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Managing Environmental Risks Associated with Brownfields

Health & Environment Session-Brownfields Panel Workshop

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Topics

- Sources and Types of Environmental Liabilities
- Superfund and its Defenses
- Environmental Due Diligence
- Managing Environmental Risks
  - Contractually
  - Extracontractually
- Conclusion

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Brownfields

- The term "Brownfield Site" means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.
- The definition was added to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601 et seq.), commonly known as CERCLA or Superfund, by Public Law 107-118 (H.R. 2869) - the "Small Business Liability Relief and Brownfields Revitalization Act" in 2002.
- The so-called Brownfield Amendments of 2002 were intended to ameliorate some of the liability concerns that had resulted from the enactment of CERCLA in 1980.

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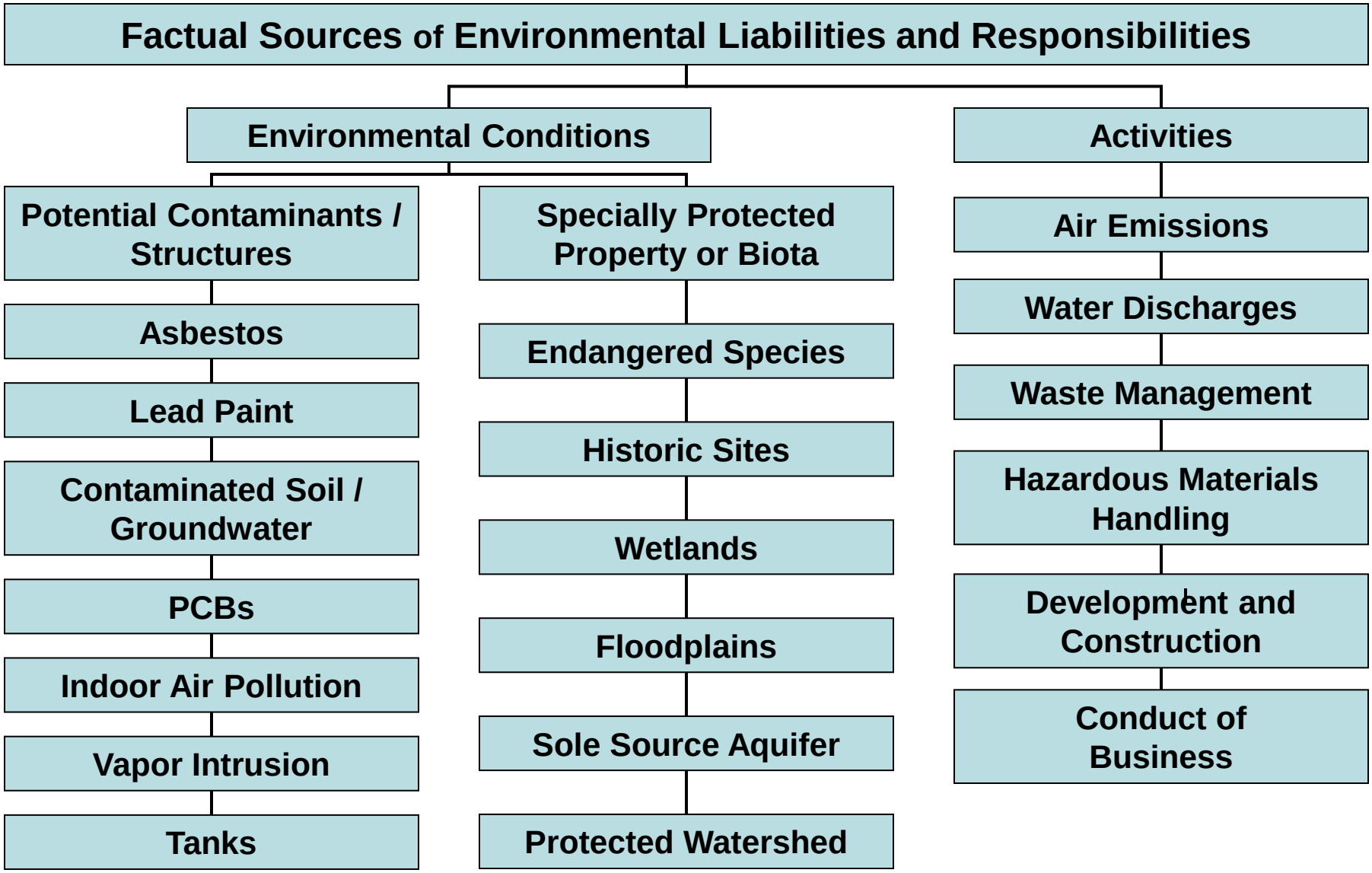
Factual Sources of Environmental Liabilities and Responsibilities



