

The Real Risk Of Property Transactions

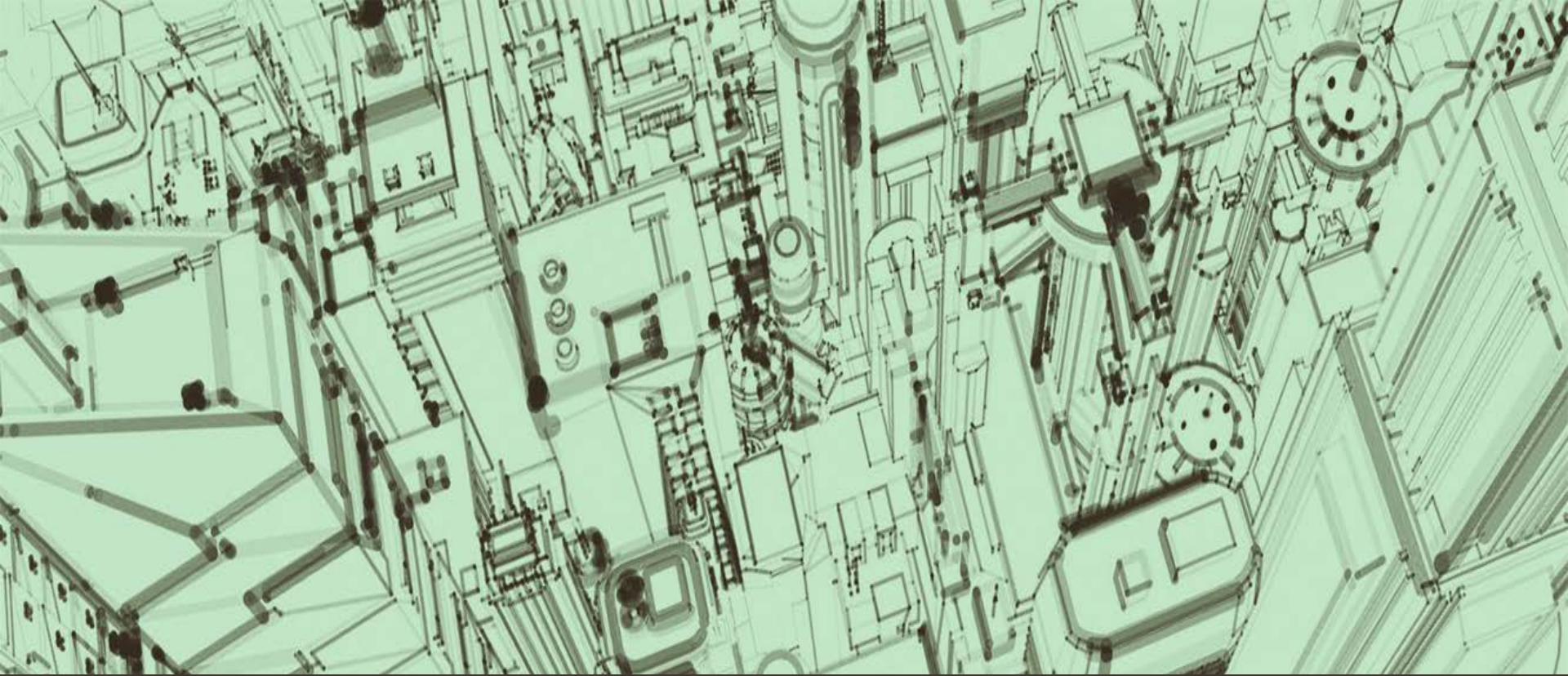
Why Smart Businesses Comply with Existing Environmental Regulations

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**ENVIRONMENTAL • GEOTECHNICAL
BUILDING SCIENCES • MATERIALS TESTING**

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Part 1 – Historical Perspective
Part 2 – Age of Laws & Regulations
Part 3 – Free Market Economy



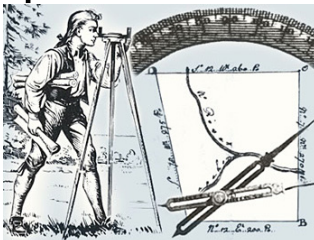
A Brief History of US Property Transactions

- In the 1600s land in the eastern US was settled by squatting
- Some (not much) was bought from Native Americans
- Indentured colonists - required to work 3 to 7 years on common land after which they might receive a 3 acre grant
- For each new emigrant (“head”) who worked for 3 years colonists were given the right (“headwright”) to survey and work 50 to 100 acres of land.
- Investors could get more land.
- Planters - 50 acres for every servant they imported.
- The Homestead Act of 1864 provided provided free land to encourage immigration to the unsettled western lands (repealed in 1976).



