

Environmental Due Diligence

Nicholas G. Maloof, RPG
Associated Environmental Services, LLC
40701 Woodward Ave, Suite 50
Bloomfield Hills, MI 48304

(248) 203-9898
ngm@associatedenvironmental.net

Environmental Due Diligence

Real Property Law Academy I

State Bar of Michigan Real Property Law Section

Program

This program is designed to help you gain a basic understanding of the fundamental environmental risks in a Michigan real estate practice when counseling a Client with:

1. Purchasing, selling or refinancing real property. This could include transferring a property between business entities within the same “family tree;”
2. Leasing real property;
3. Purchasing businesses entities having related real property assets;
4. Operating businesses that have real property assets and/or impact real property by the nature of their operations; and
5. Taking advantage of environmental impacts to obtain benefits such as discounted price, economic and environmental incentives such as tax increment financing, tax abatements, grants, loans, and others.

Purpose

Why Conduct Due Diligence?

1. Legal Protection
2. Understand Condition of Property/Business
3. Negotiation of Price and Terms
4. Fixed Asset and Operational Liability Issues
5. Walk/No Walk from Deal
6. Incentives

You may remember “due diligence” from Real Property class, but it’s highly unlikely that your professor’s explanation included soil and groundwater testing for trichloroethylene (TCE), underground storage tanks (USTs) or the newest hot-button issue – Vapor Intrusion (VI).

Due diligence is crucial to any real property transaction. Many factors impact the type, timing and complexity of due diligence activities. These factors include, amongst others:

- the type of property (vacant land, residential, commercial, industrial);
- the current and historical uses of the property;
- the location of the property;
- whether bank financing is involved;

- the size of the property;
- the number of properties involved;
- known site conditions; and
- Legal protections from both State of Michigan and Federal liability.

Other Important and often overlooked issues are the relationship between buyer and seller as well as the purpose for doing the due diligence. **In fact the purpose for doing the due diligence can evolve over time as the site conditions are better understood.**

Most people conduct some type of due diligence when they purchase a home, whether it's a home inspection, having contractors run through to assess the structure and foundation, or simply purchase a home warranty.

So, if you wouldn't purchase a home without proper due diligence, why would you ever advise your client to purchase or lease a commercial or industrial property or acquire a business operation with related real property without conducting it?

Value of Due Diligence

The value of due diligence to an attorney is that it allows you to fully understand the nature of the transaction. As an attorney, your duty is to your client's best interests, which generally requires arming yourself with all relevant information. Conducting environmental due diligence is not simply a good idea—it is absolutely essential part of carrying out your job properly.

Without recommending that your client conduct environmental due diligence, it is impossible to understand the true condition of the property. You may be opening your client up to liability that they never knew existed; and opening yourself up to a potential grievance (I do not use the "G" word lightly) or malpractice suit. **It is important to recognize, there is no rational relationship between the monetary value of a business or a property and potential environmental liability exposure.**

The attorney that recommends and client that conducts proper environmental due diligence will find that they are better equipped to determine the actual value of a real-property investment, negotiate price and terms, and allow the attorney to properly advise their client as to the best course of action, if any is determined to be required.

To begin treading the path of environmental enlightenment, it is necessary to understand the basic Federal and State statutes that govern this area of law in Michigan. A majority of the areas related to real property transactions in Michigan are governed by State of Michigan law, but many have their basis in Federal environmental laws. In addition, sometimes both Federal and State Law can apply to a given situation, but with different outcomes.

The following are summaries of some of the commonly encountered regulations impacting real property transactions, development and financing.

Environmental Due Diligence

Federal Laws

CERCLA/SARA 42 U.S.C. §9601 et seq.

Link: <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title42/html/USCODE-2011-title42-chap103.htm>

The Comprehensive Environmental Response, Compensation, and Liability Act grants United States Environmental Protection Agency (USEPA or EPA) authority to finance environmental clean-ups and hold parties liable for the costs. This statute became known as “Superfund” due to the amount of money made available to EPA. Under the original CERCLA statute, EPA was granted sole discretion to identify and regulate the clean-up of qualified sites in all 50 states. CERCLA also provides for strict, joint, several and retroactive liability for those persons causing contamination, those persons arranging for disposal of contamination, the transporters of hazardous substances, as well as an owner or operator of a property with no culpability for the release, but also without liability protections.

It is important to note that “strict liability” means that someone can be held liable even if they are not responsible for causing the release. Merely owning or operating a contaminated site can result in incurred liability or if owner/operator did not conduct appropriate due diligence or does not undertake appropriate “due care” in owning/operating on the property.

In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA), which impacted many levels of the program: State and citizen involvement in the process was better defined; the use of permanent remedies and best available technologies was strongly encouraged; and enforcement provisions were strengthened, while at the same time giving deference to voluntary settlements.

In 2002, Congress passed the Small Business Relief and Brownfield Revitalization Act (Brownfield Amendments) which was designed to lessen the burden on businesses buying or redeveloping hazardous substance impacted property. For the first time Congress was permitting an entity to purchase property with known contamination while avoiding strict liability. These Landowner Liability Protections are self-implementing.

Defenses to liability under CERCLA include the following Landowner Liability Protections:

1. Innocent Landowner Defense (ILO);
2. Bonafide Prospective Purchaser Defense (BFPP); and
3. Contiguous Property Owners (CPOs) (Migration)

Link: <https://www.epa.gov/enforcement/landowner-liability-protections>

RCRA 42 U.S.C. §6901 et seq. (1976)

Link: <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title42/html/USCODE-2011-title42-chap82.htm>

The Resource Conservation and Recovery Act (RCRA) grants EPA the authority to regulate hazardous waste generation, transportation, treatment, storage, and disposal – so called “cradle to grave” liability. RCRA also governs non-hazardous solid waste, as well as underground storage tanks (USTs). EPA’s RCRA regulations provide specific hazardous waste definitions—including mixtures comprising hazardous waste in part—and outlines transportation, storage, and disposal protocols.

The most common impact to a real estate practice under RCRA will be in three areas: (1) remediation and disposal of contaminated materials; (2) transportation, storage and disposal facilities (TSDF); and (3) underground storage tank (UST) regulation, removal and closure.

Other regulatory impacts to a real estate transaction may include Institutional Controls and ongoing Due Care compliance. Institutional Controls are non-engineered instruments such as administrative and legal controls that help minimize the potential for human exposure to contamination and/or protect the integrity of the remedy. These can include Restrictive Covenants, Easements, and using Local Ordinances to prohibit certain activities (such as using groundwater for drinking water). Due Care compliance may require ongoing operations and maintenance (O&M), ongoing monitoring, providing a source of clean drinking water or other obligations as part of a remedy.

Both Institutional Controls and ongoing Due Care compliance can have a significant impact on a development opportunity and are increasingly common issues being encountered.

