

**KEY ENVIRONMENTAL LAWS DURING THE LIFE
CYCLE OF REAL PROPERTY OWNERSHIP**

General Practice, Solo, and Small Firm Section

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Austin

Thursday, June 22, 2017
11:15 a.m. – 11:45 a.m.



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Erich Birch is an environmental lawyer with the firm of Birch, Becker & Moorman, LLP, where he assists clients with permitting, enforcement, environmental audits, contested hearings, and other environmental and regulatory matters. He has extensive substantive experience with air quality, industrial and hazardous waste, municipal solid waste, petroleum storage tanks, used and waste oils, Superfund, and recycling issues. Erich is a former attorney with the Texas Water Commission, and prior to practicing law he was an engineer in the chemical industry. He is on the Board of Directors of the State Bar of Texas, is the former Chair of the Alternate Dispute Resolution (ADR) Section of the Bar, and serves on the Council of the Bar's General Practice, Solo, and Small Firm Section. He provides ADR services to the U.S. Environmental Protection Agency (EPA), is an arbitrator on the panel of the American Arbitration Association, a Credentialed Mediator, and an insurance Umpire. He is also a Professional Engineer in Texas. Erich has a B.E. in Mechanical Engineering from Vanderbilt University, and a law degree from the University of Houston Law Center.

Key Environmental Laws in the Life Cycle of Real Property Ownership

State Bar of Texas Annual Meeting

Dallas, Texas

June 22, 2017

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Agenda

- Life Cycle of Real Property Ownership
- Potential Environmental Risks
- Potential Liabilities
- Managing the Risks: Environmental Laws & Policies