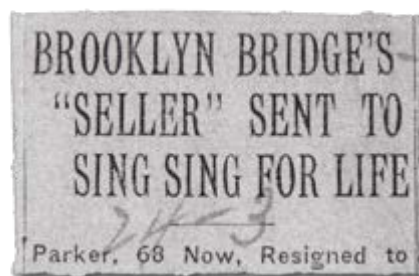
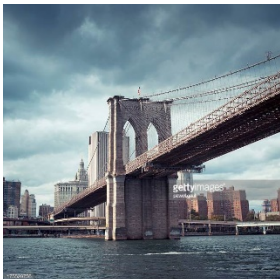
A Brief History of US Property Transactions

- In the 1700s landowners who surveyed tracts of land acquired patents certifying their exclusive ownership of a particular parcel.
- A land patent is an exclusive land grant made by a sovereign entity with respect to a particular tract of land.
- To get a patent the landowner must document the land grant, securely sign and seal the document (patent), and openly publish the document.
- A land patent is sometimes called a first-title deed.
- Land patents lead to the deed and title system we have today.



Famous U.S. Land Swindles

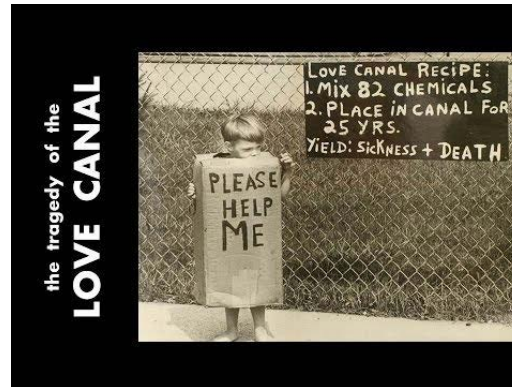
- White Picket Fences and the Like (Boise City, Oklahoma 1908)
- Land banking scams and the “Selling the Brooklyn Bridge” (George C. Parker 1920s)
- Selling Swampland In Florida (1920s, 1960s & 1970s)
- BarWorks (online brokerage 2017)



**BAR
WORKS**
WORK SPACE WITH VIBE

Contaminated Property Disasters

- Lead Contamination (Picher, OK 1920s)
- Nuclear Weapons Testing (Nevada 1951–1971)
- Dioxin Contamination (Times Beach, MO 1970s)
- Love Canal (Niagara Falls, NY 1976)





Part 2 – The Age of Laws & Regulations



What If You're Standing On A Property & Still Can't See "The Swamp" (CERCLA)?

- Buying, selling, owning or operating property got much more complicated in 1980
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) the "Superfund" law



CERCLA Liability (1980 – Present)

Potential responsible parties include:

- current owners or operators of hazardous waste sites
- persons who owned or operated the site at the time of disposal
- hazardous waste generators who arranged for disposal or treatment of their waste at the site; and
- transporters of the hazardous waste to a site from which there is a release or threatened release



CERCLA Liability (1980 – Present)

- Joint and several liability
- An innocent purchaser of a property could be held liable even though they may not have caused the contamination
- A claimant may pursue an obligation against any one party as if they were jointly liable and it becomes the responsibility of the defendants to sort out their respective proportions of liability and payment.



Superfund Amendments and Reauthorization Act (SARA)

- Passed by Congress in 1986
- Included liability protections known as the “innocent landowner provision” for purchasers of property as long as they completed “All Appropriate Inquiry (AAI)”



Small Business Liability Relief and Brownfields Revitalization Act

(“The Brownfields Law” Public Law No. 107-118, 115 stat. 2356)

- Passed by Congress in 2002
- Retained innocent landowner (ILO) liability protection from SARA
- Added two new liability protections:
 - bona fide prospective purchasers (BFPP)
 - contiguous property owners (CPO)



CERCLA Liability Protections

Innocent landowner (ILO)...

parties that acquire property and had no knowledge of the contamination at the time of purchase. Superfund distinguishes between three types of landowners:

- Purchasers who acquire property without knowledge of contamination on the property.
- Governments acquiring contaminated property through eminent domain authority by purchase or condemnation.
- Inheritors of contaminated property.



CERCLA Liability Protections

Bona Fide Prospective Purchaser (BFPP)...

a party who owns or acquires contaminated property but did not cause or contribute to the contamination and who acquires ownership after January 11, 2002.



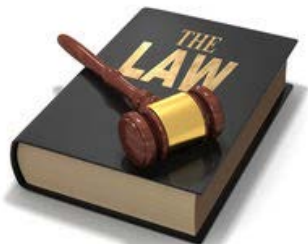
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CERCLA Liability Protections

Contiguous Property Owner (CPO)

a landowner who owns property that is or may be contaminated, but is not the original source of the hazardous substance contamination.

Unlike a BFPP persons who know, or have reason to know, prior to purchase, that the property is or could be contaminated, cannot qualify for the CPO liability protection.