Link: <https://www.epa.gov/sites/production/files/2016-01/documents/icfactfinal.pdf>

TSCA 15 U.S.C. §2601 et seq. (1976)

Link: <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title15/html/USCODE-2011-title15-chap53.htm>

The Toxic Substances Control Act (TSCA) grants EPA the authority to regulate reporting, record-keeping, and testing requirements for chemical substances and mixtures. TSCA authority includes the production, use, and disposal of asbestos, lead-based paint, and polychlorinated biphenyls (PCBs). The lead-based paint tenant notice law for buildings constructed pre-1978 is a TSCA based duty for all landlords.

FIFRA 7 U.S.C. §136 et seq. (1996)

Link: <https://www.gpo.gov/fdsys/pkg/USCODE-2014-title7/html/USCODE-2014-title7-chap6-subchapII-sec136o.htm>

The Federal Insecticide, Fungicide, and Rodenticide Act grants EPA the authority to regulate pesticide distribution, sale, and use. Per FIFRA, it is unlawful to use any pesticide product that has not received EPA approval. Also, EPA may conduct regulatory compliance checks on FIFRA permit holder's facilities.

There are numerous others, but for most State of Michigan real property law practitioners, the above statutes are the most likely areas of Federal Law that would impact a real property law attorney's practice.

State of Michigan Laws

In Michigan, the Natural Resources and Environmental Protection Act (NREPA) was signed into law in 1994 and created a unified state-level regulatory framework governing Michigan's environment and natural resources. The Michigan Department of Environment, Great Lakes and Energy (EGLE) (formerly known as "MDEQ") derives its statutory authority from NREPA. NREPA is divided into multiple "Parts" each addressing a different topic and area of regulation. See Link: <http://www.legislature.mi.gov/documents/mcl/pdf/mcl-act-451-of-1994.pdf>

The most common "Parts" that you will encounter related to real estate transactions are related to historical use and operations on the property. These "Parts" are identified below.

Part 111 Hazardous Waste Management

Part 111 regulates the generation, disposal, storage, treatment, or transport of hazardous waste. Per EGLE regulations, a treatment, storage and disposal facility (TSDF) owner must file a notice in the register of deeds for the county where the facility is located. Such notice must provide the legal description of the property and state that the property has been used as a TSD facility. *If the facility is also a landfill, Part 115 requires a restrictive covenant be recorded in the county deed registry.*

Part 111 also requires that all waste is transported and disposed using a Manifest to track it; from its generation and acceptance of waste for transportation by a transporter to delivery of hazardous waste for disposal and requires an operating license for any hazardous waste disposal facility. Any hazardous waste disposal facility that ceases operations is also subject to closure requirements and a post-closure monitoring and maintenance plan.

A hazardous waste landfill is subject to extremely stringent post-closure requirements, records of which can be found with the EGLE, accessible either online or through a FOIA request. The post-closure process requires owners to provide EGLE with adequate financial assurance mechanisms to offset the cost of any post-closure cleanups that may become necessary. See [http://www.legislature.mi.gov/\(S\(svexsrq33fzpprzjvbtuuav\)\)/mileg.aspx?page=GetObject&objectname=mcl-451-1994-II-3-111](http://www.legislature.mi.gov/(S(svexsrq33fzpprzjvbtuuav))/mileg.aspx?page=GetObject&objectname=mcl-451-1994-II-3-111) and See Link: https://www.michigan.gov/documents/deq/deq-whm-hwp-Part111Rules_248146_7.pdf

EGLE also maintains a database of hazardous waste generators and records of waste generated. See <http://www.deq.state.mi.us/wdsp/AdvancedSearch.aspx>

Environmental Due Diligence

Part 115

Part 115 regulates solid waste landfills and non-hazardous recovery facilities. Although Part 115 facilities are usually for non-hazardous waste, certain industrial wastes may be allowed. Part 115 owners must execute a restrictive covenant in the register of deeds for the county in which the facility is located. Part 115 landfills must carry closure/post-closure requirements that are similar to those required for TSD facilities. See Link: <http://www.legislature.mi.gov/documents/mcl/pdf/mcl-451-1994-ii-3-115.pdf>

Liability for closing and capping a landfill is a “Status Liability” – if you own it you have the liability to comply with Part 115. A BEA under Part 201 of NREPA may provide liability protection under Part 201, but has no effect for the independent requirements under Part 115 to properly close a landfill.

Part 201

Part 201 regulates the cleanup of contaminated sites, similar to the federal CERCLA program. Liable parties must investigate and remediate releases of hazardous substances and provide reports to EGLE. Non-labile parties can also investigate and remediate releases of hazardous substances, but are not required to notify or submit reports to EGLE. Potential Owners and/or Operators of contaminated property can avoid liability if they either:

1. Are not responsible for the release of hazardous substances, and they became owner of the property before June 5, 1995, or;
2. The contaminated property was acquired and/or occupied after June 5, 1995 and an adequate Baseline Environmental Assessment (BEA) was conducted prior to or within 45 days of taking occupancy, possession or title (becoming and owner and/or operator) and the BEA was Disclosed to EGLE within 6 months of that date and the Owner and/or Operator discloses the results of the BEA to any subsequent purchasers or transferees.
3. The new owner and/or operator must complete and adhere to a section 7a Compliance Analysis (7aCA or Due Care Plan), or the parties continuing obligations.

Other avenues for Part 201 liability protection include:

- Whether the “facility” is subject to corrective action under Part 111 of NREPA;
- The owner is a lender that engages in a lawful marshalling or liquidation of personal property if the lender does not cause or contribute to the environmental contamination;
- Contamination has migrated onto the property, unless owner is responsible for the release;
- The release was caused by an act of God, an act of war, an act or omission of a third party, or
- The contamination is addressed in a no further action report that is approved by the EGLE.

Regardless of their potential liability, an Owner and/or Operator of a “facility” must take reasonable steps to prevent human exposure to hazardous substances and ensure that the pre-existing contamination does not

worsen (exacerbation) by any overt act. Overt actions can include grading and excavation which spreads contamination to uncontaminated areas or even contaminated areas contaminated by different hazardous substances.

