Environmental Issues

Chapter 11

Environmental Issues Affect
Small Business and Real Estate Acquisitions

Q: I'm buying a small business. Are there environmental issues that need to be considered?

A: Yes. Regulation of our environment is so pervasive today that it impacts almost every business. The environmental conditions of the property upon which the business operates and a business' compliance with applicable environmental requirements can have a profound impact on the value of the business, whether it can operate legally, how it can operate, and even its future viability. A business that is out of compliance with applicable environmental requirements might face substantial capital, operating and legal costs and expenses to come into compliance, and might face the risks of administrative, civil or criminal enforcement, including the imposition of fines and penalties from regulatory agencies, and, under certain circumstances, may even be unable to continue operations. The environmental conditions of the property may affect how the business can be financed, insured and marketed. It is important to evaluate the environmental compliance status of any business and the environmental conditions of the property prior to its purchase.

Q: Isn't the fact that the business is operating proof of its environmental compliance?

A: No. Many operating businesses are not in substantial compliance with applicable environmental requirements. The Environmental Protection Agency's (EPA) inspection and enforcement capabilities to ensure compliance of all businesses are limited, and environmental laws, like our tax laws, put the burden directly on the company to comply. When the EPA learns of noncompliance, it may commence enforcement actions, and publicize its enforcement activities to deter others from noncompliance. Statutory penalties for environmental violations can reach and exceed $25,000 per day per violation. Accordingly, the thorough assessment of the environmental compliance status of the business is an important step prior to the purchase of any business. Historic releases, unrelated to current compliance issues can be the source of expensive onsite cleanup requirements.

Q: In my contract with the seller, the seller has warranted the environmental compliance of the business and the environmental condition of the property. Is that enough?

A: That depends. It is certainly valuable to have the current owner or operator of a business represent that the business is in compliance with environmental requirements or that no adverse environmental conditions exist on the property. That representation alone, however, will not shield a new buyer from its obligations to comply with environmental requirements that the seller did not know of, or did not otherwise comply. In addition, the value of the seller's representation of compliance will vary, and may not be very valuable if the seller's representation proves to be inaccurate. The seller may not have assets to stand behind its representation, and the buyer would still have the responsibility, and may need to bear the cost, to bring the business into compliance with applicable environmental requirements or to address the adverse environmental conditions of the property. In general, representations alone should not be a substitute for independent investigation of a prospective purchase before buying property or a business.

Q: What else can a buyer do?

A: As part of the process in acquiring a business, a buyer may hire a qualified environmental consultant and attorney to perform and evaluate, respectively, a Phase I audit and an *environmental compliance audit*. This type of environmental "due diligence" is standard in many business and real estate transactions today. While this type of investigation increases the cost of the acquisition transaction, it provides a buyer with the necessary information and assurance that the existing business is in compliance with applicable environmental requirements, or will identify those steps necessary to bring the business into compliance, which can be addressed in the transactional documents for the sale and purchase of the business. This due diligence may also entail the separate performance of an *environmental site assessment* to determine if concerns exist regarding environmental site contamination and need to be addressed in the transactional documents.

Q: Would it be simpler to buy or lease a piece of undeveloped real estate and start a business from the ground up?

A: It may be, but you will want to evaluate the environmental risks associated with the real estate that you are purchasing or leasing as well. Under the federal Comprehensive Environmental Response, Compensation, and Liability Act, also known as the *Superfund law*, owners or lessees of contaminated real estate can be held liable for the cost of returning the property to an acceptable environmental condition. When buying or leasing real estate, it is important to determine that environmental conditions on the property do not create unacceptable liability risks, or that such risks are identified and addressed in the transactional documents to acquire or lease the property. An environmental site assessment performed by a trained environmental professional, and evaluated by an attorney, should be used to identify any unacceptable environmental site conditions that might impact the economic viability of the prospective real estate transaction and any associated business operations on such property.

Q: Aren't my chances of being caught by EPA small? Can't I just ignore all these environmental issues?