Life Cycle of Real Property Ownership

Life Cycle of Real Property Ownership



Potential Environmental Risks

Safe Drinking Water Act - Protecting America's Public Health

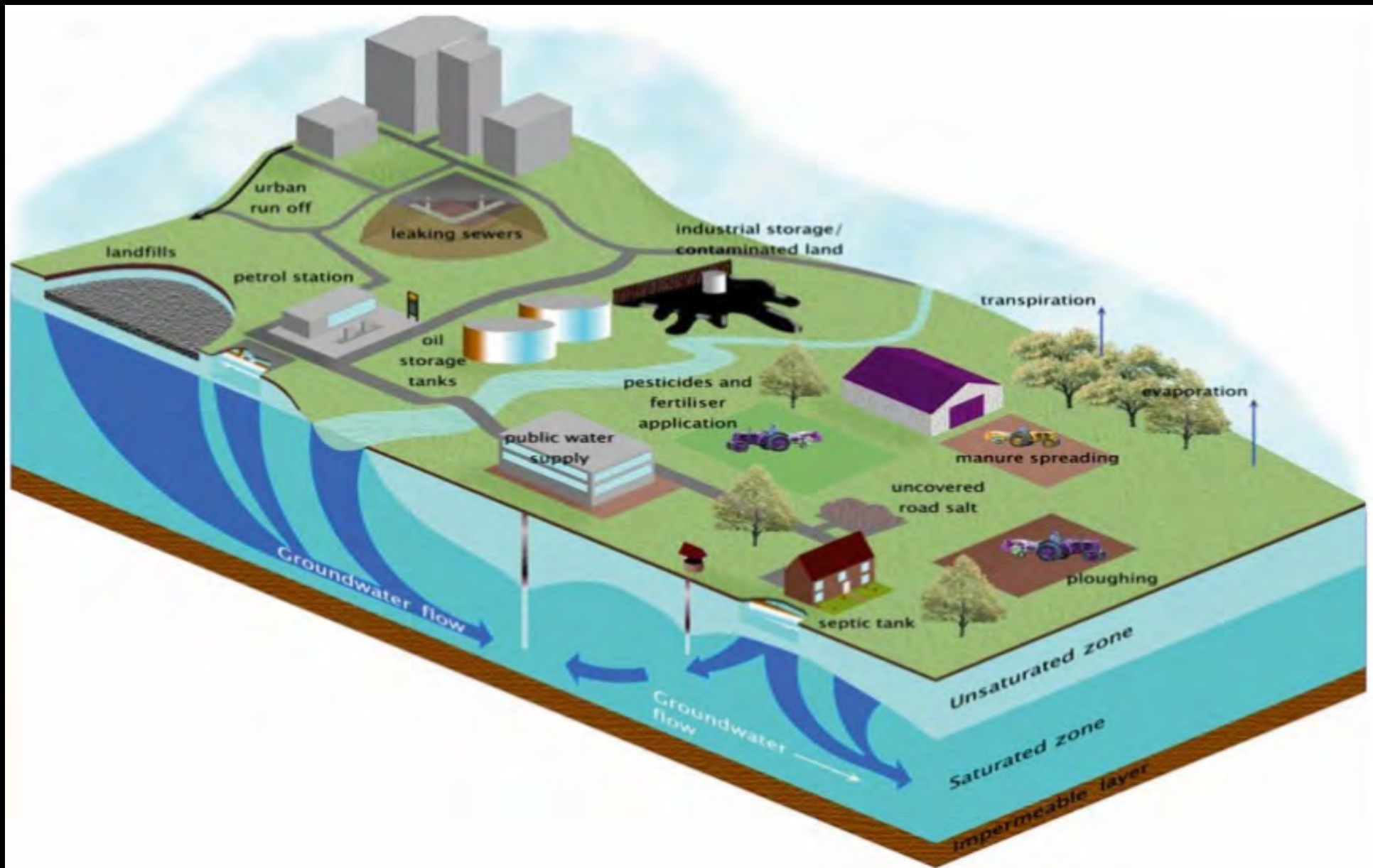


MULTIPLE RISKS REQUIRE MULTIPLE BARRIERS

Safe drinking water is essential to the health of American citizens and the economic health of our communities. However, drinking water is vulnerable to contamination from many potential threats. There are programs and activities that when operated effectively form a protective web of multiple barriers to ensure the safety of our drinking water. The success of these barriers relies on the involvement and vigilance of local, state and federal officials, the private sector, public interest groups and individual citizens.

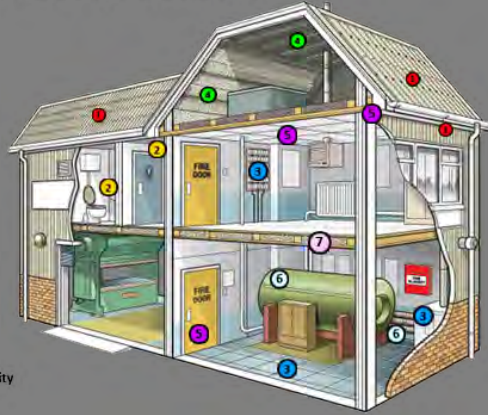
This poster identifies examples of

1. Surface and groundwater sources of drinking water (in blue),
2. Potential threats to those drinking water sources (in red), and
3. The multiple barriers that together protect our nation's public health (in green):
 - Risk Prevention Barrier
 - Risk Management Barrier
 - Risk Monitoring and Compliance Barrier
 - Individual Action Barrier

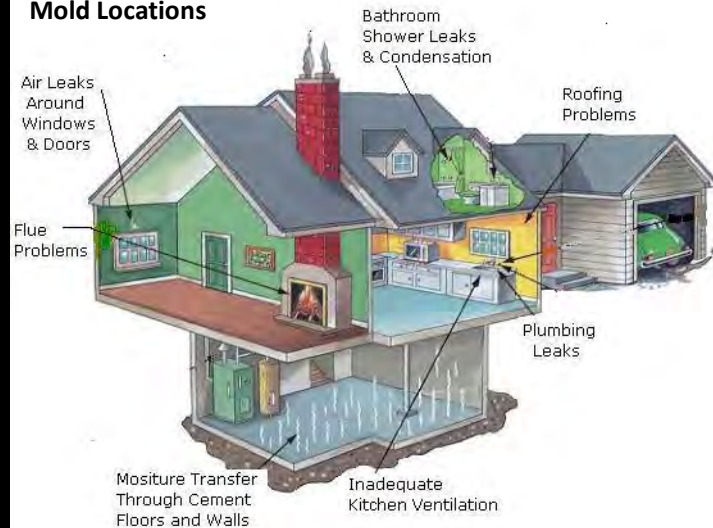


Asbestos Materials: Likely Locations

- 1** Asbestos Cement Products
- 2** Textured Coatings
- 3** Floor Tiles, Textiles & Composites
- 4** Sprayed coatings on walls, beams/columns
- 5** Asbestos insulating board
- 6** Lagging
- 7** Loose Asbestos in ceiling or floor cavity



Mold Locations



Where Are Lead Hazards Found In the Home?