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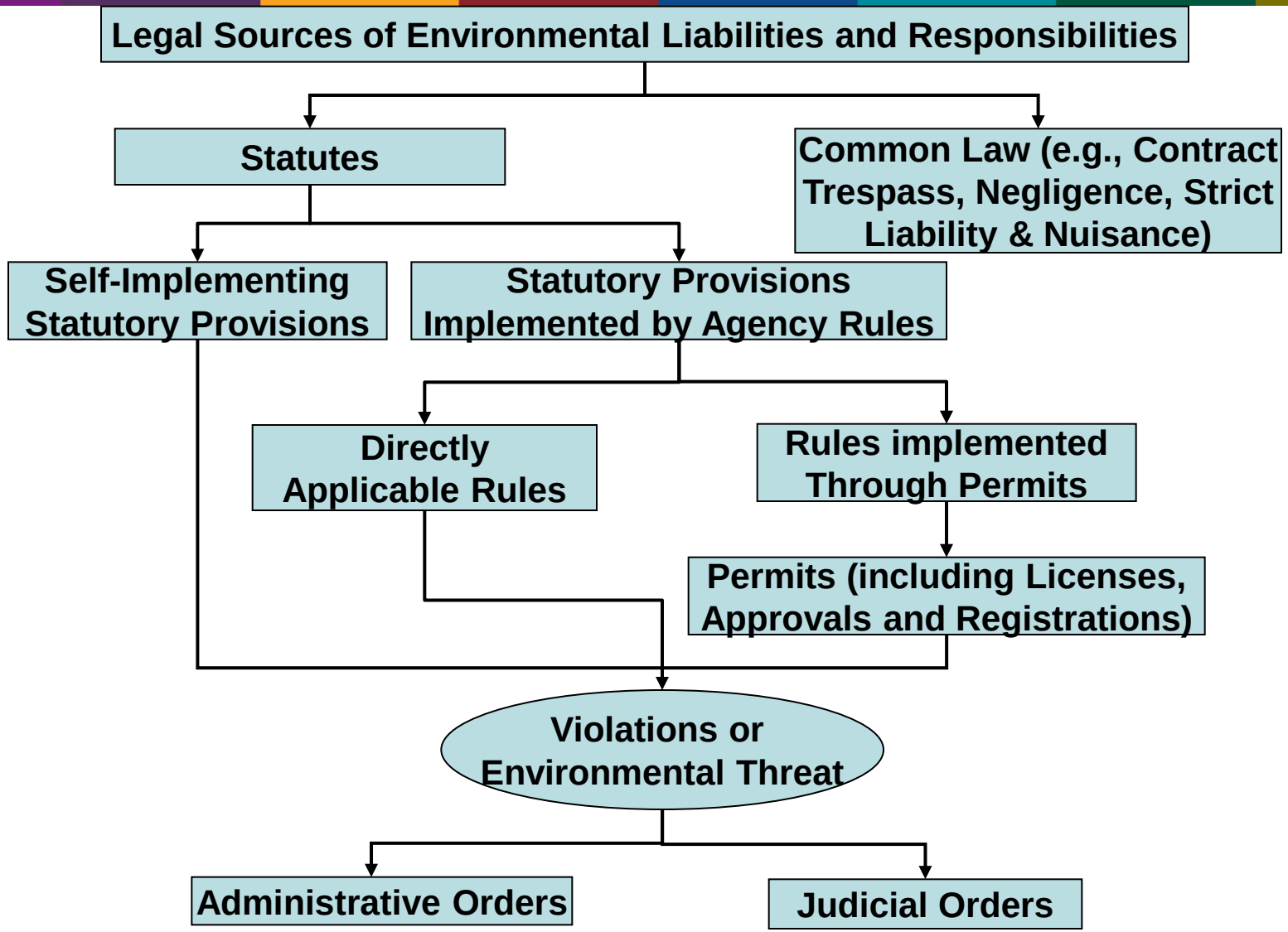

