



Minnesota CLE August Webcast Extravaganza
Environmental Due Diligence Basics

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Environmental Due Diligence Basics

- I. Sources of Environmental Law
- II. Due Diligence Practices
- III. Risk and Liability Mitigation

I. Sources of Environmental Law

Federal Statutes and Regulations

- CERCLA, Clean Air Act, Clean Water Act, RCRA, EPCRA, TSCA, FIFRA

State Statutes and Regulations

- MERLA, Minnesota Environmental Statutes Chs. 115 and 116, Air, Water, Solid and Hazardous Wastes, Tanks

Local Ordinances

- Hazardous Wastes (Seven County Metro), MCES Industrial Wastewater, Conditional Use Permits

II. Due Diligence Practices

Why?

Federal Superfund Liability

- Past and Current Owners and Operators Liable for Clean-up Costs
- Joint and Several Liability

II. Due Diligence Practices

Defenses/Protections

- Innocent Landowner Defense
- Contiguous Property Owner Defense
- Bonafide Prospective Purchaser

To qualify for protections you must perform All Appropriate Inquiry (AAI) known as Phase I Environmental Site Assessment (ESA) prior to taking title of property.

ASTM developed a Phase I ESA standard (ASTM E1527) which incorporates AAI elements

III. Risk and Liability Mitigation

Hiring Environmental Legal Counsel

- Experience and Background

II. Due Diligence Practices

Type of Project- dictates approach and response

- Sale
- Acquisition
- Refinance
- Lease
- Redevelopment

II. Due Diligence Practices

Phase I Environmental Site Assessment

- Should comply with current ASTM Standard Practice
- Primary purpose is to Identify “Recognized Environmental Conditions”
- Added purpose may include identification of “Business Environmental Risks”
- Shelf Life

III. Risk and Liability Mitigation

Hiring an Environmental Consultant.

- Experience and Background
- Contract, Scope of Work and Terms and Conditions Considerations
- Geographic Reach

II. Due Diligence Practices

Recognized Environmental Conditions

“The presence or likely presence of any hazardous substances or petroleum products on the property under conditions that indicate an existing release, past release, or material threat of release.”

II. Due Diligence Practices

Vapor Encroachment Condition

II. Due Diligence Practices

Business Environmental Risk

II. Due Diligence Practices

Phase I ESA Components

- Regulatory Review
- User Questionnaire
- Interviews
- Current and Past Property Use
- Title Review
- Site Visit: Looking at Subject Property and Neighboring Properties.
- Recommendations- Situational
- Examples of issues that may be identified as RECs, CRECs or HRECs.

