WEBINAR: AN OVERVIEW OF HB168 AND THE BFPD

WEDNESDAY, JULY 15, 2020 AT 11AM
WELCOME & HOUSEKEEPING

Introductions
- Aaron Clapper, GOPC
- Joseph Koncelik, Tucker Ellis LLP
- Kristin Watt, Vorys, Sater, Seymour, and Pease LLP

Webinar Housekeeping
- Participants are in listen-only; please submit questions through the chat box (found by clicking “more” → “chat”)
  - We will hold time at the end for Q&A
- Today’s webinar will be recorded. The recording and slides will be made available via email and on GOPC’s website after today’s webinar.
AN OVERVIEW FOR TODAY’S DISCUSSION

1. A background on HB168, its introduction, and process through the legislature
2. An Overview of the BFPD, and the advantages it brings to the state
3. The BFPD in practice
4. Brief time for Q&A

Please note, GOPC’s website provides a supplemental FAQ, and will have an updated Q&A section after this presentation.
House Bill 168
Enhanced Strategy to Address Environmental Liability

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I. Why was H.B. 168 needed?
   A. Benefits of reuse/revitalization
   B. Environmental Law 101- What prevents buyers from taking on property with environmental issues?
   C. Pre- H.B. 168- Ohio’s progress on reuse/revitalization

II. Advantages of BFPD (H.B. 168)
   A. Reduced complexity
   B. Faster and less costly option

III. How does the BFPD work in practice
Encouraging Reuse/Revitalization
Reuse Commercial/Industrial Property v. Greenfield

- Studies show businesses in urban areas find it less costly to move the entire company’s operations to a greenfield site than to expand current facility in the city

Ex: Cleveland Company – Cost $1.2 million more to develop adjacent property than to move to suburban location

- Study in Ohio found that the cost of developing a brownfield was four times the cost of building on a greenfield—Brownfields: Cleaning and Reusing
Urban Sprawl
Encouraging Reuse of Property

Developed Land - 1948
Developed Land - 2002
Roughly the Same Population
Types of properties H.B. 168 addresses?

“Brownfields” and a whole lot more…
Environmental Liability Law 101
Concerns for Buyers
Environmental Liability 101

**RCRA** = Hazardous waste units and release post-1980

**BUSTR** = Underground storage tanks

**CERCLA** = Liability for hazardous substances pre and post 1980

**TSCA** = PCBs (transformers, machinery and elevators)

**VAP** = Ohio Voluntary Action Program
CERCLA ("Superfund")

- Liability to "owners" (in the chain of title)
- Can be liable for historical contamination even if didn’t create the contamination
- Joint/several liability
- "Releases" of "hazardous substances"
- Broadest liability provisions
- Costly cleanups with heavy oversight from regulators
Congress Addresses CERCLA Liability for Prospective Purchasers

Creation of the *Bona Fide Purchaser Defense* at the Federal Level

Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Act)

Signed into law by President Bush on January 11, 2002

Amended CERCLA to provide liability protection to prospective buyers

A buyer with “clean hands” can qualify for liability protection if it performs adequate due diligence *BEFORE* it buys or leases a property even if property is contaminated
Gap in Ohio Law
Ohio law doesn’t recognize the BFDP

Since 2002 BFDP has not been recognized under Ohio law
• Michigan Baseline Environmental Assessments
• Indiana Recognizes BFDP

State had legal authority to pursue cleanup under Ohio law
• BFDP defense to CERCLA liability
• Ohio EPA has state law authority to pursue cleanup

Voluntary Action Program (VAP)- Since 1997 only way for buyers to address Ohio liability
• Looking to purchase commercial/industrial property
• Pre-existing contamination they did not create
• Everything from strip malls to former auto assembly plants
Pre-House Bill 168

Ohio’s Performance on Encouraging Reuse/Revitalization
Ohio Relies on Public Incentives

Clean Ohio/JobsOhio [35 cleanups per year]
• Clean Ohio 2001-2014- Ohio’s Golden Age of Brownfield redevelopment
• JobsOhio- 2014 to 2020

Greater Ohio Clean Ohio Study
• As of 2012 Clean Ohio spent $315,231,174 on 160 projects
• Average incentive was $1.97 million dollars per project
• $4.67 in new economic activity for every dollar spent
Ohio Scorecard on Reuse/Revitalization

VAP Fully implemented in Ohio in 1997

U.S. EPA estimates 10,000 brownfields in Ohio
- 650 VAP CNS (July 2020) = 9,350

270 years to address all of Ohio brownfields
- With brownfield funding average 35 CNSs per year 2001-2020 Clean Ohio/JobsOhio
- Without funding average between 17-25 CNSs per year
- Assumes no new brownfields were created in that time period

$18.5 billion incentives to address current brownfields (Assuming average Clean Ohio Cost per project)
Why VAP Doesn’t Work for All Sites

Complexity

• 197 pages of rules
• 82 different guidance documents

Time

• “Fast VAP” = 1 year
• Average VAP 18 months to 24 months
• Most business transaction want to close in 60 to 180 days

Cost

• Sampling alone $80k to $250k
• Administrative Paperwork $60k to $120k
• Remediation $0 to $2 million or more
House Bill 168
Enhanced Tool for Addressing Environmental Liability
## Ohio’s New Reuse/Revitalization Strategy