A: Most financial institutions will require some degree of environmental investigation prior to participating in the financing of the purchase of any business or real estate. You should expect your financial lending institution to require some environmental investigation before it will agree to lend money to purchase a business or the real estate. As a practical matter, the environmental investigation required as part of most financing arrangements will require you to address the outstanding environmental issues.

In addition, the enforcement risks associated with noncompliance may be significant. While civil fines and penalties can be substantial, most environmental laws carry stiff criminal penalties as well. These concerns are often significantly compounded by not dealing with such concerns in a timely way. The bottom line is that compliance with environmental requirements today is a well accepted cost of doing business, is an unavoidable cost, and it is a cost which can be efficiently managed with the assistance of environmental consultants and attorneys.

–by Brian M. Babb, an attorney in the Cincinnati firm, Keating Muething & Klekamp, PLL; Douglas G. Haynam, an attorney in the Toledo firm, Shumaker, Loop & Kendrick, LLP; and Dale T. Vitale, an attorney with the Environmental Section of the Ohio Attorney General's Office.

Learn about Two Important Acts for Environmental Issues

Q: What is CERCLA?

A: The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is the preeminent environmental liability law. This law makes current and even former owners and operators potentially liable for any release of hazardous substances that causes the government or a third party to spend time and money to take care of the contamination problem. Parties that clean up property can use CERCLA to recover their clean-up costs against former owners and operators.

Q: What is SARA?

A: The Superfund Amendments and Reauthorization Act (SARA) is the 1986 amendment to CERCLA, which allows an "innocent purchaser" (the buyer who did not know about any environmental contamination when the property was purchased) to qualify for CERCLA's third-party legal defense, typically referred to as the *innocent purchaser defense*.

Q: How could I prove I was an "innocent purchaser"?

A: In 2002, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act. The act amended CERCLA in several significant ways. Among other things, the act required EPA to issue a rule—known as "all appropriate" inquiry — setting out what a prospective purchaser has to do to qualify as an "innocent purchaser." The EPA's rule (40 CFR Part 312) must also be used by purchasers wishing to qualify for the "bona fide prospective purchaser" and "contiguous property owner" liability defenses that were also created under the 2002 CERCLA amendments.

Q: How does CERCLA benefit me as a property buyer?

A: If you are interested in buying a property, but are concerned about possible contamination problems down the road, CERCLA will allow you to enter into an indemnification agreement with the current owner or buy an insurance policy before you buy the property, so that any possible future contamination clean-up costs would be covered.

Q: How would that agreement work?

A: The seller can agree that the buyer will not be responsible for any contamination caused by the seller, or the seller and buyer can agree to share responsibility for different types of contamination.

Q: Why would a property owner want to do that?

A: It is always better to enter into a deal with your eyes open. After the buyers or sellers, or both, conduct an environmental investigation, they can then define the potential problems. Once the problems are defined, they can decide if anything needs to be done about them now, if future study is warranted, or if a "wait-and-see" posture is best. Regardless of what decisions are made, there are potential costs to all contamination, and an agreement between the buyer and seller regarding who's responsible for those costs is important.

Q: If I end up cleaning up contamination left by a prior owner, can I bring a legal action to recover my costs?

A: Yes. In 2007, the U.S. Supreme Court ruled that even owners and operators that were not "innocent" could sue to recover all or a part of their clean-up costs from a prior owner and operator. As a result of the court's decision, such actions—which were formerly severely restricted—are now easier to bring.

–by Thomas M. Skove, a partner in the Cleveland office of Roetzel & Andress, LPA.

You May Need an Environmental Permit for Your Business

Q: When do I need an environmental permit?

A: Depending upon the nature of the business operations, one or more environmental permits may be required from various local, state or federal regulatory agencies whose duty is to administer laws protecting human health, safety, and the environment. Generally, permits are required if an activity *will* result in the release of pollutants or contaminants that are released or emitted into the air or discharged into the state's waters. For example, it is unlawful to install, operate, or modify a source of air contamination within Ohio without first obtaining permits from the Ohio Environmental Protection Agency (OEPA) or its local designee. Permits may be required before a facility can be built or operated that discharges stormwater from construction sites or commercial and industrial facilities, or to discharge industrial wastewater into sanitary sewers or to discharge sanitary or industrial wastewater directly into the state's waters. Permits may be needed if streams, creeks, rivers or wetlands will be disturbed or altered by any proposed activity. Permits may also be required for various types of solid or hazardous waste storage, treatment or disposal activities.