Prior to taking the step of a full due diligence exercise, a prospective purchaser can check EGLE records of response activities and administrative settlement for past owners. That party can also seek to identify any restrictive covenant that may be recorded in the county register of deed where the facility is located to understand if the intended use is possible. See Link:
[http://www.legislature.mi.gov/\(S\(xkeox5halak1knz0hm5mygk5\)\)/mileg.aspx?page=GetMCLDocument&objectname=mcl-451-1994-ii-7-201](http://www.legislature.mi.gov/(S(xkeox5halak1knz0hm5mygk5))/mileg.aspx?page=GetMCLDocument&objectname=mcl-451-1994-ii-7-201)

Part 211

Part 211 governs the registration of underground storage tanks (USTs). Regulated USTs include gasoline, diesel fuel, and variations of kerosene such as jet fuel. Regulated USTs could also include USTs used in commercial and industrial operations as long as at least 10% of their volume (including connected underground piping) is ten percent or more beneath the ground and they contain "Regulated Substances." "Regulated substances" is defined in Section 21101(g) of Part 211 which includes petroleum and hazardous substances as defined in the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 1980 PL 95-510. Regulated USTs must be registered with the Department of Licensing and Regulatory Affairs (LARA) and a record of the registered USTs can also be readily accessed via the LARA Active UST List (see below) and MDEQ's online Environmental Mapper at <http://www.mcgi.state.mi.us/environmentalmapper/>.

See Link: [http://www.legislature.mi.gov/\(S\(5f0klap1sgngqxxlzhushlp\)\)/mileg.aspx?page=GetObject&objectname=mcl-451-1994-II-8-211](http://www.legislature.mi.gov/(S(5f0klap1sgngqxxlzhushlp))/mileg.aspx?page=GetObject&objectname=mcl-451-1994-II-8-211)

See also for a list of closed USTs:
http://www.michigan.gov/documents/lara/Copy_of_UST_LIST_Closed_545319_7.xls

See also for a list of active USTs:
http://www.michigan.gov/documents/lara/Copy_of_UST_LIST_Active_545316_7.xls

Notwithstanding the foregoing, regulated USTs do not include:

- USTs used to contain heating oil used for heating buildings;
- Farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes; and
- USTs with a capacity of 110 gallons or less,
- As well as a number of other exemptions.

Part 213

Part 213 regulates releases of Regulated Substances from USTs. Upon discovery of a release of regulated substances from a UST, the owner/operator has 24 hours to report the release to the EGLE. In addition to

Environmental Due Diligence

reporting the release, the owner/operator has a number of investigatory and reporting requirements to comply with Part 213. These reports include:

1. Initial Activities Report – a report summarizing all of the immediate initial actions undertaken at the time of release discovery. These activities include:
 - (a) Identifying and mitigating any immediate fire, explosion hazards, and acute vapor hazards.
 - (b) Taking action to prevent further release of the regulated substance into the environment including removing the regulated substance from the underground storage tank system that is causing the release.
 - (c) Using Risk Based Corrective Action (RBCA) investigation processes to identify Non-aqueous Phase Liquids (NAPL).
 - (d) Excavating and containing, treating or disposing of soil that is visibly contaminated if the contamination is likely to cause a fire or explosion hazard.
 - (e) Visually inspect the areas of any aboveground releases or exposed areas of below ground releases and prevent further migration of the released substance into surrounding soils, groundwater, and surface water.
2. Initial Assessment Report – Within 180 days after a release has been discovered, the owner or operator that is liable must complete an Initial Assessment Report for submittal to EGLE. The report shall include the following information:
 - (a) Results of initial actions taken as Initial Activities; and
 - (b) Site information and site characterization results.

As used in the statute, a contaminated UST site where a release has occurred (or “a threat of release exists”) with contamination exceeding the EGLE Cleanup Criteria Requirements for Response Activity is referred to as a “Site.” *The term “Site” is basically identical to the definition of the term “facility” under Part 201, with the odd additional portion “a threat of release exists.”*

“Threat of release” or “threatened release” means any circumstance that may reasonably be anticipated to cause a release...this is very open ended and does not provide an objective or bright line test, but leaves the condition open to interpretation and opinion.

As in other statutes, an owner or operator is liable if the owner or operator is responsible for an activity causing a release or threat of release.

However, an owner or operator is not liable if they became an owner or operator on or after March 6, 1996 and conducted a BEA prior to or within 45 days after the earlier of the date of purchase, occupancy, or foreclosure and the owner or operator provides a copy of the BEA to the EGLE within 6 months after the earlier of the date of purchase, occupancy, or foreclosure. The owner or operator also must disclose the BEA to a subsequent purchaser or transferee to maintain liability protection.

As under Part 201, there are numerous carve outs for certain parties under Part 213.

See

Link:

[http://www.legislature.mi.gov/\(S\(grury5t5ggul2aw2cfqykbc\)\)/mileg.aspx?page=GetObject&objectname=mcl-451-1994-II-8-213](http://www.legislature.mi.gov/(S(grury5t5ggul2aw2cfqykbc))/mileg.aspx?page=GetObject&objectname=mcl-451-1994-II-8-213)

Part 301

Part 301 regulates inland lakes and streams. An "Inland lake or stream"

means a natural or artificial lake, pond, or impoundment; a river, stream, or creek which may or may not be serving as a drain as defined by the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630; or any other body of water that has definite banks, a bed, and visible evidence of a continued flow or continued occurrence of water, including the St. Mary's, St. Clair, and Detroit rivers. An inland lake or stream does not include the Great Lakes, Lake St. Clair, or a lake or pond that has a surface area of less than 5 acres.

Part 301 prohibits the following activities without a permit:

- (a) Dredge or fill bottomland.
- (b) Construct, enlarge, extend, remove, or place a structure on bottomland.
- (c) Construct, reconfigure, or expand a marina.
- (d) Create, enlarge, or diminish an inland lake or stream.
- (e) Structurally interfere with the natural flow of an inland lake or stream.
- (f) Construct, dredge, commence, extend, or enlarge an artificial canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection with an existing inland lake or stream, or where any part of the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing inland lake or stream.
- (g) Connect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake, or similar water with an existing inland lake or stream for navigation or any other purpose.

See

Link:

[http://www.legislature.mi.gov/\(S\(w35u1yolxdgtueuum05mncda\)\)/mileg.aspx?page=GetObject&objectname=mcl-451-1994-III-1-INLAND-WATERS-301](http://www.legislature.mi.gov/(S(w35u1yolxdgtueuum05mncda))/mileg.aspx?page=GetObject&objectname=mcl-451-1994-III-1-INLAND-WATERS-301)

Part 303

Part 303 regulates activities within or impacting regulated wetlands. "Wetland"

means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh, and which is any of the following:

- (i) Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream;

- (ii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and more than 5 acres in size;
- (iii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and 5 acres or less in size if the department determines that protection of the area is essential to the preservation of the natural resources of the state from pollution, impairment, or destruction and the department has so notified the owner.

Although not defined in the statute, EGLE has defined “Contiguous” means within 500 feet.

There are also other ways to classify a wetland, such as types of vegetation or soil. Just because you don’t see standing water or cattails does not mean the property is not a wetland.

From a real estate transaction perspective, any type of vacant land transaction or improved property with a wooded area or areas near lakes, streams, ponds, etc. or intermittent standing water may be regulated as a “wetland.” EGLE inventories wetlands throughout the state, and makes these records available to the public through several outlets. The Wetlands Mapper is an EGLE online portal that allows users to search interactive maps to identify potential wetland issues.