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Environmental Liabilities/Concerns

- Cost of Compliance (time and money)
- Cost of Non-Compliance
  - Penalties – Civil and Criminal
  - Injunctive Relief (mandatory and prohibitory)
- Cost of Investigation and Remediation
- Damages to Natural Resource
- Damages to, and Diminution in Value of, Property
- Damages to People (Toxic Tort)
- Land Use Restrictions
- Stigma Damages

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For transactions involving real estate, CERCLA is the most significant environmental statute because of the substantial liabilities it imposes.

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Liability under CERCLA

- CERCLA imposes liability for the cost of:
  - Investigation
  - Remediation
  - Natural Resource Damages
- Liability is strict - without fault
- Liability is generally joint and several
- Liability is retroactive

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CERCLA – Potentially Responsible Parties (PRPs)

- Present owners and operators of a facility from which there is a release or threatened release of hazardous substances
- Past owners and operators of a facility (at the time of disposal)
- Arrangers, who generated the hazardous substances
- Transporters, who selected the disposal facility

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Traditional CERCLA Defenses are Limited by Statute

- Act of God
- Act of War
- Act of Third Party
  - Exercised due care with respect to hazardous substances
  - Took precautions against foreseeable acts of third parties

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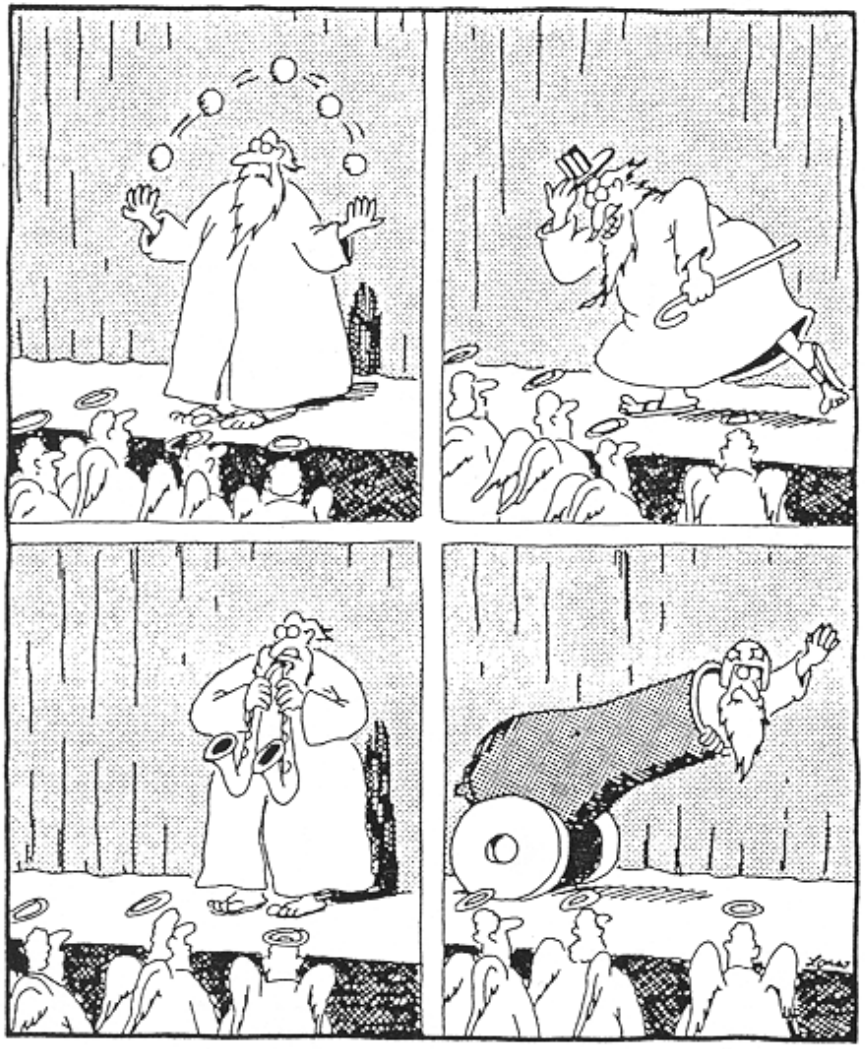