II. Due Diligence Practices

Recognized Environmental Conditions



II. Due Diligence Practices

Recognized Environmental Conditions



II. Due Diligence Practices

Recognized Environmental Conditions



II. Due Diligence Practices

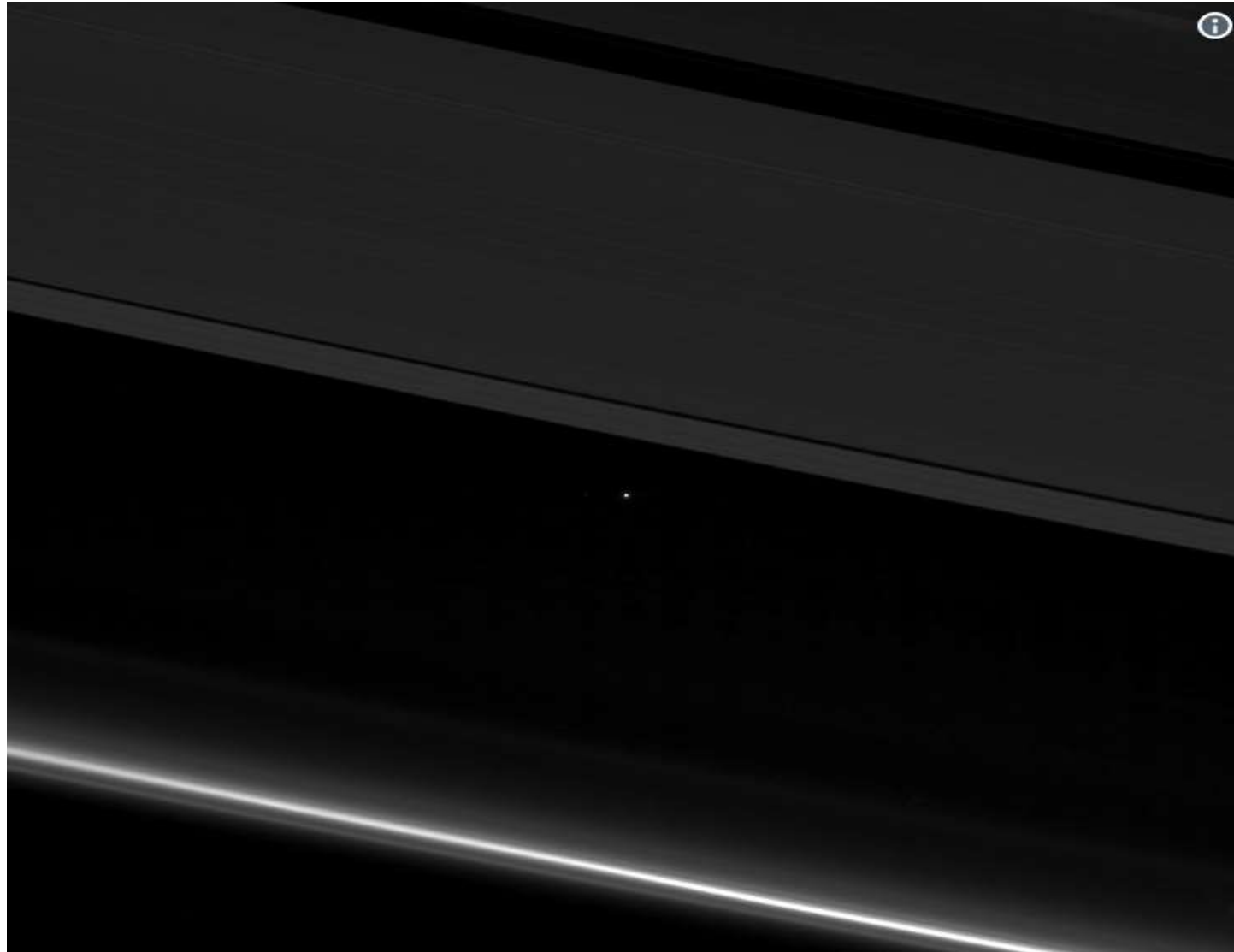
Recognized Environmental Conditions



II. Due Diligence Practices

Phase II May Be Required

- Assess RECs.
- Determine relative extent and magnitude of releases.
- Identify possible receptors.
- Obtain sufficient data to assess materiality of issues.
- Assist with cost opinion (pro forma) for acquisition and possible change in use including redevelopment.