Q: Are environmental permits difficult to get?

A: The time, effort and cost to obtain environmental permits often depend on the types of permits involved and the potential impacts on the environment. Depending on the type of business operations and in-house expertise, third-party consultants are often needed to prepare permit applications. Permits may take anywhere from less than a month to a year or more to obtain. The documentation needed to obtain a permit can vary from a simple permit application form to an application form that requires the inclusion of detailed engineering plans and drawings, emissions calculations, and environmental studies. Careful project planning and scheduling are necessary to obtain permits in a timely way. In virtually every case, permits must be obtained prior to any construction, operation or modification of the source of potential discharge, emission, disposal or release. Much of the time needed to obtain the permits is associated with the regulatory agency's, and the public's, right to review the adequacy of the permit applications. Delays in obtaining permits from regulatory agencies often arise from incompletely or inadequately prepared permit applications.

Q: How do I know if I need any environmental permits?

A: Legal counsel and technical consultants are readily available to assess the nature of the business operations and to determine whether any permits for those operations would be required. Trade associations can also be helpful in providing guidance about permitting requirements. In addition, you can consult with Ohio EPA's Office of Small Business Compliance Assistance at (800)329-7518 or via the Internet at www.epa.ohio.gov (choose "Permit & Compliance Assistance").

Q: What is the usual process for obtaining an environmental permit?

A: Environmental permit applications are routinely submitted to the local Ohio EPA district office which has jurisdiction over any facility. For an existing business, it may be advisable to consult with legal counsel or a consultant before contacting a regulatory agency about permitting requirements. For the establishment of new business operations, the best place to start is to contact the nearest Ohio EPA district office to find out if any environmental permits are required for the business. Permit applications are available from those Ohio EPA district offices (or their local designees) or via the Internet.

Completed permit applications must be submitted, along with any filing fees, to the EPA district office, or its local designee, for review and approval. Information about the permitting process and many of the permit applications is available at Ohio EPA's Web site, which you can find at www.epa.ohio.gov.

Q: What if I am purchasing a business with existing environmental permits?

A: Generally, the transfer of existing environmental permits to the new owner or operator of the facility is subject to specific regulatory requirements. In most cases, this is a simple process of providing advance written notification of the permit transfer to the respective Ohio EPA district office, or its local designee. In some cases, a permit transfer notification form must be submitted and a small fee paid. In other cases, approval for the permit transfer must be obtained from the regulatory agency. The best sources of information on the transferability of existing permits upon sale of the business are contained in the terms and conditions of the permits, the applicable environmental regulations, and from the regulatory agency that issued the permits.

Q: Once environmental permits are transferred/obtained, am I done?

A: Each permit or the regulations regarding certain regulated activities that affect the environment often include record-keeping and reporting requirements. Air pollutant emissions, wastewater discharges, or waste management activities may be subject to periodic reporting requirements. In most cases, recordkeeping and reporting requirements will be stated in the terms and conditions of the permits, however, to be prudent, you should review the applicable regulations to better understand what requirements may apply. Permits and the facility's ability to comply with the permits need to be reviewed regularly to ensure compliance. It is important that renewal applications be submitted before the permits expire, otherwise, legal authority to operate may not exist.

–by Brian M. Babb, an attorney in the Cincinnati firm, Keating Muething & Klekamp, PLL; Douglas G. Haynam, an attorney in the Toledo firm, Shumaker, Loop & Kendrick, LLP; and Dale T. Vitale, an attorney with the Environmental Section of the Ohio Attorney General's Office.

How To Manage Chemical or Petroleum Spills or Releases

Q: What should be done if a spill occurs?

