ❖ Any person who owned or operated the facility at the time of disposal or release of a hazardous substance
- ❖ Any person who brought or caused a hazardous substance to be located at the facility

Liability Is Strict, Joint and Several

According to state and federal laws, persons liable for sites where a release of hazardous substances has occurred or threatens to occur are strictly, jointly, and severally liable for the cleanup of those sites.

Strict liability means that liability may be assigned regardless of who is at fault for the release. This means that if your property is contaminated you may be held legally responsible for cleaning it up even if you did not cause the contamination.

Joint and several liability means that each and every potentially liable person can be required to pay all or part of the cleanup costs and environmental damages resulting from any release. If 100 people brought drums of chemicals to a dump, and hazardous substances leaking from those drums were later found to be a threat to human health or the environment, all 100 of them or any subgroup of them could be required to pay for cleanup.

Hazardous Waste Liability Affects Financing

Banks may be less willing to lend money on property contaminated with hazardous substances. The property could have diminished resale value or the entire value of the property could be lost. In extreme cases, contamination might make the property unsaleable or could result in a financial liability greater than the original cost of the property.

The potential causes of reduced market value for contaminated properties include:

- ❖ Cleanup costs
- ❖ Damage to natural resources (such as wildlife)
- ❖ Liability to surrounding properties and affected individuals
- ❖ The stigma attached to property that was once "dirty"
- ❖ Difficulty in acquiring mortgage loans or insurance

Defenses to Liability?

Although not easy to establish, some defenses to liability are provided in the Model Toxics Control Act. Among the persons who are not liable for a release is any person who can establish that, at the time the facility was acquired, the person had no knowledge or reason to know that any hazardous substance had been released at the site. The burden of proof lies with the purchaser.

To meet the standard of proof required to qualify for this "innocent purchaser's" defense, the person must be able to show that before buying the property they made "...all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice in an effort to minimize liability."

No person can escape liability by knowingly selling contaminated property without first disclosing knowledge of the contamination to the buyer. Nor can anyone escape liability who caused or contributed to a release of a hazardous substance.

To determine if a person is an "innocent purchaser" the courts will consider:

- ❖ The specialized knowledge or experience of the buyer
 - ❖ The relationship of the actual price paid to the value of uncontaminated property
 - ❖ Whether the buyer used commonly known or reasonably determined information consistent with good commercial or customary practices
 - ❖ The obviousness of the presence or likely presence of contamination at the property
 - ❖ The buyer's ability to detect the contamination by appropriate inspection
- The courts may hold the buyers of industrial or commercial property to higher standards of review than persons buying residential property.

Environmental Site Assessments

A thorough environmental site assessment can minimize potential liability under the Model Toxics Control Act. Since one of the primary defenses to liability is the “innocent purchaser” defense, you must be able to show that you looked into the previous ownership and uses of the property “consistent with good commercial or customary practice . . .”

The courts have yet to determine what constitutes “appropriate inquiry” or “good commercial or customary practice”, and there is no universally accepted industry standard to clarify how in-depth an investigation must be to satisfy this requirement. As a result, there is no way to be completely sure you will be free of potential liability for a hazardous waste cleanup when you acquire commercial or industrial property. However, one way to minimize your chances of being liable for cleanup of contamination caused by a prior owner is to do an environmental site assessment.

What Is An Environmental Site Assessment?

An environmental site assessment evaluates the historical uses and succession of owners or occupants of a site. It helps to identify the possibility that past practices at and around the property have left it contaminated with hazardous substances that will have to be cleaned up.

The scope of the environmental site assessment is determined by the nature of the property and any unique circumstances surrounding it. Properties near existing hazardous waste sites and properties on or near heavy industrial land are the most likely to be contaminated. The greater the chance that a site is contaminated, the more detailed the analysis of site conditions should be.

Commercial sites that are or have neighbors known to be on federal or state hazardous sites lists should be carefully evaluated. Also, existing or past businesses known to store or use chemicals should be carefully evaluated.

Small commercial properties typically require a less extensive environmental investigation, and residential properties usually even less.

