

Contaminated Property Considerations

Focus on Real Estate Transactions

This publication is for anyone involved in real estate transactions: buyers and sellers, real estate brokers and agents, appraisers, lenders, attorneys, consultants, and developers. It identifies common concerns about contamination liability as it relates to property transactions and outlines investigative techniques to help you assess the potential for property contamination. This publication conveys considerations for property transactions, but is *not* a substitute for the expertise of a qualified environmental professional or environmental attorney.

Environmental laws about contaminated properties created liability in real estate transactions. You should minimize your risk by investigating a property's history before buying or leasing. Otherwise, you could be accepting liability for contamination caused by someone else and the cost of cleanup.

Rural, agricultural, and residential properties can have significant contamination problems, although commercial and industrial properties are more likely to be contaminated. You could be liable for cleaning up hazardous substances regardless of the land use of property you buy or lease.

Liability, due diligence, and all appropriate inquiry

This publication is not intended to determine when liability will be assigned under state or federal law, nor does it establish a standard of due diligence for conducting environmental site assessments (ESAs). [All appropriate inquiry](#)¹ (AAI), the term used by state and federal environmental laws for due

diligence, is the process of evaluating a property's environmental conditions and assessing potential liability for contamination. Due diligence is the term used to refer to AAI and/or an appropriate evaluation of the potential for contamination at a property in this publication. [ASTM International Standard E1527](#)² outlines the practice for conducting Phase I ESAs.

A person must be able to show they adequately investigated a property's history before its purchase or lease to establish a reasonable defense against liability for cleanup costs related to previous activities. The buyer may be held liable for cleanup if a property inspection was not conducted with due diligence or the buyer did not conduct an appropriate inquiry. Only Washington state-supervised cleanups completed under a legal agreement called a consent decree can settle your liability and provide protection from third-party contribution claims.

Definitions: Hazardous substance and hazardous waste site

Under the Model Toxics Control Act (MTCA), **hazardous substances** are any chemical or waste that could threaten human health or the environment. A **hazardous waste site**, also known as a **cleanup site** or **contaminated site**, is defined in MTCA as any site that Ecology has confirmed a release or a threatened release of a hazardous substance requiring remedial action ([WAC 173-340-200](#)³). In this publication, **contamination** refers to a release of a hazardous substance.

¹ https://www.epa.gov/sites/production/files/2015-05/documents/aai_reporting_factsheet.pdf

² <https://www.astm.org/Standards/E1527.htm>

³ <http://apps.leg.wa.gov/WAC/default.aspx?cite=173-340-200>

Hazardous waste laws: You could become liable

In the 1980s, laws were passed requiring identifying, investigating, and cleaning up contaminated sites. These laws impose potential liability on property owners, lessors, lessees, and others involved in managing or purchasing contaminated properties that require cleanup.

Most contaminated site cleanups in Washington are governed by two laws:

- **Federal:** [Comprehensive Environmental Response Compensation and Liability Act](#)⁴ (CERCLA), commonly known as Superfund and regulated by the U.S. Environmental Protection Agency (EPA).
- **Washington state:** [Model Toxics Control Act](#)⁵ (MTCA), 70A.305 RCW, regulated by the Washington State Department of Ecology (Ecology).

Liability under the laws is far-reaching

Even if you didn't cause the contamination on your property, you could be required to pay for all or part of the cleanup cost.

You may be liable for cleanup if you buy or lease a property knowing it is contaminated, or do not conduct adequate due diligence before buying or leasing the property.

Environmental liability can be costly. We recommend you hire an environmental professional experienced in conducting ESAs, before entering into a purchase or lease agreement on potentially contaminated property. The information in this publication should not be used to replace the advice and expertise of legal or technical specialists. A qualified [environmental professional](#)⁶ must conduct a Phase I ESA to meet the ASTM standard.

Why you need an environmental site assessment

Washington state or federal law doesn't require conducting a Phase I ESA before transfer of title; however, one is recommended to provide a defense to liability for cleanup costs. In Washington, individuals and companies conduct Phase I ESAs in response to the strict liability imposed by our hazardous waste laws. Lenders often require a Phase I ESA prior to issuing a property loan to protect themselves from default on payments due to the high cost of cleaning up contamination.