A: The facility's spill contingency plan should be implemented. Generally, immediate notification of the Ohio EPA, U.S. EPA, and the local fire department is required when there is an unpermitted release or spill of certain chemicals, petroleum, or other regulated materials or hazardous substances into the environment. If a facility does not have a contingency plan and employees are not trained to deal with the spill, local emergency response personnel should be promptly contacted. Spilled chemicals, petroleum, materials or substances that are regulated and exceed reportable quantity thresholds should be immediately reported to appropriate governmental agencies. In addition, remediation contractors should be promptly employed to clean up the spill to mitigate the potential damage to the environmental and the threat to human health and safety, and to minimize cleanup costs. Environmental consultants and legal counsel should be consulted promptly whenever there is a spill or release of chemicals, petroleum, or other regulated materials or hazardous substances into the environment.

Q: Do accidental spills or releases of chemicals, hazardous substances, or petroleum need to be reported?

A: It depends. If the chemicals, petroleum, regulated materials or hazardous substances are accidentally spilled or released into the environment (air, water or soil), then the business owner needs to quickly determine whether the chemicals, petroleum, substances or materials are regulated and whether the substance or material spilled or released exceeds the reportable quantity limits set forth in various environmental laws and regulations. For example, the spill or release of 25 gallons or more of oil into the environment, or a spill which creates a sheen on any surface water, is sufficient to trigger regulatory notification obligations. Such laws often require the person discovering the spill to report the spill immediately to appropriate authorities. Sometimes it is advisable to make a prompt protective notification to the emergency response and regulatory agencies if there is uncertainty whether a reportable substance or material is involved, if the reportable quantity has been exceeded, or if unsafe conditions exist. The penalties for the failure to promptly report a spill can be substantial.

If chemicals, petroleum, regulated materials or hazardous substances have been spilled inside a building and there is no threat of the materials or substances are being released into the environment, spill reporting requirements are not triggered; however, it is advisable to obtain guidance from an environmental consultant and attorney concerning such matters. There may be instances where there is no threat that the chemicals, petroleum, materials, or substances spilled within a building will be released into the environment, but it may be advisable to notify regulatory authorities and emergency response providers where health and safety concerns exist. Under most laws, written follow-up spill reports must be submitted to the regulatory agencies and the emergency response providers by the owner or operator of the facility or vessel where the spill occurred as soon as practicable. Qualified consultants and attorneys should be immediately consulted to determine whether the spill or release should be reported and how to manage the release or spill properly.

Q: How do I determine if the spilled substance or material is regulated?

A: You can often find detailed information about the substance or material often will be contained on the Material Safety and Data Sheet that was provided when the material was purchased, or you can obtain this information from the manufacturer or distributor of the product. You should review federal and state environmental regulations to determine if the spilled substance or material is regulated and exceeds the reportable quantity threshold. You also may directly contact regulatory agencies may be contacted directly for guidance, and you should seek assistance should be sought from environmental consultants and legal counsel.

Q: When and to whom must the release be reported?

A: Spills or releases of chemicals, petroleum, regulated materials or hazardous substances into the environment must be reported immediately to the National Response Center at (800)424-8802, Ohio EPA at (800)282-9378, and the local emergency planning committee where the facility is located. (Call the fire department to find out about the local committee.)

Q: Will I be required to cleanup the spill or release?

A: Generally, yes. Some spills or releases of chemicals, petroleum, regulated materials, or hazardous substances can be cleaned up with spill cleanup kits available at the facility. In some cases, it will be necessary to promptly hire a private environmental remediation company to clean up the spilled materials. In other instances, governmental entities may respond quickly to the spill notification and contain or clean up the spilled substances or oil to prevent harm to the environment or human health. The costs for governmental cleanups or response actions are generally billed to the owner or operator of the facility that caused or is responsible for the spill or release.

Q: What are the consequences of a failure to report a spill of hazardous substance or oil into the environment?

A: The failure to report a spill or release in a timely fashion may endanger the environment or public health and safety, compound cleanup efforts and expenses, and may result in the imposition of statutory penalties of $25,000 or more per day per violation and, depending upon the circumstances, could result in criminal prosecution.