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“Common Elements” To Qualify For CERCLA Liability Protections

<i>Summary: Common Element among the Brownfields Amendments Landowner Provisions</i>	Bona Fide Prospective Purchaser	Contiguous Property Owner	Section 101 (35)(A)(i) Innocent Landowner
All appropriate inquiry	• •	• •	• •
No affiliation demonstration	• •	• •	
Compliance with land use restrictions and institutional controls	• •	• •	• •
Taking reasonable steps	• •	• •	• •
Cooperation, assistance, access	• •	• •	• •
Compliance with information requests and administrative subpoenas	• •	• •	
Providing legally required notices	• •	• •	

All Appropriate Inquiry

The process of evaluating a property's environmental conditions and assessing potential liability for any contamination prior to purchase.

- In 2005 EPA published in the *Federal Register* a [final rule on standards and practices for all appropriate inquiries \(PDF\)](#)
- The 2005 Final Rule was updated on December 30, 2013 to reference the latest version (2013) of the American Society for Testing and Materials (ASTM) International's voluntary standard for conducting a **Phase I Environmental Site Assessment** (ASTM E1527-13)



Affiliation

A BFPP or CPO must not be "affiliated" with any other person who is potentially liable for response costs. Affiliations include:

- Direct or indirect familial relationships.
- Contractual, corporate, or financial relationships.
- The result of a business reorganization.



Reasonable Steps

- Another requirement for BFPPs, CPOs and ILOs is the obligation to take "reasonable steps" with respect to hazardous substances on their property.
- Reasonable steps include:
 1. stopping any continuing release,
 2. preventing any threatened future release, and
 3. preventing or limiting human, environmental, or natural resource exposure to previously released hazardous substance





Part 3 – The Free Market Economy



Do Laws & Regulations Provide Protection in a Free Market Economy?

“caveat emptor”

- First used in 1523 but relevant to today’s property transactions
- “let the buyer beware”
- Meaning the buyer assumes the risk in a transaction



Assumptions & Myths About Due Diligence & All Appropriate Inquiry (AAI)

- Only large property transactions are likely to have significant contamination & need AAI
- A Phase I ESA will take too long and kill the deal
- The cost of a Phase I ESA will kill the deal
- Experienced risk managers have “a feel” for which properties have liability and need a Phase I ESA
- A buyer always has legal recourse after completion of a deal against a seller of contaminated property
- If someone gives me property I shouldn't rock the boat (a deal this good doesn't come around every day)



Hypothetical Case Study – The Smaller The Property, The Smaller the Risk?

- 40 property, 400 acre portfolio
- Assessed value: \$12 million
- Due diligence completed on 38 properties in 30 days
- Phase I for 2 small properties (2 & 4 acres) required 45 days
- Escrow closed day 32
- Purchase price: \$12 million
- Cost to remediate 2 properties: \$2 million
- Buyer paid 17% more than market value



Case Study #1 – AAI Better Late Than Never?



- 77 acres of desert land
- Adjacent to City's new industrial park
- Sold to City in 2014 for \$10,868 by redi-mix cement company
- Phase I ESA (2017) identified 100 piles of construction debris
- Sometime between 2010 and 2012 debris bulldozed onto site from adjacent land
- 2017 sampling found asbestos
- Cost to City for offsite disposal of asbestos: \$250,000



Case Study #2 - There's No Such Thing As A Free Lunch

- Three parcel (12.3 acres) railroad property along historic highway through downtown of City
- Given to City in 1998 & 2004
- Cost to the City at the time: \$0
- Phase I ESA (2015) & Phase II ESA (2017)
- Electric generating station 1904-1940
- Coal/oil fired ice house between 1904-1967
- Cost to the City: \$350,000



Conclusions

- Property transactions today are more complicated than ever before
- There are laws and regulations that identify & hold potentially responsible parties liable
- These same laws and regulations can protect innocent purchasers and landowners
- Protection is not available unless AAI and due diligence is followed with each and every transaction
- AAI & due diligence are essential to avoid a modern day property swindle or a contamination disaster

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- Mr. David Laney is a Principal/Senior Project Manager with ATC Group Services LLC responsible for Arizona and the Southwestern US. He has 34 years of experience in environmental consulting including project and program management; site assessments/investigations; remediation of contaminated soil and groundwater; asbestos and lead-based paint building inspections and abatement; vapor intrusion assessments; site and underground storage tank closure; regulatory compliance and permitting; brownfields redevelopment; and green remediation.
- Mr. Laney has managed projects at sites and facilities for USEPA, the State of California, ADEQ, ADOT, ADOA, ADEMA, the Arizona Army National Guard, and numerous private sector clients in Arizona, California, Colorado, Nevada and New York.
- Mr. Laney is a Certified Hazardous Materials Manager an AHERA certified asbestos building inspector and contractor supervisor and an EPA certified lead risk assessor.