Acts of God

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CERCLA's Defenses

- **1980-Superfund**
  - Provided a third party defense
  - Defense was precluded if the act of the third party causing the contamination occurred in connection with a contractual relationship with the defendant
- **1986-Superfund Amendments and Reauthorization Act (SARA)**--added 3 types of innocent landowner defenses

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Innocent Landowner Defenses

- Governments acquiring contaminated property involuntarily or through the exercise of eminent domain authority by purchase or condemnation.
- Inheritors of contaminated property
- Innocent purchasers, i.e., even if there were a contractual nexus the purchaser would be protected if the purchaser did not know and had no reason to know of contamination; “had no reason to know” was embodied in “all appropriate inquiries” or “AAI”

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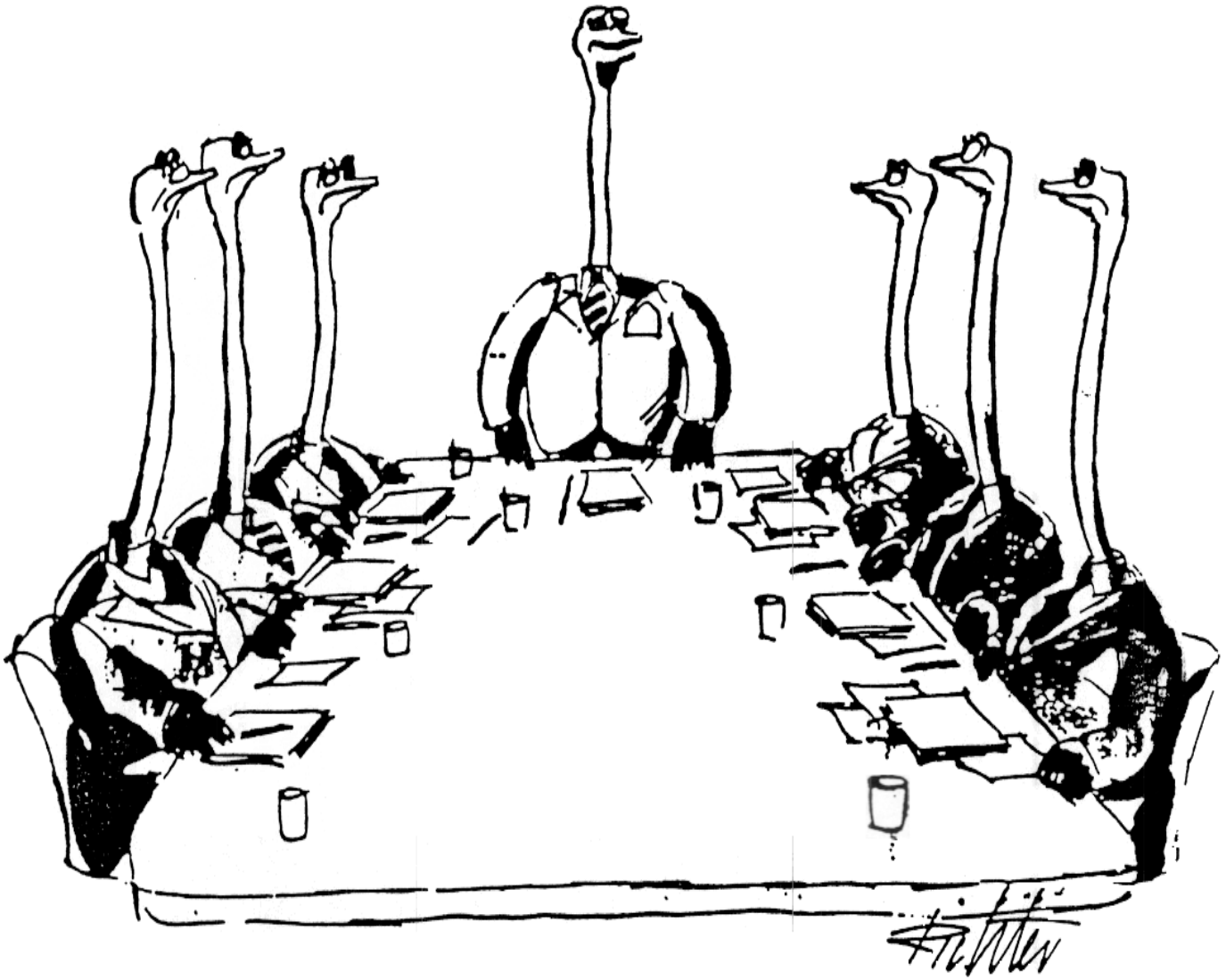

"The motion has been made and seconded that we stick our heads in the sand."