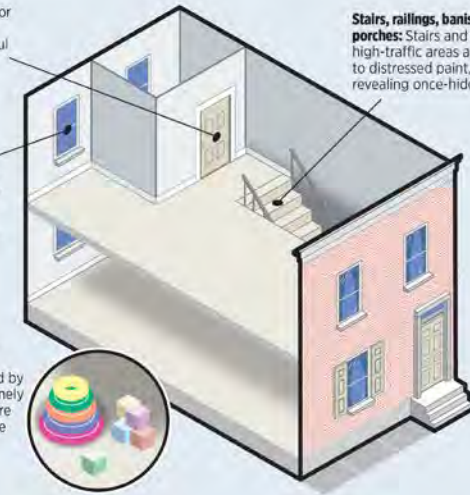
Lead was used in a variety of common household items until it was banned in 1978. Decades later, however, many homes are still full of dangerous lead paint. While painting over the contaminated walls and fixtures will temporarily prevent lead exposure, the wear-and-tear of life often exposes the toxic lead paint below.

Doors and frames: Doors and door frames often become dented and scratched, exposing harmful layers of lead.

Stairs, railings, banisters, and porches: Stairs and other high-traffic areas are susceptible to distressed paint, potentially revealing once-hidden lead paint.

Windows: Due to changing temperatures and exposure to the elements, paint on window sills is often likely to crack and flake. Additionally, many window sills are at the perfect height for young children to chew on.

Toys: Infants and toddlers can ingest the toxic metal while playing with toys contaminated by lead dust. Parents should routinely wash toys and mop floors where children play to help reduce the risk of lead poisoning.

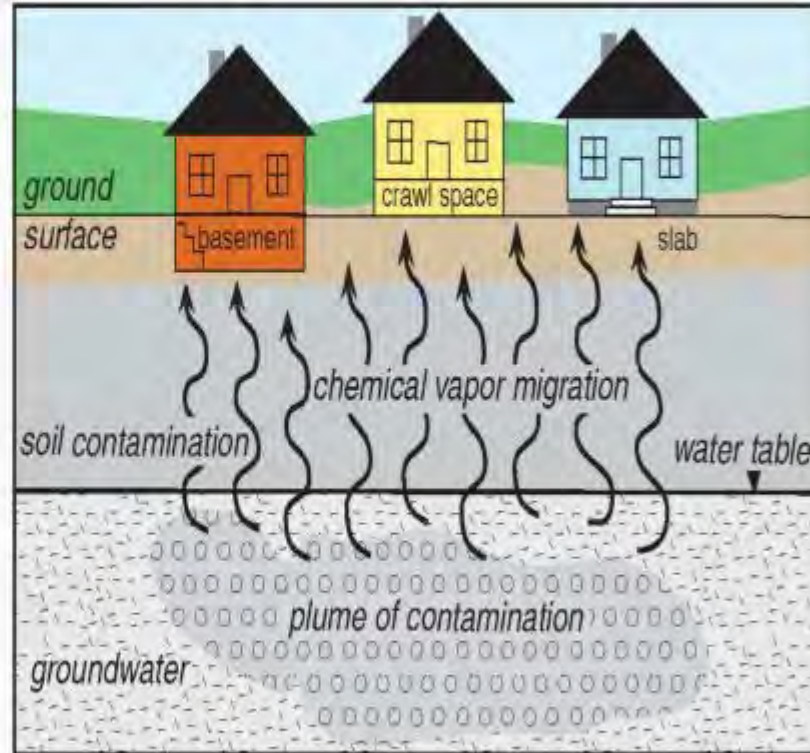


Staff Graphic

Vapor Intrusion (VI)



- Vapors from soil and/or groundwater contamination can migrate upwards into buildings
- Potential indoor air exposures
- Chlorinated solvents (TCE)



Potential Liabilities

Liability Exposure...