But don't be deceived by the size of the property, its location or use. A few 55-gallon drums of chemicals can be stored anywhere, and they can contaminate thousands of gallons of ground water and/or hundreds of cubic yards of soil.

Due to the unique history and circumstances surrounding every piece of property, the scope of an environmental site assessment should be determined on a site-by-site basis. This is why it has been so difficult to establish a standard of due diligence for environmental site assessments. It's hard to say how much investigation will be adequate when every site is different. If you do an environmental site assessment and don't find contamination until after you buy the property, you may still be required to pay for its cleanup.

There are a variety of guidance materials and publications available on conducting property assessments. Although these publications may provide some of the basics of a property assessment, there is no replacement for the experience of a thorough and reputable professional who is competent in conducting environmental site assessments.

You Must Be Thorough!

Environmental site assessments contain several common elements, including a site history, comprehensive review of records, interviews, and a physical site inspection. Soil and water sampling will be needed if any of the other investigative methods identify a possibility that contamination could exist.

Although valuable information may be obtained from federal, state, and local regulatory agencies, you or your hired consultant will be responsible for acquiring, analyzing, and compiling the information as well as justifying the results. Remember, you have the burden of proving that you did everything possible to discover potential contamination.

Always keep in mind: The more likely a site is contaminated, the more detailed the environmental site assessment should be. Remember to keep the results of your environmental site assessment. The information may be useful in the future (i.e. future property transfers, liability issues).

What Makes Up An Environmental Site Assessment?

Check Site Lists

Ecology's Toxics Cleanup Program maintains a data base of all currently known hazardous waste sites. A report entitled *The Confirmed or Suspected Contaminated Sites Report* lists potential and confirmed hazardous waste sites in Washington and is available to the public.

In addition, Ecology publishes the *Hazardous Sites List* twice each year. This list contains sites that have been assessed by the Washington Ranking Method (WARM), in which a rank of "1" is used for sites with the highest potential for risk to human health and the environment and "5" is the lowest. The WARM ranking is a comparison between all sites on the list and is used

Do not assume that there are no hazardous waste problems at a site just because the property is not on one of Ecology's lists. It is possible that contamination has gone undiscovered or hasn't been reported.

by Ecology to help prioritize sites for cleanup. It does not determine the actual risk at a site. A state-wide list of sites with leaking underground storage tanks is also available from Ecology.

All of the sites on the Hazardous Sites List will also be on the Confirmed or Suspected Contaminated Sites Report, but the reverse is not true. A site doesn't go on the Hazardous Sites List

until it has gone through a preliminary study in the state cleanup process (called a Site Hazard Assessment) and has been ranked.

In addition to the state's Hazardous Sites List, the U.S. Environmental Protection Agency (EPA) has a list of all known federal sites being cleaned up under Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA - also known as "Superfund"), as well as sites that could be contaminated due to the handling of hazardous substances that are Resource Conservation and Recovery Act (RCRA) facilities. You can write the Region 10 EPA office and request information about known or likely contamination at the property you are considering.

Personal Interviews

Interviews can provide useful information about a site. As appropriate under the circumstances, the following individuals could be interviewed:

- ❖ Present and former owners, operators and employees of a facility
- ❖ Regulatory agency personnel
- ❖ Neighboring residents or businesses

Review of Regulatory Records

Regulatory agencies such as EPA, the Department of Ecology, county health departments, and local planning offices can provide useful information regarding potential liability at a site. The following types of information is often available in the files at federal, state, and local regulatory agencies. It can be viewed, or copies obtained for a fee, by contacting the regulatory agency.

- ❖ Environmental permits (air, water, discharge, septic, etc.)
- ❖ Hazardous waste manifests, storage notices, and waste generator reports
- ❖ Inspection reports
- ❖ Spill reports
- ❖ Violation notices, administrative orders, compliance schedules, or other enforcement actions regarding the site
- ❖ Correspondence related to the site
- ❖ Zoning, comprehensive plans, and business licenses

Information

Call (360) 407-7170 (voice), (360) 407-6006 (TDD) or toll-free 1-800-826-7716 to receive:

The Confirmed or Suspected Contaminated Sites Report - A list of all known sites where hazardous substances have been released or a release is suspected and further testing is needed.