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CERCLA's Defenses (continued)

2002 Brownfields Amendments

- added 2 new transactional defenses that required AAI
  - -Bona Fide Prospective Purchaser
  - -Contiguous Land Owner
- provided guidance regarding AAI

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Common Elements of CERCLA Transaction Defenses (Innocent purchaser, BFPP, and CLO)

- Before Acquisition – AAI and No Affiliation
- Post-acquisition – Continuing Obligations, including:
  - Stop and prevent continuing releases and threatened future releases
  - Prevent or limit any human, environmental or natural resource exposure to any previously released hazardous substances

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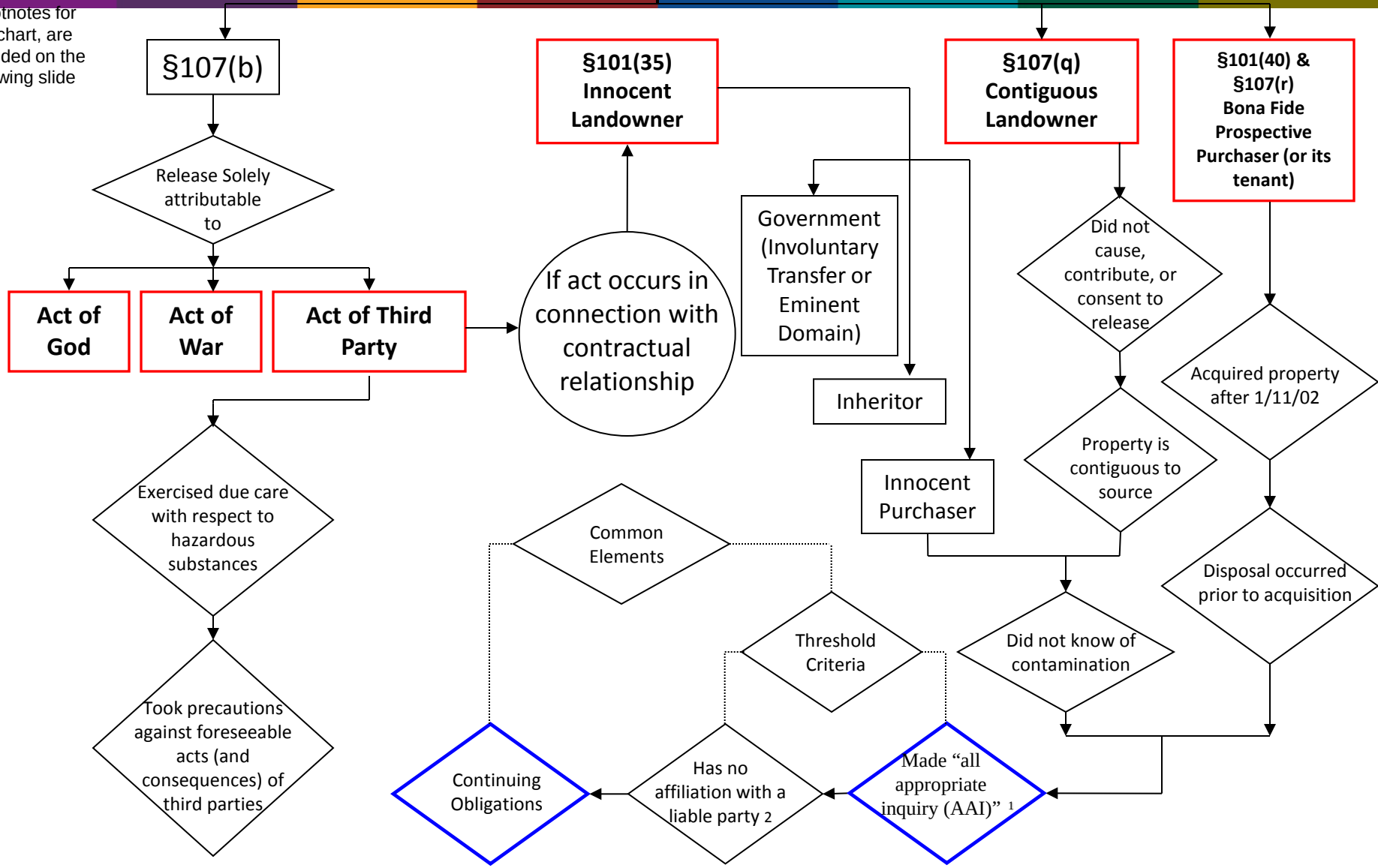
Superfund Defenses*