However, even though a property may not be regulated by the State, some local governments have enacted far stricter regulation that regulates even fractions of acres of wetlands.

See

Link:

[http://www.legislature.mi.gov/\(S\(tgatkyadvedaospbeyjwyc12\)\)/mileg.aspx?page=GetObject&objectname=mcL-451-1994-III-1-INLAND-WATERS-303](http://www.legislature.mi.gov/(S(tgatkyadvedaospbeyjwyc12))/mileg.aspx?page=GetObject&objectname=mcL-451-1994-III-1-INLAND-WATERS-303)

Real Estate Due Diligence Activities/Process

ETS

The Environmental Transaction Screen (ETS) is a national consensus protocol under the American Society for Testing and Materials (ASTM) designated ASTM E1528-14 for screening real property. ASTM E1528-14 sets forth a procedure for conducting limited environmental due diligence, but does not convey any legal protections under federal law (CERCLA) or Michigan law (Part 201) for the user. The ETS is mostly used by financial institutions and other lenders using real property as collateral to screen the collateral for obvious environmental issues that may impact value or the ability of the borrower to repay the loan. The ETS does not convey any legal defense to liability that a properly conducted Phase I Environmental Site Assessment (ESA) does under the CERCLA LLPs as it does not constitute, “all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice” as defined in 42 U.S.C. §9601(35)(B). See <https://www.astm.org/Standards/E1528.htm>

Phase I ESA/AAI

The Phase I Environmental Site Assessment (ESA) is a national consensus protocol under the American Society for Testing and Materials (ASTM) designated ASTM E1527-13 for conducting “all appropriate inquiry (AAI)” when purchasing real property. ASTM E1527-13 sets forth a procedure for conducting the first steps of environmental due diligence constituting AAI to obtain the legal protections under federal law (CERCLA) or Michigan law (Part 201) for the user related to the “Innocent Landowner Defense” and the first step in qualifying for the “Contiguous Property Owner Defense” and/or the “Bona fide Prospective Purchaser Defense,” (collectively known as the “Landowner Liability Protections” or “LLPs”).

It is important to note that the ASTM E1527 protocol was adopted by USEPA as meeting the definition of “All Appropriate Inquiry (AAI).”

In 2005 EPA published in the *Federal Register* a final rule on standards and practices for all appropriate inquiries referencing the 2005 version (E1527-05) of the American Society for Testing and Materials (ASTM) International’s voluntary standard for conducting a Phase I environmental site assessments. The 2005 Final Rule was updated on December 30, 2013 to reference the latest version (2013) of ASTM International’s voluntary standard for conducting a Phase I environmental site assessment (ASTM E1527-13). Additional updates to the 2005 Final Rule were published in the October 6, 2014 *Federal Register* which terminates recognition of the 2005 ASTM International industry standard (E1527-05) as a method to meet AAI requirements. Parties performing AAI should refer to the 2013 ASTM International industry standard (E1527-13) to satisfy the requirement for AAI. More information on AAI is available on EPA’s All Appropriate Inquiries website. Link: <https://www.epa.gov/enforcement/landowner-liability-protections>

The Phase I ESA is generally performed prior to purchasing or otherwise taking possession and/or control of real property. The Phase I ESA should always be the first step of the environmental due diligence process by a purchaser or lessee of real property to determine the history of the property, its uses and the potential for hazardous substances to be present in the subsurface soil, soil gas/subsurface vapor and

groundwater. These conditions may also impact value or utility of the property. Most importantly, the properly conducted Phase I ESA conveys a legal defense to liability that an ETS does not by meeting the definition of constituting, “all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice” as defined in 42 U.S.C. §9601(35)(B). See <https://www.astm.org/Standards/E1527.htm>

A Phase I ESA is generally comprised of three parts:

1. Interviews with the property owner (typically via a questionnaire) regarding knowledge of environmental conditions, current uses, past uses, adjacent properties, etc.
2. A review of historical records pertaining to the property which should include, but is not limited to, state and federal databases, historical fire insurance maps (Sanborn Maps), historical topographic maps (USGS), historical aerial photographs, City Directories (Bresser's, Polk) current and historical municipal assessing, building, fire and health department records and current and historical land title records; and
3. A site reconnaissance to observe site conditions and identify visually obvious environmental concerns on the property or adjoining properties that could potentially impact conditions on your client's property.

The purpose of the Phase I ESA is to identify environmental conditions that qualify as: (1) “Recognized Environmental Conditions (RECs)” and (2) qualify for the “Innocent Land Owner Defense” under CERCLA or is the first step of the “Prospective Purchase Defense” if the property is contaminated and a Phase II ESA is then conducted to assess the condition of the property.

The term REC means, “the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment. De minimis conditions are not RECs” (2) Controlled RECs (CRECs), meaning conditions that qualify as RECs, but have been controlled through the use of property use/deed restrictions, AULs, institutional controls or engineering controls. CRECs are typically related to past releases that have been addressed, but where contamination still remains and is subject to the implementation of required activity use limitations (AULs) such as institutional or engineering controls; and (3) Historical RECs (HRECs), meaning conditions that previously qualified as RECs, but may have been remediated to less than actionable levels without subjecting the property to any required controls (e.g., property use/deed restrictions, AULs, institutional controls, or engineering controls).

Phase II ESA

A Phase II Environmental Site Assessment (ESA) is conducted following the identification of RECs/CRECs and sometimes HRECs on a property. The Phase II ESA typically consists of collecting surface and/or subsurface soil samples, soil vapor/gas and sub-slab soil vapor/gas samples and groundwater samples. Depending upon the nature of the suspected contamination, these samples may be analyzed for chemical constituents contained in solvents and oils such as volatile organic compounds (VOCs) (i.e. chlorinated solvents and gasoline components), polynuclear aromatic hydrocarbons (PNAs), metals and other substances. The EGLE has established allowable concentrations of regulated chemicals for both Residential and Non-residential land use scenarios. See <http://www.michigan.gov/deq/0,4561,7-135->

Environmental Due Diligence

Real Property Law Academy I
State Bar of Michigan Real Property Law Section

[3311 4109-251790--.00.html](#). The allowable concentrations of regulated chemicals vary from substance to substance based on the possible pathway to expose human beings as well as potential for impacting the environment.

If concentrations of regulated chemicals exceed the EGLE Cleanup Criteria Requirements for Response Activity (formerly the Part 201 Generic Cleanup Criteria and Screening Levels), then the property is considered a “facility” under Part 201 or a “site” under Part 213 of NREPA, P.A. 451 of 1994, as amended. Facility or Site status means that any purchaser or lessee: (1) may, prior to or within 45 calendar days of taking occupancy, possession or title, conduct a Baseline Environmental Assessment (BEA) and “Disclose” the BEA to the EGLE within six (6) months of the date of taking occupancy, possession or title; (2) must comply with Due Care requirements to render the site safe for its intended use; and (3) must prepare a section 7a Compliance Analysis or “Due Care Plan” as it is commonly referred.