Source: NASA

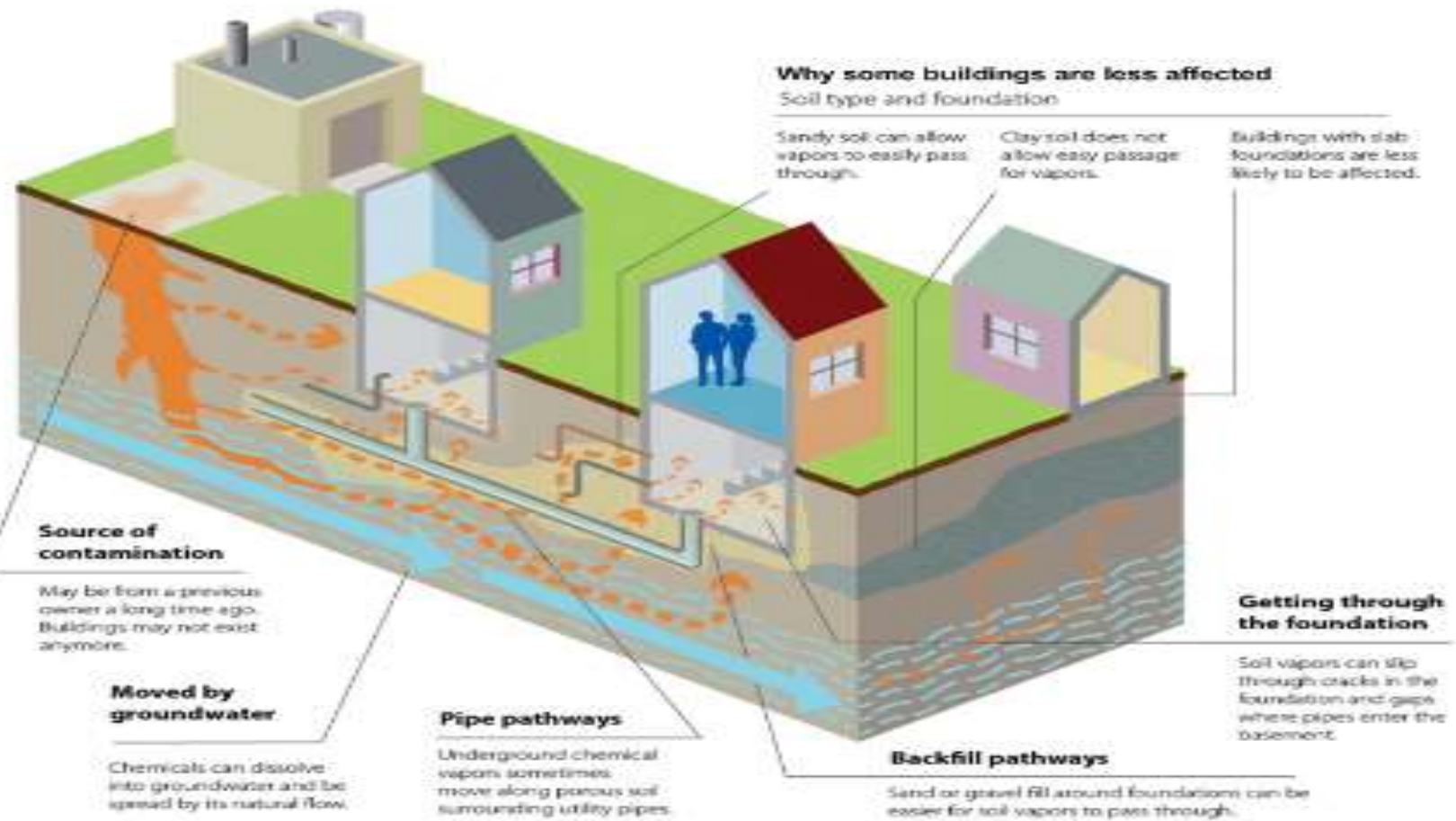
II. Due Diligence Practices

Phase II Findings

Soil, Groundwater and/or Soil Vapor Impacts

- Comparison to Risk Based Regulatory Standards According to Land Use
- Standards constantly evolving- primarily downward
- Vapor Intrusion Risk is recent trend- TCE and PCE

How vapor intrusion happens: a complex path



II. Due Diligence Practices

Vapor Intrusion Risk

Testing

- Sub-slab
- Indoor Air

MPCA Guidance

- Use Based Intrusion Screening Values (ISVs) and Expedited ISVs
 - >33X ISVs Requires Mitigation
 - Test Out- Seasonal Paired Sampling
 - >33X Expedited ISVs Requires Actions within 30 Days

Soil Vapor: Como Neighborhood – Minneapolis Building Mitigation Status



Figure 4: Area of GSI Evaluation of MPCA Investigation/Remediation Sites



Key Point: A large number of MPCA-oversight investigation sites are present upgradient of the Facility. The investigation results from these sites provide an improved understanding of TCE concentrations in the Glacial Drift aquifer.

Vapor Mitigation Decisions SE Hennepin Area Groundwater and Vapor site SR1401

5/22/2017



Map of SE Hennepin Area Groundwater and Vapor site

II. Due Diligence Practices

Vapor Intrusion Risk

Designed Mitigation- Sub-slab Depressurization

- Sumps
- Risers
- Blowers
- Verification Testing
- Operation and Maintenance

Sub-Slab Depressurization



II. Due Diligence Practices

Vapor Intrusion Risk

Designed Mitigation- New Construction Vapor Mitigation System

- Bedded Horizontal Runs
- Spray Applied or Sheet Membrane
- Risers
- Blower
- Verification Testing
- Operations and Maintenance

VMS- New Construction



II. Due Diligence Practices

Are Reporting Requirements Triggered?

- Requires Technical and Legal Analysis
- Minn. Stat. § 115.061
- UST Reporting
- CERCLA Reportable Quantity- National Contingency Plan
- Implications

III. Risk and Liability Mitigation

Role of Minnesota Voluntary Programs

VIC Program- Non-Petroleum

- No Association Determination
 - No Further Action Letter
 - Certificate of Completion
 - Off-site Source Determination
 - Approval of Vapor Response Actions
 - Approval of Vapor Assessment
 - Approval of Response Action Plans and Implementation

III. Risk and Liability Mitigation

Role of Minnesota Voluntary Programs

Petroleum Brownfield Program

- Tank and Non-Tank Closure
- General Liability Letter
- Tank Removal Verification
- Approval of Development Response Action Plans and Implementation

III. Risk and Liability Mitigation

Role of Minnesota Voluntary Programs

- Should You Seek Assurances or Not?

III. Risk and Liability Mitigation

Handling Environmental Concerns That Arise During Diligence

- Budget Opinion - Cost to Cure
- Post Closing Obligations
 - Purchase Agreement
 - Lender Undertaking
- Escrow Funds To Address Ongoing Issues
- Indemnification Trigger

III. Risk and Liability Mitigation

Warranties and Representations

- Establishes Baseline Of Knowledge To Compare Against Future Findings
- Exceptions Exhibited

III. Risk and Liability Mitigation

Indemnification

- Triggers
- Sunset

III. Risk and Liability Mitigation

Lender Involvement

- Underwriting Checklist
- Standard Loan Agreement- REC

III. Risk and Liability Mitigation

Insurance

- Representation and Warranty
- Pollution Liability
- Provide Due Diligence For Review

Questions?

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