*Footnotes for this chart, are included on the following slide



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Superfund Defenses Footnotes

[1] AAI equates to “had no reason to know.” AAI rules are codified in 40 CFR Part 312.

[2] The no affiliation requirement applicable to contiguous land owners and bona fide prospective purchasers and does not apply to innocent purchasers, but innocent purchasers do need to satisfy the contractual relationship test of the third party defense.

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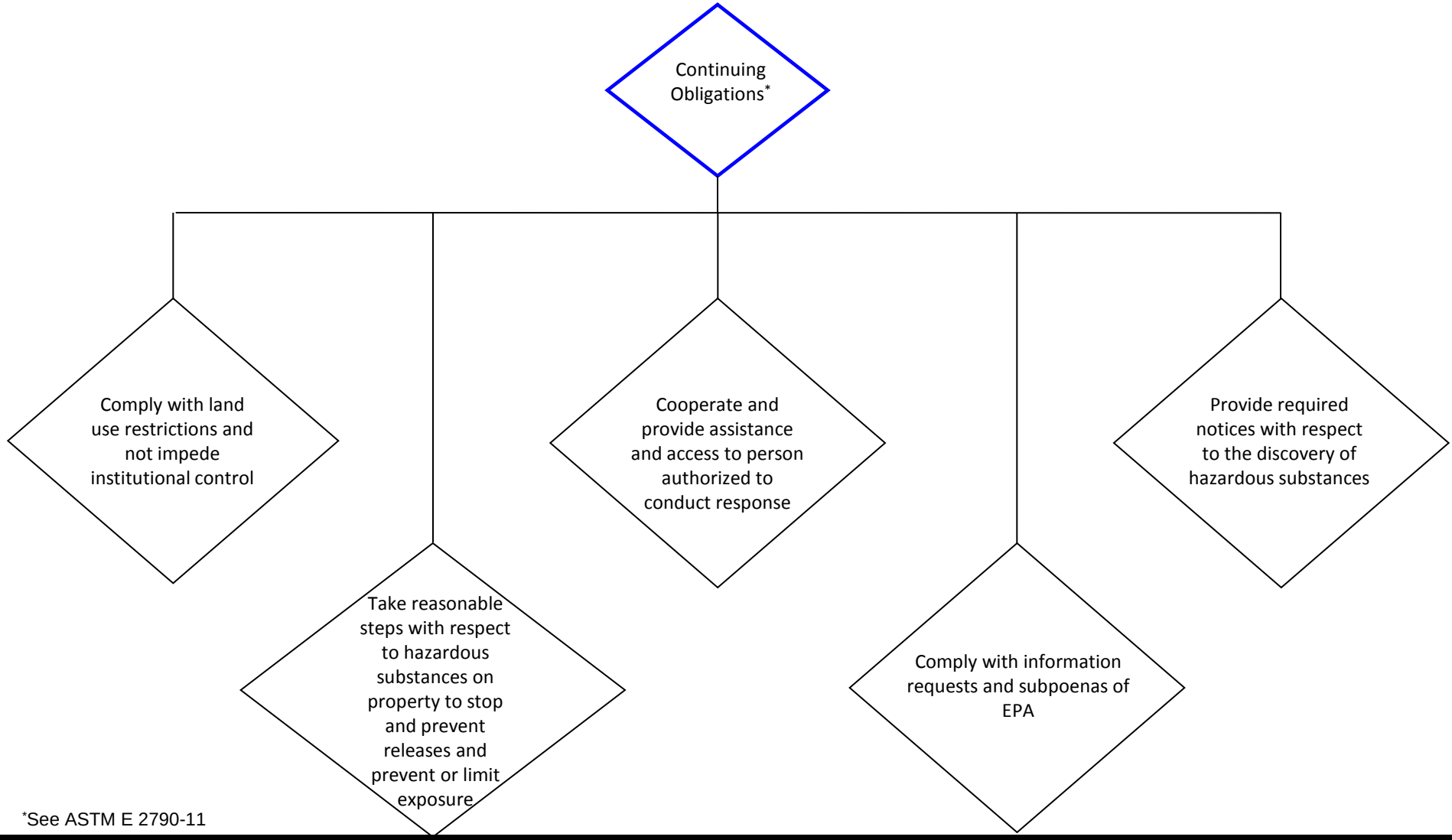
Superfund Defenses - continued