For a list of known “facility” sites See <https://secure1.state.mi.us/FacilitiesInventoryQueries/>

For EGLE resource materials for the Part 201 and Part 213 Programs, See <http://www.michigan.gov/deq/0,4561,7-135-3311 4109 4215-101581--.00.html>

BEA

If the Phase II ESA identifies contamination exceeding the EGLE Cleanup Criteria Requirements for Response Activity, then a Baseline Environmental Assessment (BEA) – a combination of the Phase I ESA site conditions and historical property uses, a description of the known environmental impacts on the property and the intended use(s) of the property should be prepared and “Disclosed” to EGLE. EGLE maintains a record of all BEAs filed. Sites that have been subject to a BEA submission can be identified via the known “facilities inventory” list on the EGLE website as well as identified through the EGLE Environmental Mapper. A Freedom of Information Act (FOIA) request of agency records can be made. *In addition, the current the property owner/seller should have copies of the records is legally obligated to provide a copy of their BEA to a subsequent transferee.*

If concentrations of regulated chemicals exceed the EGLE Cleanup Criteria Requirements for Response Activity, then the property is considered a “facility” under Part 201 of NREPA, P.A. 451 of 1994, as amended. This means that: (1) any purchaser or lessee, prior to or within 45 calendar days of taking occupancy, possession or title, must conduct a Baseline Environmental Assessment (BEA) and “Disclose” the BEA to the EGLE within six (6) months of the date of taking occupancy, possession or title or become a liable party. See [MCL §324.20126\(1\)\(c\)\(i\)](#); (2) prepare a Due Care Plan to comply with the owner or operator’s continuing obligations rendering the site safe for its intended use; and (3) disclose known conditions to potential purchasers.

See https://www.michigan.gov/documents/deq/deq-ess-caap-manufguide-chap7_313424_7.pdf

See also http://www.michigan.gov/documents/deq/deq-rrd-BEA-BEACitizensGuide_357377_7.pdf and http://www.michigan.gov/documents/deq/deq-rrd-Part201CitizensGuide_247033_7.pdf

Environmental Due Diligence

Section 7a Compliance Analysis or Due Care Plan/Response Activity Plan

If a property qualifies as a “facility” under Part 201 or a “Site” under Part 213, the owner and operator must undertake Due Care, or continuing obligations, with respect to the contamination on the property to ensure that the contamination is not exacerbated as a result of the operations conducted on-site and that no complete human exposure pathways are present.

In order to show documentation with these legal requirements, a section 7a Compliance Analysis or “Due Care Plan” as it is commonly referred is prepared to outline proposed activities or measures to be taken to comply with the owner or operators Due Care requirements. If affirmative activities are undertaken or none are necessary based on the site conditions and proposed operations, a “Documentation of Due Care Compliance” Report can be prepared to document that the owner or operator has achieved compliance with their Due Care requirements.

Due Care Plans and Documentation of Due Care Compliance Reports are to be provided to subsequent owners and occupants of the property along with a copy of the BEA.

Note that there is case law holding that a property owner must disclose the “facility” status of the property to a subsequent transferee or the transaction is void as to law. See *Lapeer v Rice* http://courts.mi.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=290995&CourtType_CaseNumber=2 and *AD Transport Express vs. Michigan Materials* http://courts.mi.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=290236&CourtType_CaseNumber=2

Vapor Intrusion

Vapor Intrusion occurs when soil gas/vapors from volatile chemicals in contaminated soil or ground water migrate through subsurface soils and/or preferential pathways (such as underground utilities, sumps, floor drains, etc.) and impact the indoor air quality of an overlying building. Some vapors are capable of penetrating cracks, expansion joints and other openings in the concrete floor slabs and foundations of structures. To avoid this exposure pathway, preventative measures can be implemented to mitigate the impacts of vapor intrusion. These measures can include removal of underlying impacted soils, installing engineering controls such as a sub-slab vapor barrier for new construction, floor coatings such as RetroCoat™ (See <http://www.landsciencetech.com/technologies/retro-coat/>) or mechanical systems such as sub-slab depressurization systems (See <http://www.itrcweb.org/PetroleumVI-Guidance/Content/Appendix%20J.%20Vapor%20Intrusion%20Control.htm>).

The issue of VI is a red-hot issue with the USEPA, EGLE and Michigan Department of Public Health (MDPH). Each agency has its own guidance, rules and screening criteria – some that contradict each other. Cooperation has been lacking between the agencies and their guidance to date has been reactionary and updated guidance draconian. This is an area rife with troubles for a real estate transaction and is not cheap to investigate nor mitigate.

UST Removal/Closure

USTs can present several hazards for a property owner. In addition to potential contamination issues, the tanks may deteriorate to the point of collapse, which can present a subsidence hazard potentially damaging to both persons and property. LARA maintains records of registered USTs, but those installed prior to registration and reporting requirements may be difficult to find unless a thorough review of historical records is conducted. Even then, thousands of unknown USTs have been discovered over the years – especially when redeveloping previously developed property. Regardless of liability status, an owner of a property becomes owner of any abandoned or unknown USTs and becomes responsible for removal upon discovery. See http://www.michigan.gov/lara/0,4601,7-154-42271_4115_4238---,00.html

Brownfield Incentives

Brownfield Incentives are a broad range of incentives to assist land developers, investors, prospective purchasers and owners of contaminated, blighted or functionally obsolete properties with investing resources to redevelop these properties by off-setting the extra-ordinary costs of development associated with remedying the contamination, blight or functional obsolescence. Brownfield Incentives can include Tax Increment Financing, Grants, Loans, Tax Abatements or any combination thereof.

See http://www.michigan.gov/deq/0,4561,7-135-3311_29262---,00.html and http://www.michiganbusiness.org/cm/Files/Community_Development/2015-Community-Incentive-Guidance.pdf.

In addition, if a structure is Historic, it may qualify for Historic Tax Credits through Federal programs. See <https://www.nps.gov/tps/tax-incentives.htm>.

Qualification of Site

Under 1996 PA 381, a site is meets brownfield classification if it is a “site,” “property,” “facility,” “blighted,” or “functionally obsolete.” Facility status is defined under Part 201. Site and Property status are defined by Part 213. “Blighted” and “Functionally Obsolete” are terms defined in P.A. 381.

