

# Contaminated Real Property Transactions in OHIO

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# Introduction



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# Thinking of Buying Commercial Property in Ohio?

- Forget LOCATION, LOCATION, LOCATION...
- Think: CONTAMINATED?, CONTAMINATED?, CONTAMINATED?
- Focus on Petroleum Contamination

# Sources of Liability

- RCRA
- CERCLA
- Ohio Revised Code
- BUSTR Regulations
- Local government regulations



# Look before you leap

As the prospective purchaser, can you answer the following?

- Have you performed adequate due diligence consistent with ASTM Standards?
- Is there funding available for cleanup of the contamination?
- Can you you meet financial responsibility requirements to qualify for transferring eligibility for state funding?
- Has there been a pollution liability insurance policy in place?
- Is the contamination contained within property boundaries?
- Are there mechanisms available to reduce the cost of cleanup or entice purchase?

Have you performed adequate “**all appropriate inquiry**” consistent with ASTM Standards?

- American Society for Testing and Materials (ASTM)
- ASTM – E1527
- The purpose
  - define **good commercial and customary practice** in the United States of America for conducting an **environmental site assessment of a parcel of commercial real estate with respect to the range of contaminants** within the scope of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. 9601) **and petroleum products.**
  - intended to permit a user to satisfy one of the requirements to qualify for the **innocent landowner, contiguous property owner, or bona fide prospective purchaser limitations on CERCLA liability** : that is, the practice that constitutes "**all appropriate inquiry** into the previous ownership and uses of the property consistent with good commercial or customary practice" as defined at 42 U.S.C. 9601(35)(B)

# ASTM - File Review

Releases of petroleum to the environment in Ohio are regulated by

- **Environmental Protection Agency**
- Ohio Department of Commerce, Division of State Fire Marshall
- **Bureau of Underground Storage Tank Regulation (BUSTR),**
- the Divisions of Wildlife and Oil and Gas,
- Ohio Department of Natural Resources (ODNR);
- Public Utilities Commission of Ohio;
- **Ohio Environmental Agency (OEPA);**
- United States Coast Guard;
- **United States Environmental Protection Agency, (US EPA); and**
- various local municipalities which have adopted pollution prohibition regulations and ordinances.
- **The Ohio Petroleum Underground Storage Tank Release Compensation Board**
- **Judgments, Liens, Use Restrictions –**

# BUSTR - <http://www.com.ohio.gov/fire/bustMain.aspx>

## BUREAU of UNDERGROUND STORAGE REGULATIONS

- BUSTR has been delegated the responsibility for implementation of
  - the underground storage tank program and
  - **corrective action program for releases of petroleum from underground storage tanks**
- BUSTR regulations establish different levels of contamination and remedial action based on the applicable level.
  - Category One Action Level - most intensive remediation
  - Category Four Action Level - require the least remediation.
  - Site categorization is based on factors relating to the presence and depth of ground water, the site's proximity to potable wells, the geology of the site and man-made or natural conduits for ground water at the site.



# <https://apps.com.ohio.gov/fire/OTTER/> ER/

The screenshot shows a web browser window with the URL <https://apps.com.ohio.gov/fire/OTTER/>. The browser's address bar and tabs are visible at the top. The main content area features a header with the Ohio.gov logo and the Department of Commerce. Below the header is a large banner image of a fire hydrant. The OTTER logo, which includes a stylized cat face, is prominently displayed. To the right of the logo is a login section for existing users, with fields for Username (Owner Id) and Password, and buttons for Submit and Forgot Password?. Below the login section is a navigation bar with links for Inquiry, Registrations, Public Information Request, Red Tag Information, and County Map. The main content area is titled "Facility / Corrective Action Search" and contains a welcome message from the BUSTR Public Inquiry page. The message states that BUSTR policy is to make the fullest possible disclosure of information without unjustifiable expense or unnecessary delay to any requester. It also mentions that if additional information is required, users should click on the "Public Information Request" tab. The message concludes by asking users to ensure the information they seek is not already available on the BUSTR website (e.g., complete list of active registered facilities or active releases). Below the message is an "Instructions" section with a text input field and a "Search" button. The browser's taskbar at the bottom shows various icons, including the Start button, Internet Explorer, and several open applications. The system clock in the bottom right corner indicates the time is 12:17 PM on 11/27/2012.