*See ASTM E 2790-11

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Is AAI Required?

Only if you want to take advantage of:

- **CERCLA's transactional defenses**
  - Innocent Purchaser
  - Bona Fide Prospective Purchaser
  - Contiguous Land Owner

- **CERCLA's Brownfields site characterization and assessment grant programs**

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Relative Value of CERCLA Defenses

Third Party Defense >

Innocent Land Owner (Governmental Entity) >

Bona Fide Prospective Purchaser Defense (BFPP) >

Contiguous Land Owner (CLO) & Innocent Land Owner (Innocent Purchaser Defense)

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What are the Shortcomings of BFPP?

- Burden of proof is on purchaser
- AAI is only one of a number of requirements -- also must have no affiliation and must prevent release- could be costly
- Limited protection – no protection for
  - Petroleum contamination
  - Stock deal
  - Liabilities arising under other statutes or the common law

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All Appropriate Inquiries

40 CFR Part 312

- On November 1, 2006, EPA promulgated AAI rule and sanctioned use of ASTM Standard – E 1527-05 for the conduct of Phase 1s.

- Recently, ASTM adopted a new standard that EPA's approved – ASTM E1527-13.

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Phase 1s

- AAI is commonly implemented through performance of a Phase 1.
- A Phase 1 is a non-intrusive (i.e., no sampling) investigation that seeks to identify recognized environmental conditions or RECs.
- RECs are the presence or potential presence of hazardous substances or petroleum.

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What Does AAI Entail?

- Inquiry by “environmental professional”
- Interviews with past and present owners
- Reviews of historical sources
- Searches for environmental cleanup liens
- Review of federal, state & local records
- Visual inspection of facility and adjoining properties
- Specialized knowledge or experience*
- Relationship of purchase price to value of the property*
- Commonly known or ascertainable information about the property*
- Degree of obviousness of the presence or likely presence – and ability to detect by investigation*

*Applicable to “users” as well as environmental professionals.

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What Does AAI NOT Cover?

ASTM Non-Scope Issues

- ACM
- Lead-Based Paint
- Lead in Drinking Water
- Wetlands
- Regulatory Compliance
- Cultural and Historic Resources
- Industrial Hygiene
- Health and Safety
- Radon
- Ecological Resources
- Endangered Species
- Biological Agents
- Indoor Air Quality
- Vapor Intrusion

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What is Vapor Intrusion?

- Vapor intrusion involves the migration of volatile chemicals from contaminated groundwater or soil into an overlying building, where they may accumulate.
- Volatile chemicals can emit vapors that may migrate through subsurface soils and into indoor air spaces of overlying buildings seeping into homes, creating potential health risks.
- Volatile chemicals may include volatile organic compounds and select semivolatile organic compounds (*e.g.*, BTEX and chlorinated organics), and some inorganic analytes, such as elemental mercury, radon, and hydrogen sulfide (see Figure 1).