Q: What can I do to prevent spills and releases?

A: Closely control material handling practices. Work with facility personnel, environmental consultants, engineers, and attorneys to prepare for and prevent spills by identifying and ensuring compliance with applicable statutory and regulatory requirements, including obtaining required permits, preparing and maintaining updated emergency spill plans and procedures, providing employee training, and by having arrangements with third-party remediation contractors in place should a spill or release occur.

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Ohio Businesses Can Appeal Ohio EPA Decisions

As a small business, you may be adversely affected by a decision of the Ohio EPA. If so**,** you may have the right to appeal the EPA's decision**.**

An official EPA decision might include the following "acts" or "actions":

- adopting or modifying of a rule or regulation;
- issuing, modifying, or revoking an order;
- issuing, denying, modifying, or revoking a license or permit;
- approving or disapproving any plans or designs.

Any decision by the EPA director that determines a controversial right or privilege is an official act or action of the EPA. The director's refusal to decide on a matter or the EPA's sending out of correspondence or notices may not be an official action or act of the EPA.

If you are adversely affected by an official EPA act or action, you may appeal the EPA's decision to the Ohio Environmental Review Appeals Commission (ERAC), a three-member panel appointed by the governor. ERAC is independent of the Ohio EPA and is charged with hearing appeals that spring from EPA decisions. Your appeal must be filed with ERAC no later than 30 days from the time the EPA issues its official decision, and during the appeal you must demonstrate that the EPA's decision was unlawful and unreasonable. ERAC may accept any evidence deemed relevant, though it is not authorized to rule on constitutional questions. Your appeal to ERAC does not automatically stop or delay whatever act or action is adversely affecting your business.

The ERAC will issue a written order stating either that the Ohio EPA's action is lawful and reasonable or that it is unlawful and unreasonable. If the latter happens, the ERAC may modify the act or action or set aside the EPA's decision and send the matter back to the EPA. You may appeal ERAC's decision to the Franklin County Court of Appeals. ERAC's decision will be reversed if it is found to be unlawful and unsupported by reliable, probative and substantial evidence.

Because the Ohio EPA is concerned with the impact its decisions and regulations have on small businesses in Ohio, a Small Business Compliance Assistance Office has been created. The Small Business Compliance Assistance Office provides newsletters and other notices to small business as well as training and assistance in understanding and complying with Ohio EPA's laws and regulations. Ohio EPA's Small Business Compliance Assistance Office can be reached at (614)644-3469 or (800)329-7518.

If your business is either directly involved with Ohio EPA or adversely impacted by an EPA decision, you have a right to be heard. However, if you do not exercise your rights, you may not be able to make objections in the future. You can obtain advice about the Ohio EPA's laws and regulations from your legal counsel or from a member of the Ohio State Bar Association Environmental Law Committee.

–by Charles R. Dyas Jr., Esq., of the Columbus office of Kegler Brown Hill & Ritter.

Mold: A Small Business Concern

In recent years, there has been a dramatic rise in mold-related property damage and personal injury claims across the country. Your business may feel the impact in the way of increased insurance and litigation costs. You may even experience difficulty in finding coverage.

Why have mold claims suddenly become a risk management concern? After all, mold has been in existence for ages. At least part of the answer is heightened public awareness created by media coverage devoted to mold cases.

Observers have termed mold as "the new asbestos," and the spike in claims has sent insurers scurrying for ways to reduce their exposure. Some carriers have simply declined to offer property coverage. Others have increased premiums or amended their policies to include mold or fungus exclusions. Mold is, therefore, a concern to your business because it threatens your ability to maintain affordable insurance coverage. Possibly the most effective way to maintain coverage for mold and to cap insurance costs is to reduce the number and severity of claims. To be proactive about mold requires an awareness of what causes mold growth, the potential consequences of mold contamination, and how best to prevent mold-related claims.