Ohio.gov | Department of Commerce

## OTTER

Ohio Tank Tracking & Environmental Regulations

**Existing User**

Username (Owner Id):

Password:

[Forgot Password?](#)

[? Inquiry](#) [Registrations](#) [Public Information Request](#) [Red Tag Information](#) [County Map](#)

### Facility / Corrective Action Search

Welcome to the BUSTR Public Inquiry page. It is BUSTR policy to make the fullest possible disclosure of information without unjustifiable expense or unnecessary delay to any requester. If additional information is required, please click on the "Public Information Request" tab. Before making a request, please make sure the information you seek is not already available on the [BUSTR website](#) (e.g., complete list of active registered facilities or active releases).

### Instructions

Enter the known information and click the "Search" button. You may sort the results in ascending or descending order by clicking on any of the column

# File Review – BUSTR regs

- **Site Check** - Within 90 days of a certain incidents and physical discovery of a release of contamination, owners and operators shall conduct a Site Check to determine whether subsurface soil or ground water on an UST site have concentrations of chemical(s) of concern above the action levels and submit a written report.
- **No Further Action Letter** - When a certified professional believes that a property has been investigated and, if necessary, cleaned up to the standards contained in the Voluntary Action Program (VAP) rules (OAC Chapter 3745-300
- **Compliance Records/Inspections**
- **Financial Assurance Trust Fund Eligibility**

# File Review – Court Documents

- Deeds
- Liens
- Easements
- Future use restrictions



# Restricted Future Use

## Restrictive Covenants

- (E) Any restrictions on the use of real property for the purpose of the achievement by an owner or operator of applicable standards pursuant to rules adopted under division (B) of this section **shall be contained in a deed or in another instrument that is signed and acknowledged by the property owner in the same manner as a deed or an environmental covenant that is entered into in accordance with sections 5301.80 to 5301.92 of the Revised Code.**
- The deed , other instrument containing the restrictions, or environmental covenant **shall be filed and recorded in the office of the county recorder of the county in which the property is located.**
- If the use restrictions or environmental covenant are connected with registered land, the restrictions or environmental covenant **shall be entered as a memorial on the page of the register where the title of the owner is registered.**
- Any restrictions on the use of real property for the purpose of the achievement by a person that is not a responsible person, or by a person undertaking a voluntary action of applicable standards shall be contained in an environmental **covenant. The environmental covenant shall be filed and recorded in the office of the county recorder of the county in which the property is located.**
  - **The environmental covenant shall be entered as a memorial on the page of the register where the title of the owner is registered**
- s. 3737.882

Is there funding available for cleanup of the contamination?

# Funding for Cleanup

- A number of grants and loans are available at both state and federal levels to assist in the cleanup of contaminated properties.
  - The Site Assessment and Brownfield Revitalization (SABR) program is Ohio EPA's point of contact for brownfield grants in Ohio.
- The Ohio Water Pollution Control Loan Fund (WPCLF) is administered by Ohio EPA's Division of Environmental and Financial Assistance (DEFA).
  - Any environmental investigation or remediation that will benefit surface and/or ground water quality is eligible for WPCLF financing. The WPCLF will provide up to \$3 million to a project for eligible activities. More information regarding DEFA may be obtained through their Web site, or by calling (614) 644-2798.
- The Financial Assurance Trust Fund
- Pollution Liability Insurance

# Financial Assurance Trust Fund

- Petroleum Underground Storage Tank Release Compensation Board
  - consists of government and industry representatives and
  - has the primary responsibility of administering the Petroleum Financial Assurance Trust Fund.
  - The Fund is a source of money derived from mandatory per-tank fees and is available to eligible underground storage tank owners to reimburse petroleum release clean up costs.
  - <http://www.petroboard.org/>
- The Financial Assurance Trust Fund was created, in part, to help pay the costs of performing the corrective actions required to remediate the contamination.
- **Reimbursement** is a two-step process.
  - The first step is applying for eligibility.
  - If eligibility is granted, owners may make claims against the Fund by filing claim applications documenting costs expended for corrective actions.