http://www.epa.gov/oswer/vaporintrusion/basic.html

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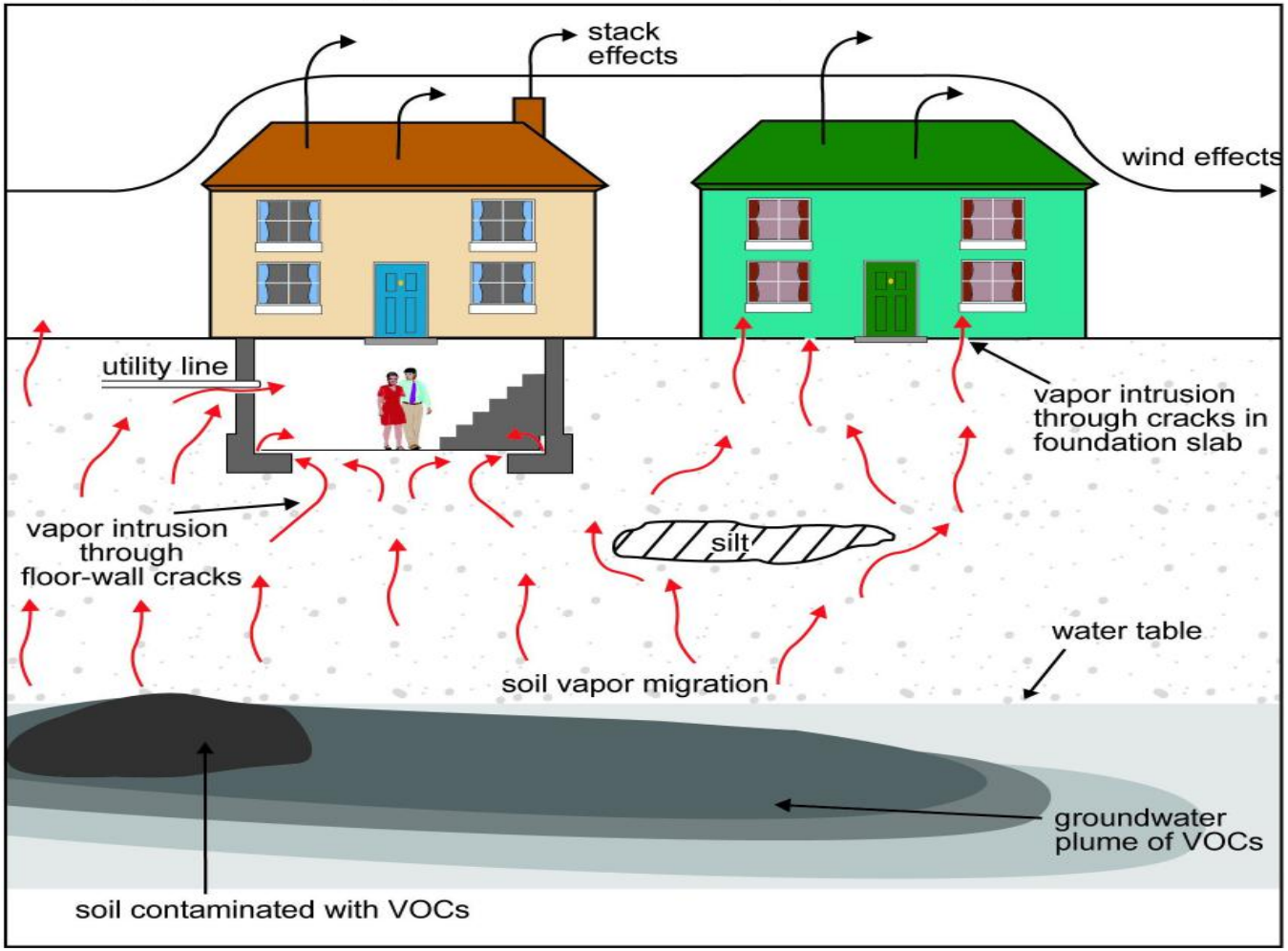
Figure 1. Migration of Soil Vapors to Indoor Air



This figure depicts the migration of volatile chemicals from contaminated soil and groundwater plumes into buildings. Volatile chemicals are shown to enter buildings through cracks in the foundation and openings for utility lines. Atmospheric conditions and building ventilation are shown to influence vapor intrusion.

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Ways to Address Environmental Concerns in a Deal

- Contractually
  - Deal Structure
  - Contract Provisions
- Extra-Contractually

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Extra-Contractual Approaches for Addressing Environmental Deal Concerns

- Voluntary Cleanup Programs
- Innocent Owner Programs
- Due Diligence – Statutory Defenses
- Use of Environmental Audit Act
- Insurance
- Other Financial Assurance
- Fixed Price Remediation
- Liability Transfers

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