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Knowing Your (Activity and Use) Limitations[®]

John Slavich

Just after Clint Eastwood dispatches the villainous Hal Holbrook in the classic 1973 movie *Magnum Force*, he solemnly intones, “A man’s got to know his limitations.” That is also good advice to prospective purchasers of real property with regard to activity and use limitations.

What are AULs?

The user’s questionnaire that environmental consultants utilize as part of their Phase I due diligence assessment process asks of the purchaser’s knowledge of Activity and Use Limitations (AULs). ASTM E1527-13 defines AULs, in relevant part, as follows:

[L]egal or physical restrictions or limitations on the use of, or access to, a site or facility: (1) to reduce or eliminate potential exposure to hazardous substances or petroleum products in the soil, soil vapor, groundwater, and/or surface water on the property, or (2) to prevent activities that could interfere with the effectiveness of a response action, in order to ensure maintenance of a condition of no significant risk to public health or the environment.

Eliminating pathways to reduce potential exposure to contaminants left in place at a site is a critical component of the risk-based closure approach utilized in Texas and other jurisdictions. AULs can take various forms, such as the following:

- A requirement that specific future activities be conducted at a site. [*Example: an obligation to inspect and maintain a cap, such as a building foundation or paved parking lot, that serves as a physical control.*]
- A prohibition of activities. [*Example: a restriction on use of groundwater.*]
- A restriction on land uses. [*Example: a prohibition of residential use at a property.*]
- Notice of site conditions. [*Example: a notification of the presence of contamination that could result in vapor intrusion into structures.*]

Institutional and Physical Controls as AULs in Texas

The Texas Risk Reduction Program (TRRP) rules adopted by the Texas Commission on Environmental Quality (TCEQ) require that institutional controls be imposed on contaminated property under certain circumstances as part of the response actions conducted at that property. Such institutional controls in Texas are memorialized in legal documents, typically in the form of a deed notice, Voluntary Cleanup Program Certificate of Completion, or restrictive covenant, filed in the county real property records. Zoning and governmental ordinances can also serve as institutional controls.

TCEQ has developed detailed regulatory guidance entitled *Institutional Controls under TRRP* (RG-366, TRRP-16 revised May 2010). The guidance document states that the fundamental purposes of an institutional control are to:

- Provide a permanent notice to subsequent owners/operators that residual chemicals of concern are present at the affected property above the protective concentration level, and/or
- Impose conditions on the future use of the affected property in order to ensure protective use of the property.

The TRRP rules also contemplate the use of physical controls, which will require post-response action care, to prevent exposure to or migration of remaining contamination. Physical controls can include caps, slurry walls, and hydraulic containment wells.

Why AULs Matter to Buyers.

Identifying existing AULs and understanding the potential impact of those AULs on property being acquired is important for a number of reasons.

- Did the consultant look? ASTM E1527-13, the standard used to perform Phase I environmental site assessments, does not require the consultant to review recorded land title records or judicial records for AULs. Consequently, unless the consultant's engagement specifically includes such a review in the scope of work to be performed, the environmental site assessment report will not be required to identify AULs. In that case, Buyer will need to independently make those inquiries and then inform the consultant of AULs identified.
- What is the impact of the AULs? Where AULs are identified by parties other than the environmental consultant (such as the title company), the buyer would be well served to have the environmental consultant explain the impact of those AULs in the context of the site conditions identified in its environmental reports.

- Are AULs filed of record? Although an AUL may have been required to be filed in the real property records, that might not have happened. A buyer should ask its environmental consultant to identify AULs referenced in its review of governmental environmental files as part of the due diligence process so that the consultant or others can then check to see whether those AULs have been filed of record. Additionally, it has been our experience that a title company may not always identify those obligations in connection with providing title work.
- How do AULs impact intended use of property? The presence of a required cap or other physical control at a property can impair the new owner's intended use of the property. Existing remediation equipment operating at the property may limit use of certain portions of the site. Physical controls can impose operational, inspection, and maintenance obligations. Those obligations can include reporting to the State regarding the effectiveness of the physical controls and financial assurance requirements. State approval for disturbance or modification of the control can potentially have a material impact on site redevelopment, as well as marketability. It can also impact everyday operations, such as where a sewer or plumbing leak that necessitates immediate action would require coordination with the State.
- Are there lender concerns? Deed notices can also trigger lender concerns, as we have seen with required notices regarding the possibility of vapor intrusion. Lenders may insist on the addition of vapor barriers or vapor mitigation systems to address a potential issue before funding a construction project.
- Do AULs require additional response actions? Where TCEQ has issued a conditional Voluntary Cleanup Program Certificate of Completion or a No Further Action letter under its Corrective Action program acknowledging partial completion of response action at a property, additional response action will be required to complete the regulatory closure process. As a result, certain obligations or restrictions will be imposed on the property until the additional response action has been completed.
- Who is responsible for compliance with the AULs? Where AULs attach to a property, there will be questions of whether those obligations have been properly addressed and the conditions met, after their imposition and prior to the buyer's acquisition of the property. If obligations remain (including additional response actions), the buyer will want to find out if a party (other than the buyer) is obligated, by contract or otherwise, to complete the response actions. If so, what are that party's obligations and does that party have the financial wherewithal to perform? The potential consequences of failure include voiding previous regulatory closure determinations by TCEQ.
- Can buyer become a responsible person? The Texas statute that defines a person "responsible for solid waste" uses a strict (without fault) standard that can

also impose joint and several liability on responsible persons. Liability under the statute extends to current and, in certain circumstances former, owners or operators of a site. At a site that has received regulatory closure from the State, a change in the land use from that specified in the AUL (such as redeveloping for residential use property restricted to commercial/industrial use) or the failure to maintain a required control is considered a substantial change in circumstances under TCEQ regulations. In those instances, the State may impose liability on the person that caused or allowed such act or omission and, in certain circumstances, also pursue others that would qualify as a responsible person for the site.

- *What about liability after sale of the property?* When the buyer considers later exit from the property, the buyer should also take into account the implications if future purchasers or tenants do not address AUL obligations, potentially resulting in liability to the buyer as a former owner of the property. Having the new purchaser contractually obligated to assume AUL obligations may provide protection to a seller, but imposing those obligations on subsequent purchasers may be challenging.
- *Compliance with AULs and Superfund liability exemptions.* Compliance with AULs is a specified condition the buyer will need to meet to qualify for the exemptions from liability under the federal superfund statute available to eligible bona fide prospective purchasers, innocent landowners, and contiguous property owners. There are no comparable statutory exemptions under Texas law.

Knowing Your Limitations.

Examples noted above touch on some of the environmental AULs that may be encountered and a few considerations related to those AULs. Note that there may be other environmental and non-environmental restrictions on activity and use created by recorded instrument and by contract that buyers should also consider.

The intended take away is this: AULs may burden a property, and it is important for a buyer to identify the resulting obligations and limitations imposed and the potential impact the AULs may have on its ownership, operation and eventual sale of the property.

This is one in a series of occasional pieces discussing environmental issues of current interest to clients and friends of the firm. This material is not intended as legal advice. Readers should not act upon information discussed in this material without consulting an attorney.

Guida, Slavich & Flores, P.C. provides legal representation to businesses and individuals in the planning, strategy-setting and execution of their business objectives within the complex maze of environmental laws, including regulatory compliance counseling, structuring and negotiation of contaminated property transactions and litigation.

www.guidaslavichflores.com

5956 Sherry Lane | Suite 1000 | Dallas, TX 75225 | 214-692-0009

106 East 6th Street | Suite 900 | Austin, TX 78701 | 512-476-6300