So, why does mold grow in buildings? Chronic moisture is the cause. Within as little as 48 hours of exposure to moisture, molds, including the infamous "black mold," can grow on cellulose-containing building materials. Cellulose is contained in drywall, wood, ceiling tile, carpet or insulation, and other commonly used building materials. Water intrusion can result from a variety of sources, including leaking plumbing, windows or doors, roof or cladding failures, subsurface drainage failures, or even poor ventilation. Damp, humid, poorly ventilated wall cavities and interior areas provide a perfect environment for mold growth.

Awareness of moisture sources and prevention of chronic moisture and water leaks are the keys to avoiding mold claims. Installation of kitchen and bathroom exhaust fans; properly operating HVAC systems; routine plumbing inspections; maintenance and inspections of roofs, windows, and the building envelope; and maintenance of drainage systems all can work to prevent the moisture problems that cause mold growth.

Upon discovery of a water leak, first shut off all sources of moisture. If it is an acute water loss with fungal growth not yet visible, promptly remove water-damaged building materials and use dehumidifiers and fans to quickly dry out the area. If mold is visible or if there is an earthy or musty odor present, assume that a fungal problem exists. According to the U.S. Environmental Protection Agency's Mold Remediation in Schools and Commercial Buildings, if there is less than 10 square feet of visible fungal growth present, the mold should be cleaned up and any damaged building materials removed. If more extensive growth is identified, additional steps must be taken. For mold removal guidelines, visit the Environmental Protection Agency's Web site at www.epa.gov.

In short, be proactive. Train employees or tenants to recognize signs of water intrusion or mold and instruct them to report or respond to the problem immediately. Awareness and prevention are the small business owner's best allies in avoiding mold-related claims and containing insurance costs.

–by Ronald B. Lee, Aaron E. McQueen and Brad A. Rimmel, attorneys in Roetzel & Andress's Akron office who practice primarily in the areas of toxic tort and mold litigation.

Know Ohio's Open Burning Regulations

Q: What does the Ohio Environmental Protection Agency (Ohio EPA) consider "open burning"?

A: The burning of any material(s) where air contaminants resulting from combustion are emitted directly into the air without passing through a stack or chimney.

Q: Why do Ohio's laws prohibit so many kinds of open burning now?

A: Because we know a lot more about the causes of air pollution now. Depending upon the material being burned, open fires can release many kinds of particles and toxic fumes. Leaves and plant material send aloft millions of spores when burned, causing those with allergies to have difficulty breathing. The pollutants released by open burning also make it more difficult to attain or maintain health-based air quality standards, especially in or near major metropolitan areas. Gases released by open burning can harm neighboring buildings by corroding metal siding and damaging paint. In addition, open burning is an inefficient way to get rid of waste because open fires do not get hot enough to burn the materials completely.

Q: Are there certain materials that can never be burned at any time, anywhere in the state?

A: Yes. They include:

1) items containing rubber, grease, plastic and plastic-coated wire, asphalt, or items that are made from petroleum, including tires, cars and auto parts;
2) garbage – any waste created in the process of handling, preparing, cooking, or consuming food; and
3) dead animals.

Q: Where is open burning illegal?

A: With few exceptions, open burning is not permitted in restricted areas, including those within:

1) the boundaries of any municipal corporation;
2) corporation limits and a 1,000-foot zone outside any municipal corporation having a population of 1,000 to 10,000; and
3) corporation limits and a one-mile zone outside any municipal corporation with a population of more than 10,000.

Q: When is it legal to open burn in a restricted area?

A: Items/ reasons for burning that are permitted within restricted areas include:

1) heating tar;
2) welding and acetylene torches;
3) smudge pots and similar occupational burning needs;
4) ensuring the warmth of outdoor workers and strikers;
5) bonfires, campfires, and outdoor fireplace equipment used for cooking for human consumption, pleasure, religious, ceremonial, warmth, recreational or similar purposes if: they are fueled with clean, seasonal firewood, natural gas or the equivalent, they are not used for waste disposal, and they have a total fuel area of three feet or less in diameter and two feet or less in height.