Tax Increment Financing / Act 381

The Tax Increment Financing (TIF) mechanism was established under P.A. 381 of 1996, as amended, to allow for the capture of future ad valorem property taxes to repay developer costs related to completing Brownfield related “eligible activities.” This mechanism is intended to provide an incentive for redevelopment of contaminated, blighted and obsolete properties while simultaneously promoting growth in the tax base for the community. After approval of a Brownfield Plan, a municipality enters into a reimbursement agreement with the developer that sets the terms for repayment over an extended period of time of up to thirty (30) years under the statute.

Environmental Due Diligence

Grant and Loans

The Brownfield Revolving Loan (BRL) and Brownfield Revolving Grant (BRG) programs were established by EGLE to provide access to Brownfield clean-up funding for qualified sites. The BRL program can be used in connection with TIF to provide eligible activity funding. Unfortunately, the legislature has not provided funding for the 2017-2018 fiscal year. EGLE has only a limited amount of funds remaining and once the funds are gone, this incentive will not be available until the BRLs start repaying their principal and/or the legislature allocates additional funding.

Tax Abatements

Tax abatements are another mechanism available to aid re-development. Examples of this type of program include Commercial Rehabilitation, Commercial Revitalization and Industrial Facilities Tax Abatement programs. These mechanisms abate future taxes, and are intended to offset the added costs of development on environmentally compromised sites. A keen eye will spot that these programs negate the ability to use TIF, to the extent taxes are abated, until the abatement period has expired as no or reduced new property taxes being generated means no or reduced TIF dollars for eligible activities reimbursement under a Brownfield Plan.

Local Remediation/Loan Funds

In addition to state programs, communities may establish their own incentive programs (Local Site Remediation Revolving Fund or LSRRF) to encourage re-development on local Brownfield sites. In addition, other programs can take a number of forms and may have additional dollars to aid a re-development project, these can include regional development groups like SEMCOG, the Downriver Community Conference Brownfield Consortium, or local municipal organizations such as a Land Development Finance Authority (LDFA), Downtown Development Authority (DDA), or Brownfield Redevelopment Authority (BRA).

Negotiation Plays / Strategies

1. Extend Due Diligence
2. Seller Participation
3. Brownfield Incentives
4. Renegotiate the Deal
5. Walk Away

Now that you have all this fantastic information, it is time to discuss how to put it to good use. When carrying out environmental due diligence, one factor more than any can help or hinder you: time.

The average due diligence period for a commercial property is typically 30 days and 45-60 days if you have a reasonable seller. However this may not be sufficient time to complete all the necessary due diligence tasks. If you find yourself in this position, you can advise your client to consider extending the due diligence

Environmental Due Diligence

period: it is better to give an additional due diligence extension fee now rather than realize they overpaid for the property or discover a huge Due Care cost obligation after closing!

A Brownfield incentive program may be available to offset some or all of the upfront cost of Due Care Compliance and/or if required, some type of remediation activities. Again, it is important that you understand the incentive process fully, especially the projected timeline. Keep in mind that you are dealing with government entities and your ability to access these funds depends on multiple levels of approval.

Also, keep in mind that contamination can be a useful tool in negotiation. If you recall from the statutory section, sellers have a duty to disclose and failure to do so can provide you and your client with leverage. How you use that leverage is entirely up to you, but knocking money off the sale price is generally the first thing that comes to mind.

Lastly, the facts may indicate that the transaction is not feasible from a financial perspective. Nobody likes to be the bearer of bad news, but it may be necessary when large sums of money are on the line. Your client might be disappointed when confronted with reality, but making a difficult decision today could head off facing millions of dollars in costs or worse, liability for clean-up or tort liability for human exposures to contamination, down the road. **Remember, there is no rational relationship between the value of a property or a business and potential environmental liability.**

Initiating and Expediting Due Diligence; Lender Issues

Environmental activities should be initiated as soon as the deal is inked and at the same time as the appraisal, survey, and other due diligence. The more time allowed to perform due diligence activities, the more time left to resolve any issues, should they arise.

Allow at least 45 days to complete minimum due diligence (i.e. a Phase I ESA, PCA, ALTA Survey, etc.).

Allow for at least one 45-day extension to investigate any issues that arise; 90 days is preferable. For development projects you need much longer.

You can help expedite the process by providing the following items at the time the Phase I ESA or other environmental due diligence work is ordered:

1. Client contacts with addresses, emails and telephone numbers;
2. Entity name for the legal entity taking title and/or possession and/or occupancy of the property;
3. Legal description of the property;
4. Title work with underlying documents – especially for any deed and/or use restrictions;
5. Previous land surveys and environmental reports;
6. Complete site descriptions; and
7. Site contacts with addresses, emails and telephone numbers

Typical Environmental Due Diligence Timeframes and Costs:

Environmental Due Diligence

Real Property Law Academy I
State Bar of Michigan Real Property Law Section

- **Phase I ESA:** three to four weeks, depending upon project location, complexity, site access, etc. *Typical fee range: \$2,100.00 - \$2,800.00+;*
- **Phase II ESA:** three to six weeks, depending upon location, complexity, site access, weather conditions, etc. *Typical fee range: \$3,500.00 - \$25,000.00+;*
- **BEA:** two to three weeks after completion of Phase I ESA & Phase II ESA. *Typical fee range: \$3,500.00 - \$4,500.00 (in addition to the Phase I and II ESA fees);*
- **7a Compliance Analysis or Due Care Plan:** two to three weeks after completion of Phase I ESA & Phase II ESA; can be completed concurrently with the BEA. *Typical fee range: \$1,800.00 - \$2,500.00 (in addition to the Phase I and II ESA and BEA fees)*

Financing Requirements:

1. Most lenders require some type of pre-loan environmental due diligence;
2. Many lenders will require compliance with Due Care Obligations if a property is contaminated; and
3. Lenders will typically conduct pre-foreclosure environmental due diligence or in the alternative just sell the Note

Due Diligence – Real Life Mistakes

Real Life Mistakes When Purchasing Real Property

No Due Diligence

- Seller bought property in 2004 – no environmental due diligence
- Tried to sell in 2014, buyer conducts Phase I ESA
- Phase I ESA identifies former dry cleaner on-site, evidence of “sludge” spills and poor housekeeping
- Phase II ESA confirms presence of very high concentrations of tetrachloroethylene (PCE) and breakdown products in soil and soil vapor below building
- Buyer walks and 1st deal implodes
- 2nd buyer walks 2 weeks later 2nd deal implodes
- Seller liable for cleanup as he did not conduct due diligence before purchase and now has knowledge of contamination and risks to human health

Limited Due Diligence

- Buyer conducts Phase I ESA
- Phase I ESA identifies former gas station on-site, prior UST Assessment samples identify contamination near former tanks
- Buyer corroborates through personal knowledge of Seller
- Phase II ESA recommended
- Buyer refuses to spend additional dollars and says he will “...take his chances with MDEQ enforcement...” closes on deal without any other due diligence
- See prior example as to what can go wrong with that strategy!