- Regulators (TCEQ, EPA, OSHA, cities, etc.)
 - Neighbors
 - Tenants
 - Workers, employees
 - Environmental groups
-
- The Owner's Investment

Managing the Risks & Liabilities

Managing Environmental Risks



Managing Environmental Risks



Pre-purchase:

Purchase

Use

Sale

Post-Ownership

- ✓ Environmental Site Assessment (ESA)
 - Phase I (visual and records review) and possibly Phase II (borings, wells, samples)
 - Areas of concern:
 - Real property contamination
 - Soil, groundwater, surface water
 - other uses: underground storage tanks, transformers, buried drums, etc.
 - previously remediated contamination
 - Off-site sources of contamination
 - Endangered Species
 - Structure contamination:
 - asbestos, lead, mold
 - indoor air intrusion
 - Consultant's Professional Liability Insurance
- ✓ Environmental Audit (for an operating facility)
- ✓ Property Insurance

"All Appropriate Inquiry"

Managing Environmental Risks



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✓ Environmental Audit (for an operating facility)

✓ Property Insurance

"All Appropriate Inquiry"

Managing Environmental Risks



- ✓ Due diligence completed?
- ✓ Disclosures from the seller
- ✓ Voluntary Cleanup Program (VCP)
- ✓ Innocent Owner/Operator Program (IOP)
- ✓ Environmental Audit (for an operating facility)
- ✓ Purchase Agreement: environmental representations and warranties of the seller:
 - compliance with environmental laws
 - required permits
 - hazardous materials
 - disposal sites
 - releases
 - indemnification

Managing Environmental Risks



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Managing Environmental Risks



Pre-purchase

Purchase

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Sale

Post-Ownership



Managing Environmental Risks



During property ownership:

- ✓ Consider the property uses
- ✓ For an operating facility:
 - Evaluate whether:
 - Wastes are being generated
 - Discharges to the ground
 - Discharges to water
 - Wastewater to a drain (POTW)
 - Air emissions
 - Competent employees
 - Environmental consultant and/or attorney
 - Environmental Audits
- ✓ Activities on neighboring properties
- ✓ Building modifications

Managing Environmental Risks



If property is leased to others:

- ✓ Address environmental liabilities in lease agreement
 - Require compliance with environmental laws
 - Define liabilities between tenant and owner
 - Indemnification
- ✓ Monitor tenant's operations
- ✓ Monitor building modifications

Remember: Property owner is nearly always liable for contaminated real property

Managing Environmental Risks



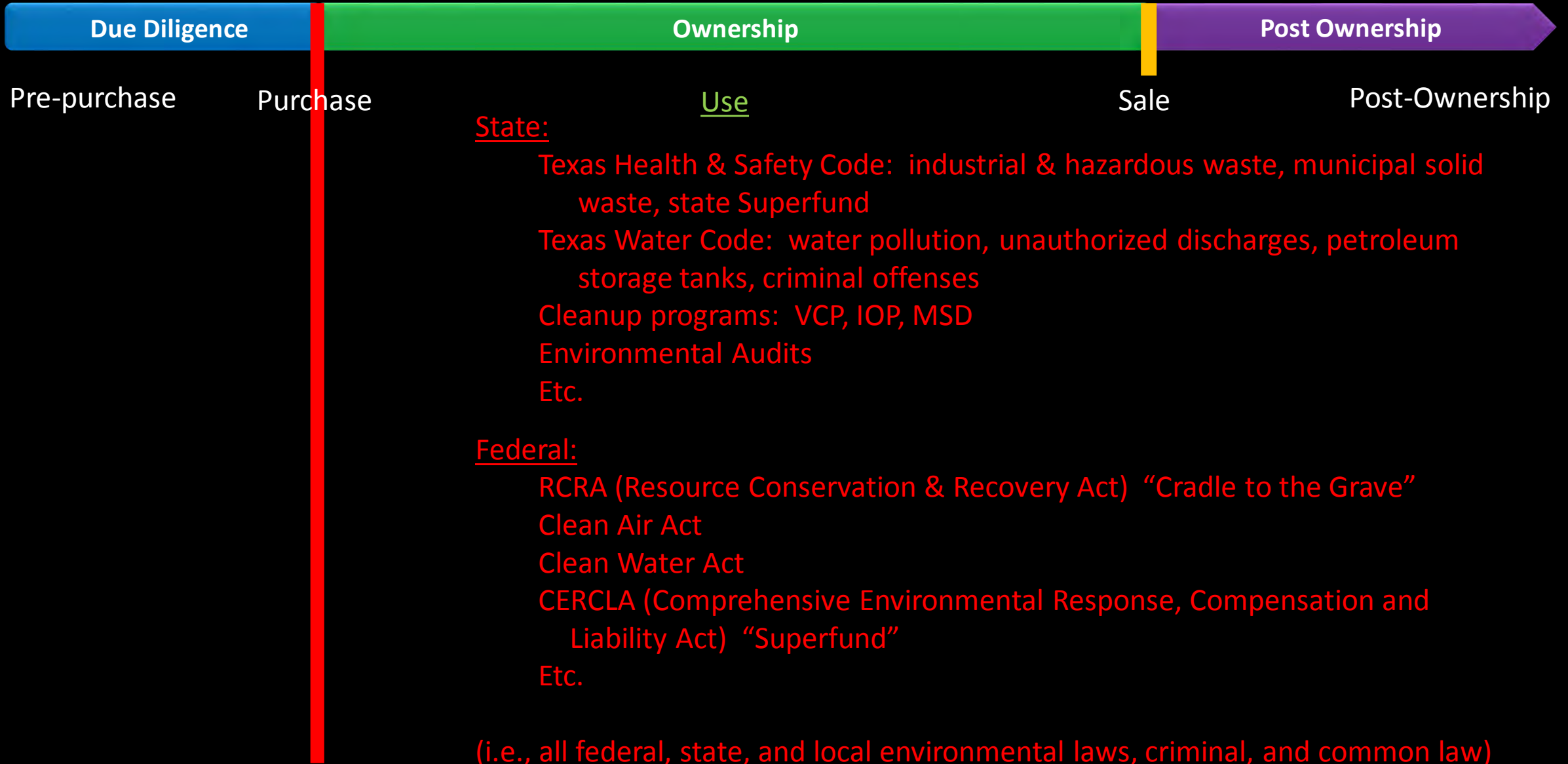
If there is an “incident” (environmental spill, violation, etc.)