Hazardous Sites List - (A subset of the Affected Media and Contaminants report) A list of ranked sites where some kind of cleanup action is likely to be required.

Site Register - An update on cleanup activities at hazardous waste sites in Washington state (published every two weeks).

Leaking Underground Storage Tank List - A list of all known sites with leaking underground storage tanks.

Call (425) 553-1200 (voice), (425) 553-1698 (TDD) to receive:

Site Information from EPA on actions related to the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the master database of facilities being investigated by all EPA programs and many state programs (Facility Index Data System - FINDS). Or write: EPA, 1200 Sixth Avenue, Seattle, WA 98101

Review of Other Public Records

A variety of other public records can provide useful information about a site. This information can be found in local newspapers, the county auditor's office, and the superior and district courts. The following types of information may be obtained:

- ❖ Title records
- ❖ Existing environmental liens
- ❖ Surrounding property owners and zoning of properties
- ❖ Aerial photographs
- ❖ Sanborn Fire Insurance Maps, Polk Directories
- ❖ Historical records and photos, including: Archival records, business records, manuscripts (personal papers)
- ❖ Books on local history
- ❖ Local newspapers and clipping files
- ❖ Periodicals/Journals on local history
- ❖ Historical society records
- ❖ Historical museum records
- ❖ Litigation regarding the property or owner

Site Inspection

All environmental site assessments should include an on-site inspection of the property. No defense to liability will be possible without a physical inspection of the property in question. Many indications of environmental problems can be easily identified by walking around and visually inspecting the property. Any of the following may signal the presence of hazardous substance contamination:

- ❖ Lack of vegetation, sick or dead vegetation
- ❖ Unusual or noxious odors
- ❖ Stained soil
- ❖ Settling ponds or unnaturally colored surface water
- ❖ Indication of current or past storage of fuel, chemicals, or hazardous substances
- ❖ The presence of fill consisting of waste materials
- ❖ Containers or drums with unknown contents
- ❖ Proximity of property to known or suspected hazardous waste sites or sources
- ❖ Proximity of property to industrial or commercial areas
- ❖ Proximity of property to a major highway or railroad line

Questions A Prudent Purchaser Should Ask

The following questions may help identify site activities or materials that could contribute to environmental liability at a site. This is not an all-inclusive list, but will give you a good start:

- ❖ What are the past uses of the property?
- ❖ What hazardous substances has the owner/operator generated, manufactured, managed, treated, stored, disposed of, released, or sent off-site?
- ❖ Have chemicals, pesticides, or fertilizers been used, treated, stored, or disposed of at the site?
- ❖ Are there any underground storage tanks, dry wells, or other buried structures where chemicals have been stored or disposed of?
- ❖ Is the site served by city sewer or septic tank? (Note: chemicals dumped in a septic tank could be a source of pollution).
- ❖ Is the site on fill land and what type of fill was used?
- ❖ Are there any materials or structures containing asbestos?
- ❖ Is there electrical equipment with PCBs?
- ❖ Does the facility have the required environmental permits to operate in its current capacity?
- ❖ Have any discharges surpassed permit requirements? What is the result of any state or federal Class 2 inspections of the facility in regard to National Pollution Discharge Elimination System (NPDES) permits?

What are the results of any Discharge Monitoring Reports (DMRs)?

- ❖ What is the compliance record with environmental laws for the current and past facilities at the site?
- ❖ What is the condition of existing pollution control equipment?
- ❖ Are there any currently known environmental liabilities?
- ❖ Is the site on or near any sensitive environments or habitats, wetlands, streams, archeological sites?

What To Do If Contamination Is Discovered

If an environmental site assessment indicates contamination may be present that could threaten human health or the environment, this must be reported to Ecology. Further testing of surface and subsurface soil and water should be conducted to determine the extent of the contamination and potential scope of cleanup needed.