Transactional and Development Case Studies

The following Case Studies provide real life examples of Due Diligence related to the acquisition or acquisition and development of real property.

Case Studies in Workout and Foreclosure Properties

Example #1 - Multi-family Residential Rental Complex

Scenario: AES was retained by a foreclosing lender to review a previously prepared Phase I Environmental Site Assessment (ESA) and determine whether a Phase II ESA was necessary for pre-foreclosure due diligence purposes. AES reviewed the report and concurred with the Phase I ESA recommendation that a Phase II ESA was necessary to investigate the historical use of the property as an orchard due to the high probability of the historical use of herbicides and pesticides at the site (lead arsenate, DDT, etc.). AES prepared a scope of work to assess the areas of the subject property that were

identified as containing the former orchard as well as areas that were outside the suspected area in order to determine the impacted areas, if any. AES drilled twenty-six (26) soil borings and analyzed the samples for arsenic, lead, herbicides and pesticides. The suspected area of the former orchard was confirmed to contain arsenic in excess of the Michigan Department of Environmental Quality (MDEQ) Cleanup Criteria Requirements for Response Activity for Direct Contact (DC) at a depth between .5 and 1 foot below the ground surface. AES advised the client that should it wish to foreclose that a Baseline Environmental Assessment (BEA) would be required and that a Due Care Plan must be prepared to address the arsenic concentrations exceeding MDEQ DC concentrations. In addition, AES was requested to prepare a rough cost estimate for further investigation and remediation of the impacted soils.

Outcome: The lender ultimately sold the Note at a discount rather than spend the additional capital required for continued due diligence and remediation activities. The main driver behind the lender's decision to sell the Note and not foreclose was not necessarily cleanup liability, but potential tort liability from human exposures to arsenic contaminated soils.

Example #2 - Recreational Property

Scenario: AES was retained by legal counsel representing a Court Appointed Receiver, appointed at the request of a lender, to prepare a Phase I ESA for a potential sale of the collateral (real property). AES identified a number of RECs related to the property and recommended that a Phase II ESA was necessary for pre-foreclosure or pre-sale due diligence purposes. AES drilled fourteen (14) soil borings adjacent to existing ASTs, former USTs and adjacent to floor drains inside a service building. The property was contaminated with petroleum hydrocarbons and qualified as a "property" or "site."

Note: A facility is a parcel of land impacted by hazardous materials regulated under Part 201. A "site" or a "property" is contaminated due to a release from an underground storage tank system.

Outcome: As the existing uses and operations would be continuing under the new purchaser, AES recommended that a BEA and Due Care Plan be prepared for the potential new purchaser and that Engineering Controls be installed in all high-risk areas to prevent exacerbation of the existing contamination.

Example #3 - Multi-tenant Industrial Property

Scenario: AES was retained by a foreclosing lender to prepare a Phase I ESA for foreclosure and potential sale of the collateral (real property). AES identified a number of RECs related to the historical use of the property and recommended that a Phase II ESA was necessary for pre-foreclosure due diligence purposes. *It should be noted that three prior Phase I ESAs conducted on the property failed to identify the historical use of chlorinated solvents and related complaints of releases due to the fact that the national company hired to conduct them failed to check the local municipality's Building and Fire Department files – even though they were retained to do so.*

Outcome: AES drilled fifteen (15) soil borings inside the buildings within the suites/units identified with the suspect high-risk past uses. The property was identified as being contaminated with perchloroethylene (PCE or "Perc"), a chlorinated solvent, caused by a former tenant, in excess of MDEQ Cleanup Criteria Requirements for Response Activity and qualified as a "facility." AES recommended that a BEA and Due Care Plan be prepared for the foreclosing lender and that Engineering Controls be installed

in all high-risk areas to prevent human exposure, exacerbation of the existing contamination and contamination by the current tenants of the building with different chemicals.

It should be noted that at the time of the original site investigation activities, the concentration of all contaminants was less than the applicable Vapor Intrusion Screening Levels.

However, on June 20, 2017, the MDEQ rescinded Appendix D of the 2013 DEQ VI Guidance – the vapor intrusion screening values provided in Appendix D.1 (i.e., Residential Vapor Intrusion Screening Values) and in Appendix D.2 (i.e., Nonresidential Vapor Intrusion Screening Values).

MDEQ's email stated, "MDEQ rescinds Appendix D of the 2013 DEQ VI Guidance. The vapor intrusion screening values provided in Appendix D.1 (i.e., Residential Vapor Intrusion Screening Values) and in Appendix D.2 (i.e., Nonresidential Vapor Intrusion Screening Values) of the 2013 DEQ VI Guidance no longer reflect the DEQ's determination of values that represent the best available information regarding the toxicity and volatilization to indoor air exposure risks posed by the hazardous substances as required by Section 20120b of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. Because Appendix D has been rescinded, the values in Appendix D may no longer be utilized to conduct a site-specific evaluation of the volatilization to indoor air pathway (VIAP)."

Based on the foregoing, the prior conclusion that a vapor intrusion concern did not exist is no longer valid and the Vapor Intrusion Pathway must be re-examined.

Unfortunately, MDEQ guidance published in August 2017 has only compounded the problem as the new "Media-Specific Volatilization to Indoor Air Interim Action Screening Levels - August 2017" are so low that almost any site using chlorinated solvents will fail to comply.

Stay tuned on this one...!

Case Studies in Re-use and Redevelopment

Example #1 – Former Commercial Structure, St. Clair Shores, Michigan

Scenario: Property contained a large structure that was blighted and functionally obsolete. Owner was willing to demolish, but needed assistance with pre-demolition due diligence and creative way to recoup demolition costs and expenses. Owner's legal counsel contacted our firm to help determine if any incentives were available.

Solution: AES contacted Macomb County Site Assessment Fund (SAF) and prepared and submitted an application for funds to conduct a Hazardous Materials Survey (HMS) as well as prepare a Brownfield Plan (BP) on behalf of the developer to recoup demolition related costs and expenses, which was approved.

Example #2 – Family Dollar Store in Detroit, Michigan

Scenario: Property was formerly operated as a gas station with at least 4 known USTs; in-ground hoists and suspect asbestos containing building materials (ACBM) and lead based paint (LBP). Developer wanted to purchase property and redevelop for a build-to-suit for a national retail tenant and requested assistance with a Brownfield incentive package.

Solution: We contacted Wayne County Site Assessment Fund (SAF) and prepared and submitted an application for funds to conduct Phase II ESA, ground penetrating radar/electromagnetic (GPR/EM) and Hazardous Materials Survey (HMS), which was approved. The SAF also paid for partial preparation of a BEA and 7a Due Care Plan.