# To be reimbursed...

- At the time of the suspected release or release, whichever is first,
- a responsible person possessed a valid **certificate of coverage**,
- the validity of which has been maintained,
- for the petroleum underground storage tank system from which the release occurred;
- 3737.1

# Certificate of Coverage

The board shall issue a Certificate of Coverage to any responsible person who has **complied with all of the following:**

1. The Eligibility Application was filed within one year from the date the release was required to be reported to the Fire Marshal or delegated authority.

1. At the time of the release:

- The owner/operator possessed a valid Certificate of Coverage for the UST from which the release occurred.
- The UST was registered with the Fire Marshal or the Fire Marshal has recommended that good cause existed for the UST not being registered.
- The UST was in compliance with Fire Marshal rules.
- The owner/operator demonstrates financial responsibility for the deductible amount.
- The release has been reported as required under Fire Marshal rules including tank performance standards, leak detection and registration.



# The UST was in compliance with Fire Marshal rules.

- Includes release detection,  
registration, record keeping, testing,  
etc.

# Penalties for Non-Compliance

- No person shall violate or fail to comply with a rule, and no person shall violate or fail to comply with the terms of any order issued under
- Whoever violates shall pay a civil penalty of **not more than ten thousand dollars for each day that the violation continues.**
- The fire marshal may, by order, assess a civil penalty under this division, or the fire marshal may request the attorney general to **bring a civil action for imposition of the civil penalty** in the court of common pleas of the county in which the violation occurred.
- The fire marshal may request the attorney general to bring a civil action for appropriate relief, **including a temporary restraining order or preliminary or permanent injunction**, in the court of common pleas of the county in which the underground storage tank.
- s.3737.882



# Financial Responsibility

- Financial responsibility - is a demonstration by owners or operators that they have the financial capability to pay for damages caused by accidental releases from petroleum USTs.
- Financial responsibility has two components:
  - Deductible Coverage
    - An owner must demonstrate he/she is financially able to pay for the deductible amount selected when remitting annual fees to the Fund.
  - Participation in the Financial Assurance Fund
    - Coverage above the deductible amount up to \$1 million per occurrence is obtained from the Financial Assurance Fund by paying the required fees. Participation in the Fund is mandatory for all petroleum UST owners and operators.

# Certificate of Coverage

## ■ NOTE

1. The Certificate of Coverage shall state the amount of coverage to which the responsible person is entitled from the fund and the time period for which the certificate provides that coverage.
2. A determination of eligibility does not constitute an obligation of the Fund to reimburse a tank owner.

# Acquiring Site and Maintaining Coverage

## **Transferring Ownership of an Underground Storage Tank**

Within 30 days of the transfer, submit the following information in writing:

- The name, address and telephone number of the previous and new owners;
- The address of the facility sold;
- The number of USTs sold;
- The date ownership transferred;

### **The new owner will be required to:**

- **Demonstrate financial responsibility and**
- **Certify the tanks are assurable before a new Certificate of Coverage will be issued.**
- **When coverage under the previous owner is at the standard deductible, the new owner may elect to pay the fees and acquire the reduced deductible, if he/she is the owner of six or less USTs. The owner should notify the Board by mailing or faxing a copy of the Transfer of Ownership Form.**

# Direct Pay Agreement

- The original tank owner, the one to whom the eligibility was granted, retains the responsibility for the remediation activities and costs.
  - However, if both parties agree that the purchaser will pay for the corrective actions costs, a Direct Pay Agreement can be executed and any reimbursement of eligible corrective action costs will be made directly to the purchaser.