The buyer assumes the rights and responsibilities of property ownership. Failure to look into the environmental status of property prior to its purchase means 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.

An ESA also helps the seller ensure they are getting the best price for contaminated property or informs their decision to do a pre-sale cleanup. However, an ESA must be conducted on behalf of the buyer for them to use it as a liability defense. Buyers should get their own ESA even if the seller did one.

ESAs are not typically used to assess properties with fewer than five units and a history of exclusively residential use. However, heating oil tanks, septic tanks, cesspools, and hazardous building materials are potential sources of environmental issues and expense at residential properties. This publication focuses on commercial property transactions, which include purchases of property with a commercial or industrial history that will be redeveloped for residential use.



⁴ <https://www.epa.gov/superfund/superfund-cercla-overview>

⁵ <https://ecology.wa.gov/Spills-Cleanup/Contamination-cleanup/Rules-directing-our-cleanup-work/Model-Toxics-Control-Act>

⁶ <https://www.ecfr.gov/current/title-40/chapter-1/subchapter-J/part-312>

Who is liable?

- Current site owners or operators
- A person who owned or operated the site at the time of disposal or release of a hazardous substance
- A person who brought or caused a hazardous substance to be at the site

Liability is strict, joint, and several

According to state and federal laws, persons liable for sites where a contamination release has occurred or threatens to occur are strictly, jointly, and severally liable for cleanup costs.

Strict liability means that liability may be assigned regardless of who is at fault for the release. You may be held legally liable for cleanup, even if you did not cause the contamination.

Joint and several liability means that each potentially liable person can be required to pay all or part of the cleanup costs and environmental damages resulting from a 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 or some of the 100 people could be required to pay for cleanup.

If you complete an [independent cleanup](#),⁷ you can seek reimbursement from prior site owners and operators through a [Private Right of Action](#)⁸ claim.

Contamination liability affects financing

Banks may be less willing to lend money on contaminated property. The property could have diminished resale value. In extreme cases, contamination might make a property useless or could result in a financial liability greater than the original property cost or current market value.

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

- Liability to surrounding properties and affected individuals
- Cleanup costs
- Damage to natural resources, such as wildlife

- The stigma attached to contaminated property
- Difficulty in acquiring mortgage loans or insurance

Defenses to liability

MTCA provides some defenses to liability. A buyer who can prove no pre-purchase knowledge or reason to know of property contamination before acquiring it is not liable. However, the burden of proof lies with the buyer.

To meet the standard of proof to qualify for this defense, before buying, a buyer must be able to show “. . . all appropriate inquiry into the previous ownership and land uses of the property, consistent with good commercial or customary practice in an effort to minimize liability” (RCW 70A.305.040(3)(b)(i))⁹ have been made.

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

To decide if a buyer has a defense to liability, the courts would consider:

- The specialized knowledge or experience of the buyer
- The relationship of the price paid to the value of non-contaminated property
- Whether the buyer used commonly known or reasonably determined information consistent with good commercial or customary practices
- The notable or likely presence of contamination at the property
- The buyer’s ability to detect the contamination by inspection

You must maintain your liability defense after purchase. Due diligence is the first step to establishing a liability defense, but the buyer must prevent new releases and often mitigate and prevent potential exposures to existing contamination to maintain that defense.

⁷ <https://ecology.wa.gov/Spills-Cleanup/Contamination-Cleanup/Cleanup-process>

⁸ <https://apps.ecology.wa.gov/publications/documents/rtc95137.pdf>

⁹ [RCW 70A.305.040: Standard of liability—Settlement](https://apps.leg.wa.gov/rcw/default.aspx?cite=70A.305.040)

(<https://apps.leg.wa.gov/rcw/default.aspx?cite=70A.305.040>)

Questions a buyer should ask

The following questions may help identify activities or materials that could contribute to environmental liability at a property. Asking these questions does not meet the requirements of AAI, but may help the buyer determine if they would like to invest in ESAs. This list is not comprehensive but is a good start:

- What are the past land uses?
- Do current or previous land uses require a permit or regulatory compliance inspection?
- Have chemicals, pesticides, or fertilizers been used, treated, stored, or disposed?
- Are there underground storage tanks, dry wells, or other buried structures present where chemicals have been stored or disposed?
- Is the property served by city sewer, septic tank, drain field, or cesspool? (Chemicals disposed to a septic system or cesspool could be a source of contamination.)
- Was dirt, rock, or other material brought onto the property to level the ground, fill in wetlands, or for any other reason? Where did it come from?
- Are there asbestos-containing materials or lead-based paint in structures or buildings? (These materials are more common in buildings constructed before 1988.)
- Are any liquids discharging from the property?
- Are there any monitoring wells on the property?
- Is the property on or near sensitive environments or habitats, wetlands, streams, or archeological sites?
- What's on the seller's disclosure statement (Form 17 – see below)? (Note whether required environmental permits for a facility were obtained, the compliance record with environmental laws for current and past facilities at the property, and known environmental liabilities.)

Real estate disclosure law

Sellers and realtors must comply with real estate disclosure law. [Chapter 64.06 RCW](http://app.leg.wa.gov/rcw/default.aspx?cite=64.06)¹⁰ creates seller disclosure forms with questions about the property being sold, including whether it is contaminated. Real estate transactions include a seller disclosure statement, known as **Form 17**. You can get this form from your real estate agent, or copy the questions from RCW 64.06.020.

Unless the buyer expressly waives the right to receive the disclosure statement, the seller must provide Form 17. A buyer cannot waive the right to Form 17 if the answer to any of the questions in the Environment section is “yes.”

Definitions: Facility/site and property

MTCA defines a **facility** as any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft; or any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located. Under MTCA, **site and facility have the same meaning**.

A **property** is real property as defined by parcel number(s) and recorded by a County Assessor. A site is defined by the extent of the hazardous substance release, regardless of property boundaries. A site may include multiple property parcels and/or right-of-way. You could become liable for contamination that is not on a property you're purchasing or leasing.

¹⁰ <http://app.leg.wa.gov/rcw/default.aspx?cite=64.06>

Environmental site assessments

A Phase I ESA can minimize a buyer's chances of being liable for cleaning up contamination caused by a prior owner. A Phase I ESA is used to conduct AAI before a purchase and assesses the likelihood of hazardous substances being released at a property. A Phase I ESA report provides details of the assessment and lists recognized environmental conditions (RECs), if any are found.

The current version of [ASTM E1527](#) is the federally recognized industry standard for completing Phase I ESAs. A Phase I involves a records review, visual inspection, and interviews with people who are knowledgeable about the property's history. It evaluates a property's historical land uses and owners or occupants, and 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.

A Phase I ESA does not include collecting new environmental data, but the results of previous investigations can be reviewed and considered as part of evaluating the property's environmental conditions. You may add services to the scope of the Phase I ESA in your contract with the environmental professional.

A Phase II ESA is often conducted to evaluate RECs identified in the Phase I. A Phase II typically includes soil and water sampling to confirm the presence or absence of contamination. Completing a Phase II before purchase is optional. A buyer often does it beforehand to collect data, but it's not a required part of AAI. The Phase II can give the buyer better information about the extent of contamination at a property, or, if no contamination is found, remove the concern about potential contamination. [ASTM E1903](#)¹¹ outlines the practice for conducting a Phase II ESA.

What should be included in an environmental site assessment?

ASTM E1527 defines the minimum scope of a Phase I ESA. The history, land use, and circumstances of the property can broaden that scope. Properties near existing contaminated sites and properties on or near heavy industrial land are more likely to be contaminated. The greater the chance that a property is contaminated, the more detailed the analysis should be. A Phase I for a property near existing contaminated sites includes a review of standard federal, state, and Tribal environmental record sources. Hazardous building materials assessments for asbestos and lead-based paint are not part of the standard scope of a Phase I, but may be added if desired by the buyer or required by a lender.

If a buyer conducts a Phase I ESA and doesn't find contamination until after the property is purchased, the buyer may still be required to pay for its cleanup. The goal of a good quality Phase I ESA is to provide the user with an understanding of the environmental conditions at a property to help guide purchasing decisions and support a landowner liability defense. Phase I ESAs must be conducted by an environmental professional, which is defined by the ASTM standard and federal law.

A Phase II ESA is recommended for commercial sites that are on or have neighbors on federal or state hazardous sites lists to evaluate the potential presence of contamination. Even if they're not on a hazardous site list, properties with existing or past businesses known to store or use chemicals should also undergo a Phase II. A Phase II may also be conducted on any property where a Phase I has identified a likely release of hazardous substances.