- ✓ Immediate response
- ✓ Regulatory notification required?
- ✓ Retain environmental consultant assistance?
- ✓ Retain environmental lawyer assistance?
- ✓ Document the resolution (for eventual sale)
- ✓ Check insurance

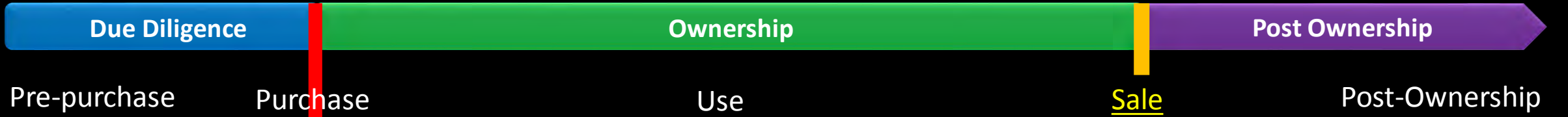
Keep in mind... potential criminal liability:

- Parallels civil liability, but with intent or harm
- At TCEQ’s discretion: don’t lie, cheat, or steal
- Prosecution in county where crime occurred or Travis County

Managing Environmental Risks



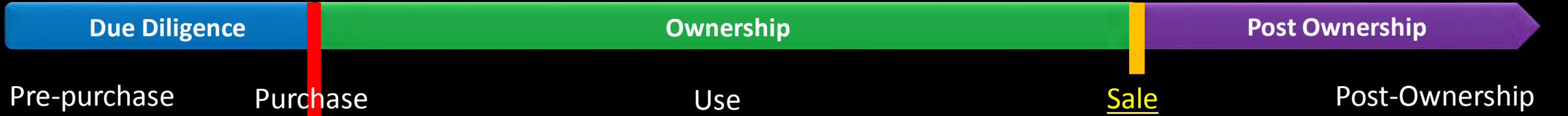
Managing Environmental Risks



- ✓ Clear and complete disclosures
- ✓ Baseline Risk Assessment
- ✓ Voluntary Cleanup Program
- ✓ Municipal Settings Designation (MSD)
- ✓ Purchase Agreement