The above work was then used to prepare a Brownfield Plan for approval by the City of Detroit, MDEQ and MEDC. The project was approved for eligible activities reimbursement that totaled almost 35% of the entire project development budget to be reimbursed through TIF.

Example #3 – Cardinal Health Medical Warehouse in Detroit, Michigan

Scenario: Property contained contaminated soil and groundwater, abandoned buildings, former building foundations and infrastructure, former rail yard and petroleum bulk storage facilities. Property assemblage contained 23 blighted structures requiring hazardous material surveys, abatement, and demolition before redevelopment. These properties included vacant lots, vacant residential homes, commercial parcels, a variety of industrial buildings/properties, and streets and alleys that would require abandonment.

The 28 acre site was assembled from over 110 lots and 85 properties that were former residential, commercial and industrial sites for re-development into a 275,000 square foot medical warehouse development (Phase 1 of project) on 19 of the 28 acres valued at over \$32,000,000. Phase 2, if constructed, could add up to a 100,000 square foot or more expansion.

Contamination identified at the property included chlorinated solvents, other volatile organic compounds (VOCs), polynuclear aromatic hydrocarbons (PAHs), petroleum products, and metals. Remediation

required the removal of 10 underground storage tanks (USTs), 14,600 gallons of UST liquid and sludge, 7,300 tons of contaminated soil, and abatement of regulated materials prior to demolition of structures.

Upon completion of demolition and initial remediation, the remaining exposure pathways of concern were direct contact and indoor air inhalation, which were mitigated through the installation of a sub-slab passive ventilation system under the entire 275,000 ft² structure with engineered vapor barrier and direct contact barriers (i.e., demarcation barriers, soil covers, berms, and security fencing).

Solution: AES provided pre-development site investigation services, including a review of existing environmental data. AES developed the overall incentive package, prepared each related applications/submittal packages and attended public meetings with the City of Detroit, Detroit Brownfield Redevelopment Authority (DBRA), MDEQ, MEDC/MSF and other agencies, conducted community outreach meetings in conjunction with Client and provided overall Brownfield incentive consultation.

Developer paid for Brownfield Plan (BP) preparation to recoup the following eligible activities
Environmental Due Diligence expenses:

1. Non-grant and loan paid portions of the Phase I&II ESA, BEA and 7a Due Care Plan;
2. UST removal and disposal;
3. Building demolition related costs and expenses;
4. Site preparation related expense including Pavement removal, Utility disconnect and re-connect;
5. Soil and groundwater remediation;
6. Installation of engineering controls and barriers; and
7. Site rough and finish grading related costs and expenses.

A multi-layered capital stack comprised of developer equity, grants, loans, tax abatements and lender capital were necessary for the project to be undertaken and completed. Financial sources included:

1. Sponsor and Developer Equity;
2. Brownfield Tax Increment Financing (TIF);
3. MDEQ Grant;
4. MDEQ Loan;
5. Detroit Wayne County Port Authority (DWCPA)/USEPA RLF Loan;
6. Michigan Strategic Fund (MSF) Community Revitalization Program (CRP) Grant;
7. P.A. 198 Industrial Facilities Tax Abatement;
8. P.A. 328 Personal Property Tax Abatement; and
9. Lender capital

Outcome: The property was re-developed and approximately \$32M in new investment was made in the property. The project was awarded over \$13.5M of TIF reimbursed expenses for eligible investment activities. Additionally, the project was awarded over \$8M in property tax abatements, \$2.5M in MDEQ related Grants & Loans, a DWCPA Loan of \$700K and a \$1M CRP Grant. The project was completed and tenant moved in May 2015. The project was selected from over 80 other submittals for the 2015 Redevelopment & Renewal Award - a very prestigious national award in the Brownfield arena.

For questions or to discuss a matter in confidence, please feel free to contact me at (248) 203-9898 or via email ngm@associatedenvironmental.net.



NICHOLAS G. MALOOF is President and General Counsel of Associated Environmental Services, LLC (AES), an environmental services, land development and real estate consulting firm based in Bloomfield Hills, Michigan. Mr. Maloof is an active member of the State Bar of Michigan and has over twenty-two years of experience as a transactional attorney and thirty years of experience in the field of environmental and real estate consulting. A majority of his work is conducted with or on behalf of attorneys, financial institutions, developers, investors, property owners and real estate brokers.

Mr. Maloof received his Juris Doctor from Michigan State University College of Law, his Master of Science Degree (MS) in Earth Science from Western Michigan University and his Bachelor of Science Degree in Business Administration from Aquinas College. He is also a Registered Professional Geologist in the State of Tennessee and a licensed Associate Real Estate Broker and Title Insurance Resident Producer in the State of Michigan.

Over the past thirty plus years, Mr. Maloof has been involved in thousands of real estate transactions and land development projects from site selection, due diligence, financing and development entitlement standpoint, as well as numerous Workout, Foreclosure and Bankruptcy related matters. Mr. Maloof has advocated and been involved in what would become known as Brownfield Redevelopment since 1989 when Site Reclamation Fund Grants first became available and has obtained tens of millions of dollars of Tax Increment Financing (TIF), Brownfield Tax Credits (SBT/MBT), Grants and Loans, Tax Abatements, Site Assessment Funds (SAF) and other economic incentives throughout Michigan for Brownfield Redevelopment projects. His tenure includes: being a Past President (2007) of the Commercial Board of Realtors (CBOR) in Michigan, the statewide commercial board which owns the Commercial Property Information Exchange (CPIX); a Member of the International Council of Shopping Centers (ICSC) East Michigan Alliance Program Steering Committee; has previously sat on the Board of Directors for the National Association of Industrial and Office Properties (NAIOP) – Detroit Chapter; and a Member of the University of Michigan/Urban Land Institute (UM/ULI) Real Estate Forum Steering Committee which just celebrated its 25th anniversary. Mr. Maloof is the also Chairman of the Oakland County Bar Association (OCBA) Energy, Sustainability and Environmental Law (ESEL) Committee for 2017-2018.

As an active member and frequent speaker for the State Bar of Michigan Real Property Law Section, Mr. Maloof is also an approved Continuing Education Instructor with the State of Michigan and has presented numerous accredited educational programs for the State Bar of Michigan, ICSC, ICLE, Lorman Education and CBOR. He is a faculty Member of the State Bar of Michigan (SBM) Real Property Law Academy for 2017-2018.

Contact Information:

Nicholas G. Maloof, RPG
President and General Counsel
Associated Environmental Services, LLC
40701 Woodward Avenue, Suite 50
Bloomfield Hills, Michigan 48304
T (248) 203-9898
E ngm@associatedenvironmental.net
W www.associatedenvironmental.net
LinkedIn: <http://www.linkedin.com/in/nicholasmaloof>

Environmental Due Diligence

Real Property Law Academy I
State Bar of Michigan Real Property Law Section