

# Environmental Law Overview For New Lawyers

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# Regulators & Courts

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- Federal
  - EPA and its Regions
  - DOJ
  - Army Corps of Eng.
  - Fish & Wildlife Service
  - Exclusive Court Jurisdiction
  - Citizen Suits
- State of Michigan
  - MDEQ
  - MDNR
  - Attorney General
  - Circuit Court Jurisdiction
  - MEPA Citizen Suit

# Cleanup Liability

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- CERCLA/Superfund
- Part 201
- Strict
- Joint and several
  - Divisibility
- Status based
  - Current owners and operators (includes lessees)
  - Owners/operators at time of disposal
  - Arrangers
  - Transporters
- Retroactive

# Scope of CERCLA/Part 201 Liability

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- Response costs
  - Investigation
  - Cleanup
  - Enforcement
  - Interest
- Fines, penalties
- Natural resource damages
- Administrative orders

# Impact of CERCLA/Part 201 Liability

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- Long tail risk
- High dollar exposure
  - Consultants, attorneys, govt. costs
- Litigation
  - Govt. enforcement
  - Contribution
- Transaction barriers
- Insurance claims
- Lending

# Corporate Liability Issues

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- Successors
- Parents
- Shareholders, Officers, Directors



# Clean Water Act

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- Point source discharges to surface waters
- Stormwater discharges to surface waters
- Industrial wastewater discharges
- Pretreatment/control
- Monitoring



# Clean Air Act

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- State Implementation Plans
  - Emission limitations
  - State permit
- Federal Renewable Operating Permits
  - Major pollution sources
  - Federal permit





# Resource Conservation and Recovery Act and Part 111

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- Cradle to grave scheme
  - Waste management
  - USTs
- Permitting scheme for TSDFs
- Corrective action
- Interim status facilities

# Regulatory Impact on Transactions

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- Reporting and record-keeping
- Pollution and process controls
- Monitoring
- Corrective action
- Fines/penalties
- Criminal liability

# Due Diligence

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- Site assessments
  - ASTM Standard
  - Phase I
  - Phase II
- Compliance audits
- Sustainability audits
- Confidentiality concerns
- Role of lenders



# CERCLA Site Assessment Drivers

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- Bona fide prospective purchaser exemption
  - Purchase after 1/11/02
  - Knows of contamination
  - Innocent
  - All appropriate inquiry before purchase
  - All disposal occurred before purchase
  - Takes due care steps
  - Without exception, liable for all contamination

## Part 201 – BEA Exemption

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- Available to purchasers, foreclosing lenders, and new occupants after 5/5/95
- Exempts from owner/ operator liability
- Report must describe
  - Past/present/future uses
  - Existing contamination
  - Basis for distinguishing past-future discharges
  - Due care measures
- Conducted within 45 days of purchase/occupancy and disclosed to MDEQ
  - Without exception, liable for all contamination

## Due Care

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- Applies to any owner or operator of a “facility”
  - Prevent exacerbation of existing contamination
  - Prevent unacceptable exposure/mitigate hazards
  - Protect against foreseeable acts or omissions of others
- Duties apply regardless of cleanup liability

## Part 201 Notification Duties

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- PRP must notify MDEQ and affected property owners of off-site migration of “residential” levels of contamination caused by it
- Owner who “has knowledge or information” that its property is a “facility” cannot transfer any interest in it without providing written notice to transferee and describing nature and extent of release

# Deal-Making Tools

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- Price adjustment
- Contract terms
  - “As is”
  - Reps & warranties
  - Disclaimers
  - Releases
  - Indemnity
  - Risk allocation
  - Dollar caps
- Escrow
- Insurance



# Thank You

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