Don't be deceived by the property size, location, or use. A few 55-gallon drums of chemicals can be stored anywhere, and they can contaminate thousands of gallons of groundwater and hundreds of cubic yards of soil. In more densely populated areas, the risk is greater for a relatively simple release to mix with a more serious one. Commingled plumes can be expensive and time-consuming to resolve.

¹¹ <https://www.astm.org/Standards/E1903.htm>

Check hazardous waste site lists

Our [Toxics Cleanup Program](#)¹² maintains a [Cleanup and Tank Search database](#)¹³ of all reported contaminated sites, which you can query to produce reports on a variety of site types. The most useful reports for ESAs are listed here, but more information is available online.

- The [Confirmed and Suspected Contaminated Sites List](#)¹⁴ shows potential and confirmed hazardous waste sites in Washington.
- The [Hazardous Sites List](#)¹⁵ contains sites that have gone through a preliminary study (Site Hazard Assessment) in the [state cleanup process](#).¹⁶ We [publish this list](#)¹⁷ twice each year. All sites on the Hazardous Sites List are on the Confirmed and Suspected Contaminated Sites List, but the reverse is not true.
- The [Leaking Underground Storage Tanks List](#)¹⁸ contains information on facilities with underground storage tanks that require cleanup and their cleanup history.

Our [Hazardous Waste & Toxics Reduction Program](#)¹⁹ maintains the [chemical hazards in your community web page](#)²⁰ that includes information about how to find out where chemicals are stored or have been released.

Do not assume that a property has no contamination problems because it is not on one of our lists. Contamination may not be discovered or reported to Ecology yet, or may be managed by a different agency. If you are considering purchasing

a property with ongoing activities that require a permit, license, and/or regulatory compliance inspections, such as a gas station, you can search Ecology's database of regulated [underground storage tanks](#),²¹ and [active and inactive facilities](#).²²

In addition to the state's lists, the EPA maintains a list of federal sites being cleaned up under CERCLA and sites that could be contaminated due to the handling of hazardous substances at facilities regulated under the [Resource Conservation and Recovery Act](#).²³ You can view [EPA hazardous waste cleanups in EPA Region 10](#),²⁴ search its [Toxics Release Inventory](#),²⁵ and [contact the Region 10 office](#)²⁶ to request information about known or likely contamination at a property.

Conduct interviews

Interviews can provide useful information about a property. When applicable, interview the following people:

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

Review regulatory records

Ecology can provide useful information about past releases at a property, along with other regulatory agencies such as the EPA, county health departments, and local planning offices. Information can be viewed or copied for a fee by contacting the applicable agency. The following

¹² <https://ecology.wa.gov/About-us/Get-to-know-us/Our-Programs/Toxics-Cleanup>

¹³ <https://apps.ecology.wa.gov/cleanupsearch/>

¹⁴ <https://apps.ecology.wa.gov/cleanupsearch/reports/cleanup/contaminated>

¹⁵ <https://ecology.wa.gov/Regulations-Permits/Guidance-technical-assistance/Site-Register-lists-and-data#HSL>

¹⁶ <https://ecology.wa.gov/Spills-Cleanup/Contamination-cleanup/Cleanup-process>

¹⁷ <https://apps.ecology.wa.gov/publications/UIPages/PublicationList.aspx?IndexTypeName=Topic&NameValue=Site+Register&DocumentTypeName=Newsletter>

¹⁸ <https://apps.ecology.wa.gov/cleanupsearch/reports/cleanup/lust>

¹⁹ <https://ecology.wa.gov/About-us/Who-we-are/Our-Programs/Hazardous-Waste-Toxics-Reduction>

²⁰ <https://ecology.wa.gov/Waste-Toxics/Community-waste-toxics/In-your-community>

²¹ <https://apps.ecology.wa.gov/cleanupsearch/reports/ust>

²² <https://apps.ecology.wa.gov/facilitysite/MapData/MapSearch.aspx>

²³ <https://www.epa.gov/enforcement/resource-conservation-and-recovery-act-rcra-and-federal-facilities>

²⁴ <https://www.epa.gov/hwcorrectiveactionsites/corrective-action-hazardous-waste-cleanups-region-10>