Common-sense rules apply to all of these exceptions. For example, fires must be kept to a minimum size for the intended purpose. Also, fires cannot be used for waste disposal purposes.

There are certain other exceptions that must be *approved in advance* by Ohio EPA. These may include: fires set to train firefighters; fires set to dispose of certain explosive materials; and recognized horticultural or wildlife management practices that involve burning. Also, fires

intended to control disease or pests may be set if Ohio EPA determines that open burning is the only appropriate control method.

Q: What types of open burning are allowed <u>outside</u> restricted areas?

A: All of the exceptions to open burning in restricted areas apply to unrestricted areas as well. However, outside a restricted area, the following types of waste generated on the premises can be burned:

1) Agricultural waste: material generated by crop, horticultural, or livestock production practices. (This includes fence posts and untreated scrap lumber, but not buildings, land clearing waste, garbage, or dead animals.) Ohio EPA must receive written notice of intent to open burn agricultural waste at least 10 days prior to the burn.
2) Land-clearing waste: plant matter that is removed when land is cleared for residential, commercial, or industrial development. This material may be burned only under certain circumstances and *with prior written permission from Ohio EPA*.
3) Landscape waste: any plant matter removed from land, such as yard or tree trimmings, branches, stumps, brush, weeds, leaves, grass, shrubbery, yard trimmings and crop residue.
4) Residential waste: any matter, including landscape wastes that are generated on a one-, two-, or three-family residence as a result of residential activities. Garbage may not be burned outdoors.

No open burning can take place within 1,000 feet of an inhabited building located off the property where the fire is set, nor can the fire obscure visibility for roadways, railroad tracks, or air fields. Wastes should also be dried and stacked to provide the best practicable condition for efficient burning.

No waste generated off the premises may be burned. For example, a tree-trimming contractor may not haul branches and limbs to another site and burn them there.

Finally, open burning is prohibited when air pollution warnings, alerts, or emergencies are in effect.

Q: Do I ever need written permission from the Ohio EPA to open burn in an unrestricted area?

A: Yes—when burning land-clearing waste, utilizing burning to dispose of ignitable or explosive materials, burning for firefighter training, or when burning for recognized horticultural or wildlife management practices. When burning land-clearing waste, certain conditions must be met in order to receive Ohio EPA permission. To learn more about those conditions, contact your local Ohio EPA district office.

Q: Does Ohio EPA ever allow exceptions to the rules?

A: Yes, under certain circumstances. However, to burn a prohibited material or set a fire in a restricted area, *you must receive written permission from Ohio EPA before you begin burning*.

Q: Can a community enact a local ordinance to allow open burning?

A: Local ordinances cannot be less strict than the state law described in this article. They may, however, be more strict.

Q: What will happen to me if I'm caught doing illegal open burning?

A: Ohio EPA has the legal authority to enforce the open burning laws. Violations can result in substantial penalties. If you have questions or wish to report an open burning incident, contact your Ohio EPA district office or your local air pollution control agency.

–by the Ohio Farm Bureau Federation, located in Columbus; updated November 2008.

What Business Owners Should Know about Mold and Indoor Air Quality Issues

Mold infestation may lead to a variety of legal claims against businesses. Such claims can include regulatory enforcement actions under OSHA's "general duty" clause, Ohio's statutory landlord tenant laws, and municipal housing codes. They can include bodily injury claims under general tort principles and workers' compensation laws. And even if no bodily injury is alleged, there can be claims for property damage under laws governing real estate transactions, Ohio's Consumer Sales Practices Act, and general contract law. Claims can arise against virtually any business involved in the life of a building, from construction contractors, real estate brokers, and landlords, to employers whose workers simply occupy the building.

To help control those potential liabilities, the business owner can follow some basic steps:

1) Mold only becomes a problem in the presence of oxygen, heat, organic material and moisture. Avoid mold problems by controlling moisture and humidity in your building and by keeping organic materials such as drywall, wood and carpet dry. Clean up any water intrusion within the first 24 hours.