If you wish to purchase the property in spite of finding contamination, you may want to work jointly with the current owner to arrange for appropriate soil and/or water testing.

Property Contracts: Written Protections

When industrial or commercial real estate is being acquired, potential liability can be lessened by including specific disclosures and written protections in the purchase contract. Such a contract could include:

- ❖ Disclosure of all hazardous substances or materials associated with the property
- ❖ Disclosure of hazardous substance release/spill reports to local, state, or federal agencies
- ❖ Disclosure of the facility's environmental compliance record
- ❖ Disclosure of all environmentally-related investigations, studies or reports prepared about the facility
- ❖ Warranty that the seller has used due diligence to discover the existence of all information requested
- ❖ An agreement on who will assume any environmental liability should problems be discovered in the future. (**Caution!** *This may not provide much protection if the person assuming liability has insufficient assets to complete a cleanup.*)

Any agreement or property contract that assigns liability for contamination that occurred at a site before its purchase exists between the contracting parties only. Once you accept control of property you become potentially liable under state law.

For More Information

Contact Ecology's Toxics Cleanup Program Headquarters Office at (360) 407-7170 (voice), 407-6006 (TDD only) or 1-800-826-7716, or contact the regional office nearest you.

Northwest Region:

3190 160th Avenue SE
Bellevue WA 98008-5452
(425) 649-7000 (voice) or
(425) 649-4259 (TDD only)

Southwest Region:

5751 6th Ave SE Olympia
WA 98504-7775
(360) 407-6300 (voice) or
(360) 407-6306 (TDD only)

Central Region:

15 W Yakima Avenue
Yakima WA 98902-3452
(509) 575-2490 (voice) or
(509) 454-7673 (TDD only)

Eastern Region:

N 4601 Monroe Suite 100
Spokane WA 99205-1295
(509) 456-2926 (voice) or
(509) 458-2055 (TDD only)

Ecology's Toxics Cleanup Program Headquarters

Office, 1-800-826-7716 or
(360) 407-7170, for copies of the Hazardous Sites List, Site Register, Confirmed or Suspected Contaminated Sites Report, or the MTCA law and/or regulations.

Ecology's Toxics Cleanup Program, Underground Storage Tank Unit, 1-800-826-7716 for information about the registration of underground storage tanks. Contact the regional office for information about sites contaminated by leaking underground storage tanks.

Ecology's Hazardous Waste and Toxics

Reduction Program,
(360) 407-6700 (voice) or
(360) 407-6006 (TDD only)
for information on the
historical record of



companies filing notifications of dangerous waste activities.

Ecology's Hazardous Substance Information

Office, 1-800-633-7585, for information on land, air, and water emissions reported under Community Right-to-Know; hazardous substances present at a site subject to Community Right-to-Know laws; and information on pesticide use.

U.S. Environmental Protection Agency Region

10, (425) 553-1200 (voice) or (425) 553-1698 (TDD only), for further site specific information about federally managed hazardous waste (RCRA) sites in Washington, or a CERCLA (Superfund) sites list. Through EPA's Freedom of Information Act officer, you may request all the information EPA has on the property you're considering, and surrounding properties if you specifically request it. They prefer that you submit your request in writing. Within ten days, EPA will respond to your request for information. Using zip code they can search each EPA data base (RCRIS, CERCLIS, FINDS) and will ask each of their programs to identify all the

information they have about a piece of property.

Local Fire Districts or Emergency Response Agencies, check your local directory, for information on sites of chemical or toxic substance fires, explosions, or spills.

Local Health Department, check your local directory, for information about solid waste, moderate risk waste facilities, or contaminated drinking water systems in your area.

Local City and County Planning Departments, check your local directory, for information regarding local land use plans and zoning.

Local City and County Building Departments, check your local directory, for information about site use information.

Local library and Historical Societies for information on historic land uses, industries, and individuals.

Ecology is an Equal Opportunity employer. If you have special accommodation needs, please contact the Toxics Cleanup Program at (360) 407-7170 (voice) or (360) 407-6006 (TDD only).