### Large Industrial/Highly Contaminated Properties
- Reserve limited public incentives for these sites
- Increase incentives for these complex properties
  - Avg. $1.97 million
  - JobsOhio caps at $1 million
- VAP is the right tool for these sites
  - Regulatory oversight
  - Public health issues (solvent plumes)

### Light Industrial/Commercial Properties
- House Bill 168 BFPD
- Self-Implementing
- Less complex
- Lower cost
- Faster
- Increase volume of reuse/revitalization
## Advantages of BFPD (HB 168)

### Less Complexity

### VAP
- 197 pages of rules
- 82 different guidance documents
- Agency “Technical Assistance” for review of complex issues

### BFPD
- National Guidance
- U.S. EPA’s “All Appropriate Inquiries” Rule
  - Approximately 10 pages of rules
- ASTM Guidance Documents
  - Adequate Phase I
  - Continuing Obligations
Advantages of BFPD (HB 168)

Costs- Sampling and Cleanup

**BFPD**
- Take “reasonable steps” for property to be safe for reuse
- 15-25 samples ($25k to $50k)
- More flexible on cleanups
- Less administrative costs

**VAP**
- Full “nature and extent” of contamination
- $80k to $250k sampling alone
- Cleanup can easily run from $250k to $2 million
- Full Agency review of cleanup
## Advantages of BFPD (HB 168)

### More Efficient

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<tr>
<th>VAP</th>
<th>BFPD</th>
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<td>• Prescriptive with oversight</td>
<td>• Self-implementing</td>
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<td>• VAP Phase I 30 days</td>
<td>• ASTM Phase I (2 to 4 weeks)</td>
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<td>• VAP Phase II- 60 to 180 days</td>
<td>• Possible Phase II sampling (30 to 60 days)</td>
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<td>• Cleanup- 90 to 180 days</td>
<td>• Close on Property</td>
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<td>• No Further Action Review 90 to 180 days</td>
<td>• Implement “Reasonable Steps” post-closing</td>
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<td>• 1 to 2 year process</td>
<td>• 30 to 90 days to complete prior to closing</td>
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How to complete the BFPD process
How Does the Bona Fide Prospective Purchaser Defense Work in Practice?
What do I need to do to qualify for the BFPP Defense??

- **2 Things to be a BFPP** (HB 168 Follows Federal BFPP definition):
  - #1 *All Appropriate Inquiry* (Do I know what I’m acquiring?)
    - No affiliation to land
  - #2 If find “issues”, need to address those issues
What is AAI??

— AAI (All Appropriate Inquiry rule, 40 CFR §312.20)

➢ Evaluation of environmental conditions & assessing potential liabilities for contamination

➢ Phase I Environmental Site Assessment, the ASTM International Standard E1527-13 is consistent with AAI Rule (written report)
  o Interviews (current and past owners/operators)
  o Historical information/Aerial Photos
  o Governmental Records (EDR database)
What is AAI?? (Cont.)

- Visual Inspection
- Lien search/chain of title
- Purchase Price
- Must be performed by an “Environmental Professional”
- Must be ≤180 days (365 days for some things)
- etc.
What is AAI?? (Cont.)

- Ultimate Goal of ASTM Phase I – to identify Recognized Environmental Conditions (RECs)
  - Presence or likely presence of Hazardous Substances or petroleum products
    - Due to a Release to environment
    - Conditions indicative of a release
    - Material threat to future release
Common Phase I/AAI Mistakes:

• a/k/a
“Horror Story” Lessons:

• Timing – allow enough time (incomplete)
• Using the right ASTM Standard (in compliance with . . .)
• Select a good consultant (not skilled, too busy, etc.)
  — Consultants who did prior Phase I on subject property
• Read the report and ask questions, fix errors
  — Sloppy writing can be tell tale sign . . .
  — “low lying wet areas”
  — What did they miss (vent pipes/tanks/adjacent parcels/golf course)
  — What does NFA mean?
• Interview the right person
Remember, to qualify to BFPD . . . #2

- If you find issues/RECs . . .
- Must take reasonable steps to –
  - Stop any continuing Release
  - Prevent any Threatened Release, and
  - Prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances
When is more investigation required?

• “Clean” Phase I vs. RECs
• If REC(s), then you may need to dig deeper to determine whether something to address
  ➢ Phase II ESA
    o No “Standard”
    o Paper trail or samples
      • Balance Scope vs. $
BFPD has Continuing Obligations (Common Elements)

• No disposal after acquisition
• Comply with land use restrictions & engineering/institutional controls
• Comply with Gov’t. information requests
• Continuously take “Reasonable Steps” to manage Releases (Halt or minimize exposure)
  — Exercise appropriate care (very site specific)
  — Act reasonably under the circumstances
Continuing Obligations, cont.

— Create O&M Plan?

➢ Obtain professional assistance
➢ Follow it
➢ Maintain it
➢ Document it
Used Right, It’s a Useful New Tool!
Q&A

PLEASE SUBMIT QUESTIONS THROUGH THE CHAT BOX
THANK YOU

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https://www.greaterohio.org/ohio-bfpd-law