2) Where there is no visible mold problem but there is an alleged indoor air quality problem, hire a qualified testing contractor to recommend and conduct appropriate tests to determine the nature and location of the problem. The contractor's project supervisor should hold the title of Certified Industrial Hygienist from the American Industrial Hygiene Association. The testing contractor should be completely separate from the remediation contractor to avoid conflicts of interest.

3) When a mold problem is visible, spend your money on remediation, not testing. Follow remediation recommendations published by EPA or by the Institute of Inspection, Cleaning and Restoration Certification. If hiring a remediation contractor, require the project manager to be certified by IICRC or the American Indoor Air Quality Council, and obtain references.

4) Thoroughly investigate and document any allegations of health effects by individuals potentially exposed to mold.

5) Notify your insurer of any known mold-related problems or claims. Mold damage may or may not be covered under your policy, but either way, your insurer may be able to point you in the direction of appropriate contractors and other resources to help mitigate the damage.

6) Carefully consider what legal duties you may have to disclose a mold issue, and consult with your legal counsel if you are in doubt. There may be specific legal disclosure requirements regarding mold.

While each mold infestation scenario is different and potentially complex, taking these basic first steps can prevent serious problems.

–by Brent C. Taggart is a partner in the Columbus office of Vorys, Sater, Seymour and Pease LLP.

How Are Environmental Liabilities Handled by the Bankruptcy Code?

Q: My company is facing bankruptcy and wishes to reorganize under Chapter 11 of the Bankruptcy Code. How does Chapter 11 address environmental obligations, say, my company's contaminated property?

A: All claims, including environmental obligations, are generally handled the same way as other claims are handled in bankruptcy, but because environmental claims are brought by a governmental entity (such as a state or the EPA), they are sometimes afforded special treatment. Environmental claims are typically claims for clean up costs, payment of civil or administrative penalties for past violations of environmental law, or claims for the current cost of complying with the law if the debtor is reorganizing under Chapter 11.

Q: I've heard that environmental claims are exempted from the automatic stay. Is this true?

A: Generally, yes. Once a debtor files a petition in bankruptcy court, the "automatic stay" prevents creditors from taking any further action against the debtor to collect on their claims. For example, a person who has a breach of contract claim against the debtor cannot even file suit against the debtor. Instead, the creditor must file a *claim* for *breach of contract* with the bankruptcy court and wait to see how the claim is handled by the court.

Governmental entities, however, cannot only file environmental claims against a debtor; they can simultaneously file suit against the debtor and attempt to convert their claim into a *judgment* if they prove their case. However, even though the government may convert their environmental claim into a judgment, they cannot collect on the judgment unless the bankruptcy court authorizes it.

Q: Must I continue to comply with all laws, including environmental laws, if my company is reorganizing under Chapter 11?

A: Yes. Federal law provides that a debtor in possession, *i.e.*, a debtor undergoing a reorganization under Chapter 11, must continue to comply with all applicable state and federal laws, including environmental laws, while the reorganization is pending.

Q: My company has contaminated property as part of its assets. Can it just abandon the property or sell it to someone else?

A: No. Contaminated property cannot be abandoned to avoid a governmental obligation. However, you may be able to sell the contaminated property if notice is given to other creditors, the government's environmental claim is addressed, and the bankruptcy court authorizes the sale. The new buyer would then be obligated to comply with environmental laws and clean up the property.

Q: When my company submits its plan for reorganization to the bankruptcy court for approval, can the governmental entity (for example, the Ohio EPA) object to my plan?

A: Yes, and under the Bankruptcy Code, the governmental entity's claim will likely be the largest single claim asserted, as cleanup costs usually run into the millions of dollars. Creditors and claims that are similar are lumped together for purposes of objecting to reorganization plans, and thus governmental entities with large environmental claims may have more votes when it comes to approving or rejecting the reorganization plan.

Therefore, it is important to discuss with those governmental entities what they would need to satisfy their claims before submitting a reorganization plan to the bankruptcy court.

The law changes frequently, and it is important to consult with an attorney regarding any environmental liability concerns you may have.

–by David G. Cox, an associate with the Columbus firm of Lane, Alton & Horst LLC.