Leave no loose strings

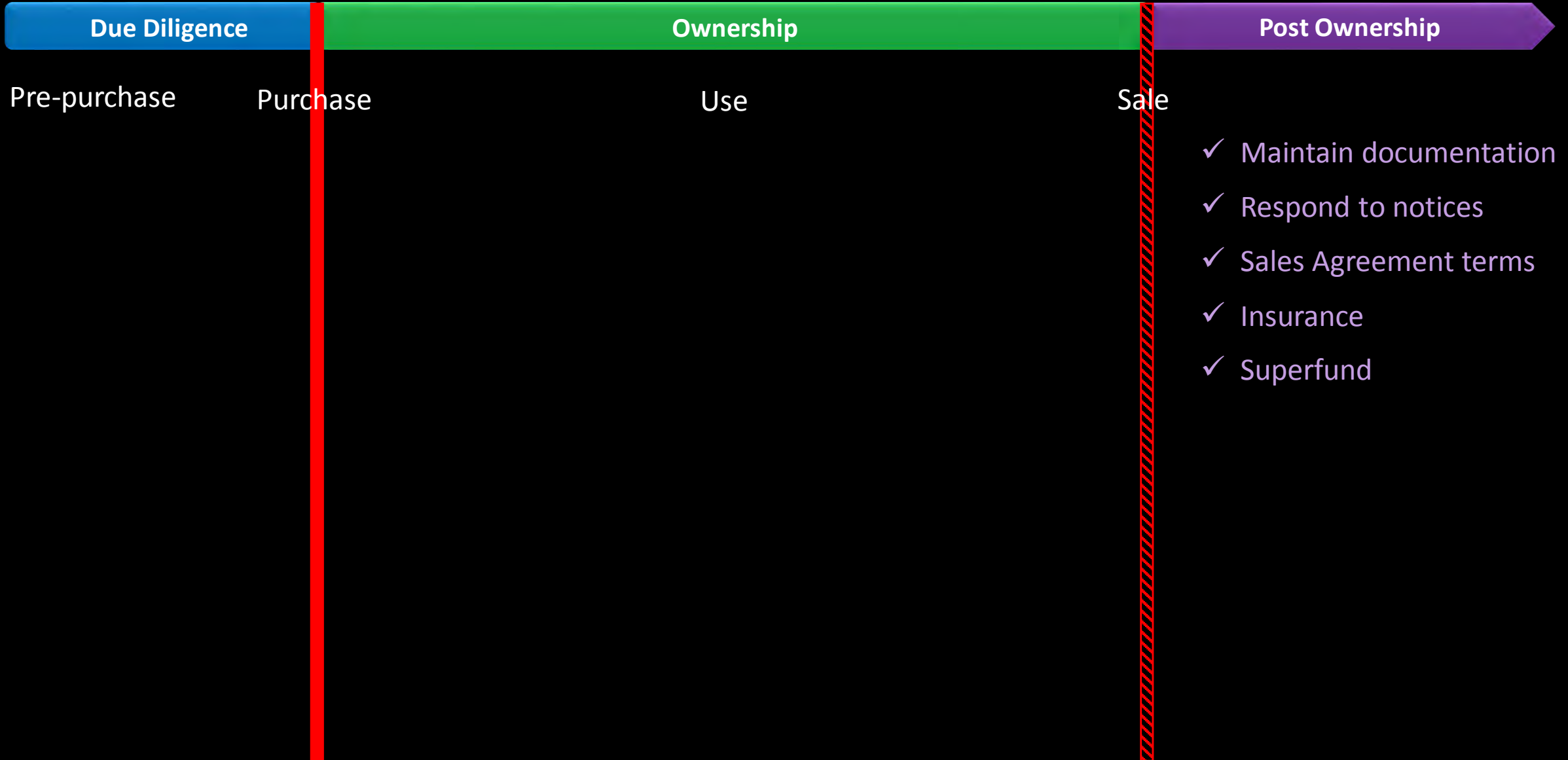
Managing Environmental Risks



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Managing Environmental Risks



Managing Environmental Risks



Tools for Managing Environmental Risks

1. Voluntary Cleanup Program (VCP)
2. Innocent Owner/Operator Program (IOP)
3. Municipal Settings Designation (MSD)
4. Environmental Audits
5. Purchase & Lease Agreements
6. Insurance
7. All Appropriate Inquiry (for CERCLA/Superfund)
8. Statutes of Limitations
9. Environmental Consultants
10. Environmental Attorneys







Thanks for your attention!

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