# Acquiring a site without a Certificate of Coverage

- Not issued a valid Certificate of Coverage to an owner or operator for a given UST for two or more consecutive years, additional requirements for obtaining coverage are imposed.
- Before coverage can begin the owner or operator must submit the following:
  - All outstanding fees and penalties
  - A certification that no release has been suspected or confirmed from the petroleum UST, or any known release is in compliance with State Fire Marshal rules
  - A certification that leak detection requirements for the UST have been and continue to be complied with
  - Leak detection records to evidence compliance

- ☑ All Appropriate Inquiry
- ☑ History of Compliance
- ☑ Certificate of Coverage
- ☑ Transfer of Certificate of Coverage
- ☑ Direct Pay Agreement
- ☑ Home Free...NOT SO FAST
  - ☑What a NUISANCE!



# Offsite Contamination

**Common Law Nuisance** – “interference with another’s property” (25 cent definition)

Third party may file a civil lawsuit seeking damages, injunctive relief (temporary and permanent) and attorneys fees in response to a nuisance

## MOVE OVER AMBULANCE CHASERS...

- Movement in the SE whereby attorneys are locating offsite contamination and soliciting clients

# 3<sup>rd</sup> Party Claims

- In the event a third party is claiming property damage or bodily injury as a result of a release from an assured UST system, the owner/operator should contact the Board immediately. A third-party eligibility application must be made to the Board within **THIRTY DAYS** from the date an owner/operator receives any of the following:
  - Service of a third-party complaint against an owner/operator
  - Receipt of a third-party demand for settlement
  - Notice of representation of a third party in a lawsuit against an owner/operator
  - In addition, the same criteria in the first-party eligibility process must be met in the third-party eligibility process.



# Pollution Liability Insurance

- “The Premises Pollution Liability (PPL) Policy offers industrial, commercial, and agricultural property owners, managers and developers a broad range of pollution liability protection for gradual, as well as sudden and accidental, first-party and third-party environmental liabilities.”
- “This fixed-site Pollution Liability coverage is available for a wide range of facilities and responds to losses arising from pollution events at or emanating from an insured location. On and off-site clean-up costs, as well as, third party claims arising from sudden and gradual pollution events at an insured's location(s) are included in this form.”
- Great supplement to complications in Fund Coverage and offsite contamination... not guaranteed coverage

Are there mechanisms available to reduce the cost of cleanup or entice purchase?

- Future Use Restrictions
- Voluntary Action Program
- Brownsfield Redevelopment

# Voluntary Action Program

- Ohio's Voluntary Action Program (VAP) was created in September 1994.
  - The program was created to give companies a way to investigate possible environmental contamination, clean it up if necessary and receive a promise from the State of Ohio that no more cleanup is needed.
  - Redevelopment of contaminated sites where real estate deal makes sense

# Brownfield

- A brownfield is an abandoned, idled or under-used industrial or commercial property where expansion or redevelopment is complicated by known or potential releases of hazardous substances and/or petroleum.
- <http://www.epa.ohio.gov/derr/SABR/sabr.aspx>

# Case Study

- Taylor v. Petroleum Underground Storage Tank –
  - Ohio Supreme Court - 2001-Ohio-4180
- Applicant-appellant Thomas Taylor, the owner of a site with petroleum-contaminated soil, brought this claim for compensation after he removed a large quantity of that contaminated soil for remediation. The Petroleum Underground Storage Tank Release Board ("board") disallowed nearly all of the claim on grounds that the remediation was unnecessary.
- Buyer was Rite-Aid who wanted (and contracted) all contaminated soil be removed.
- Seller agreed and removed. Board said it was clean enough. Seller stuck with \$40,000.00+ soil removal bill.
- MORAL – Even if all the check boxes are checked, purchasing contaminated site may leave you with a not completely clean site, unexpected costs, and inability to finance... to be continued.

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