²⁵ <https://www.epa.gov/toxics-release-inventory-tri-program/tri-data-and-tools>

²⁶ <https://www.epa.gov/aboutepa/forms/contact-epas-region-10-office-seattle>

types of information are often available at regulatory agencies:

- Environmental permits (air, water, discharge, septic, etc.)
- Historic permits (plumbing, building, etc.)
- Hazardous waste manifests, storage notices, and waste generator reports
- Site inspection reports
- Spill reports
- Violation notices, administrative orders, compliance schedules, or other enforcement actions
- Correspondence
- Zoning, comprehensive plans, and business licenses

Review other public records

A variety of other useful public records can be found in local newspapers, local libraries, county auditor offices, and superior and district courts:

- Title records
- Existing environmental liens
- Surrounding property owners and zoning of properties
- Property boundary maps and aerial photographs
- Sanborn Fire Insurance Maps, Polk Directories, Cole Information
- Historical records and photos, including archival records, business records, manuscripts, and personal papers
- Books, periodicals, journals, and websites on local history
- Local newspapers and clipping files
- Historical society records
- Historical museum records

Site inspection

Many indications of environmental problems can be identified during a visual inspection. Any of the following signal possible 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
- Fill material consisting of waste materials
- Containers or drums with unknown contents
- Proximity of property to known or suspected contaminated sites or sources
- Proximity of property to industrial or commercial areas
- Proximity of property to a major highway or railroad line



A lack of vegetation may signal possible contamination.

The buyer should be thorough

Although valuable information may be obtained from federal, state, and local regulatory agencies, the buyer and the buyer's consultant will be responsible for acquiring, analyzing, and compiling the information and justifying the results. Remember, buyers have the burden of proving that they completed AAI to discover potential contamination. A buyer cannot complete due diligence on their own; a Phase I ESA must be completed by a qualified environmental professional on behalf of the buyer.

Always keep in mind, the more likely a property is to be contaminated, the more detailed the ESA should be. Keep ESA results. The information may be useful in the future for property transfers or resolving potential liability issues. It is just as important to note that a Phase I ESA evaluates

environmental conditions at a point in time. To be valid for an environmental liability defense, a Phase I ESA must be conducted within 180 days *prior* to purchasing or leasing a contaminated property. An older Phase I ESA may provide valuable information, but Phase I ESAs are only valid for 180 days.

Completing due diligence does not absolve a buyer of their responsibility to prevent exposure to site contamination. An owner or operator of a contaminated property must take steps to prevent new releases or exposures to existing contamination. This may be through restricting site access with fencing or adding a temporary or permanent barrier to prevent contaminant migration and exposure.

What to do if contamination is discovered

If a Phase I ESA identifies RECs indicating contamination may be present, a Phase II is often conducted to confirm the presence or absence of contamination.

If the Phase II confirms the presence of contamination that could threaten human health or the environment, you must [report it to Ecology](#).²⁷ Testing of surface and subsurface soil and water should be conducted to identify the extent of the contamination and potential scope of cleanup needed.

If you wish to purchase the property despite finding contamination, you may want to work with the current owner to arrange soil and water testing. You can seek technical assistance for a fee from our [Voluntary Cleanup Program](#).²⁸

Our [Brownfields Program](#)²⁹ can also help match your project to one or more of the wide range of federal and state funding and technical assistance opportunities. Learn more about [cleanup options](#)³⁰ on Ecology's website.

Property contracts: Disclosures and written protections

When acquiring industrial or commercial real estate, potential liability can be reduced by including the following disclosures and written protections in the purchase contract:

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



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To request an ADA accommodation, contact Ecology by phone at 360-407-6831 or email at ecyadacoordinator@ecy.wa.gov, or visit <https://ecology.wa.gov/accessibility>. For Relay Service or TTY call 711 or 877-833-6341.

²⁷ <https://ecology.wa.gov/About-us/Get-involved/Report-an-environmental-issue>

²⁸ <https://ecology.wa.gov/vcp>

²⁹ <https://ecology.wa.gov/Spills-Cleanup/Contamination-cleanup/Brownfields>

³⁰ <https://ecology.wa.gov/Spills-Cleanup/Contamination-cleanup/Cleanup-process/Cleanup-options>