

The Tale that Could Wag the Dog: *Stories and Environmental Issues in Business Agreements*

Presented by:

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Today's Presenters



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Session Overview

- Two quick tales that illustrate why environmental due diligence and careful drafting are so important.
- The anatomy of the business deal in the environmental world.
- Important environmental laws and risk factors.
- Pitfalls in due diligence and transitioning due diligence to agreement drafting.
- Due diligence.
- Contractual provisions and other tools.
- Wrap-up.

Tale #1 – The Phase I Data Gap

- Largest misconception – A Phase I actually tells us something
- Not just a box to check in the transaction
- What is a “data gap” anyway?
- Absolutely critical, but of limited worth in actual due diligence

Tale #1 – The Phase I Data Gap

DATA GAPS AND FAILURES

ASTM Standard E 1527-13 and 40 CFR Part 312, “*Standards and Practices for All Appropriate Inquiries*,” specifically require that all data gaps and/or data failures in the research be identified and comments regarding the significance of the data gaps on the ability of the environmental professional to identify RECs be provided. The following data gaps were identified in the completion of this assessment. . . .”

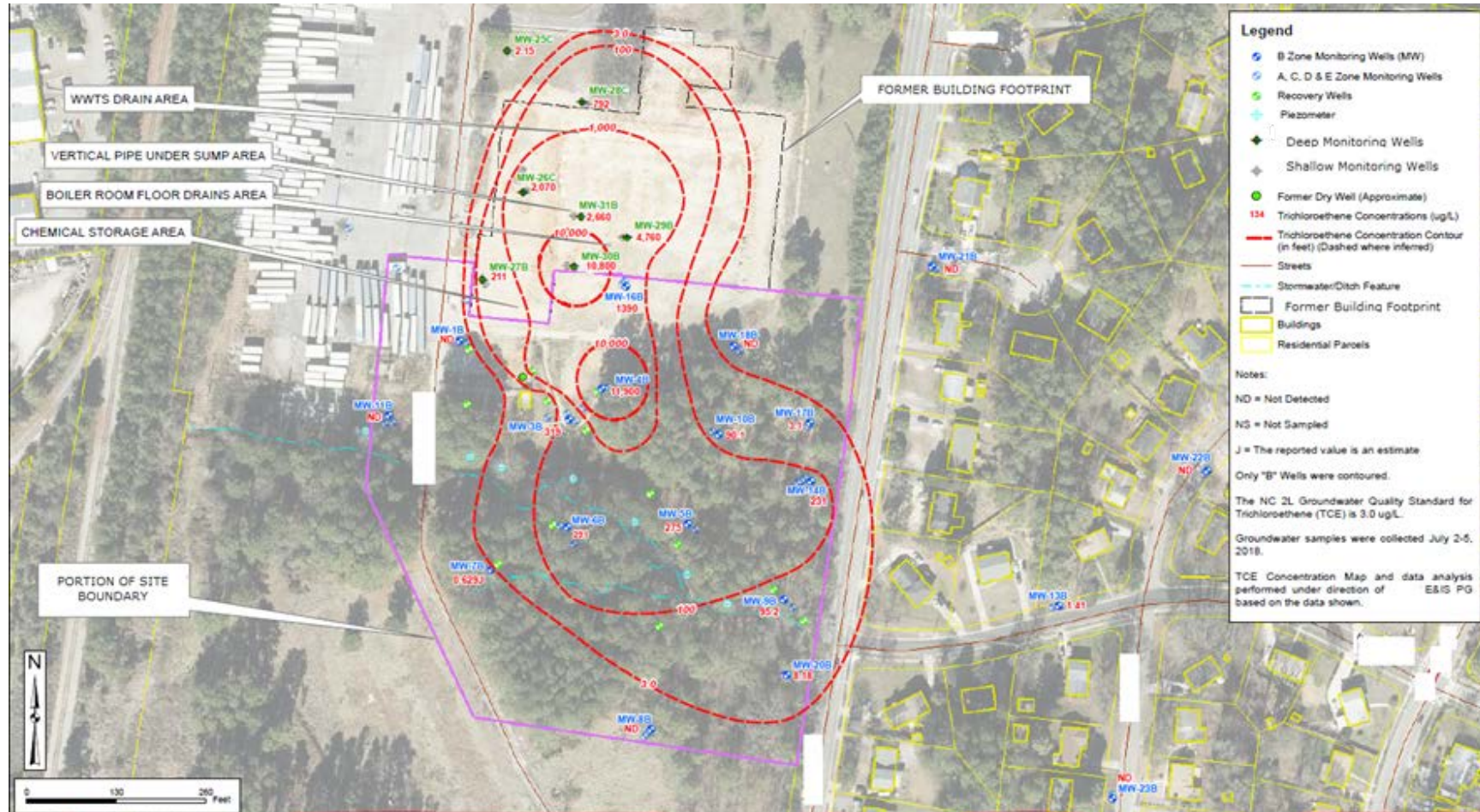
[Actual Language from Phase I]

Tale #2 – Four Simple Words

2. [REDACTED] agrees to effect all remedial measures required by law or regulation with respect to Environmental Situations and, without limitation thereon, agrees to effect the specific remedial measure set forth in Schedule A hereto.

- Resulted in litigation over a \$52 million cleanup
 - Federal Court action, two administrative appeals, State Court action

Tale #2 – Four Simple Words



Anatomy of Business Deal – Environmental

- Due Diligence
 - Phase I
 - Phase II
 - Operational (permits, compliance history)
- Sketching Out the Environmental Risk
 - What do the business people want and how to get there
- Papering the Business Deal
- Post-Closing Obligations

What is the Playing Field? (Awareness of the Acronym)

CERCLA

RCRA

CWA

CAA

FIFRA

TSCA

EPCRA

SARA

RISK FACTORS – and more acronyms!

ACM

LBP

VI

AST/UST

GW

PFAS

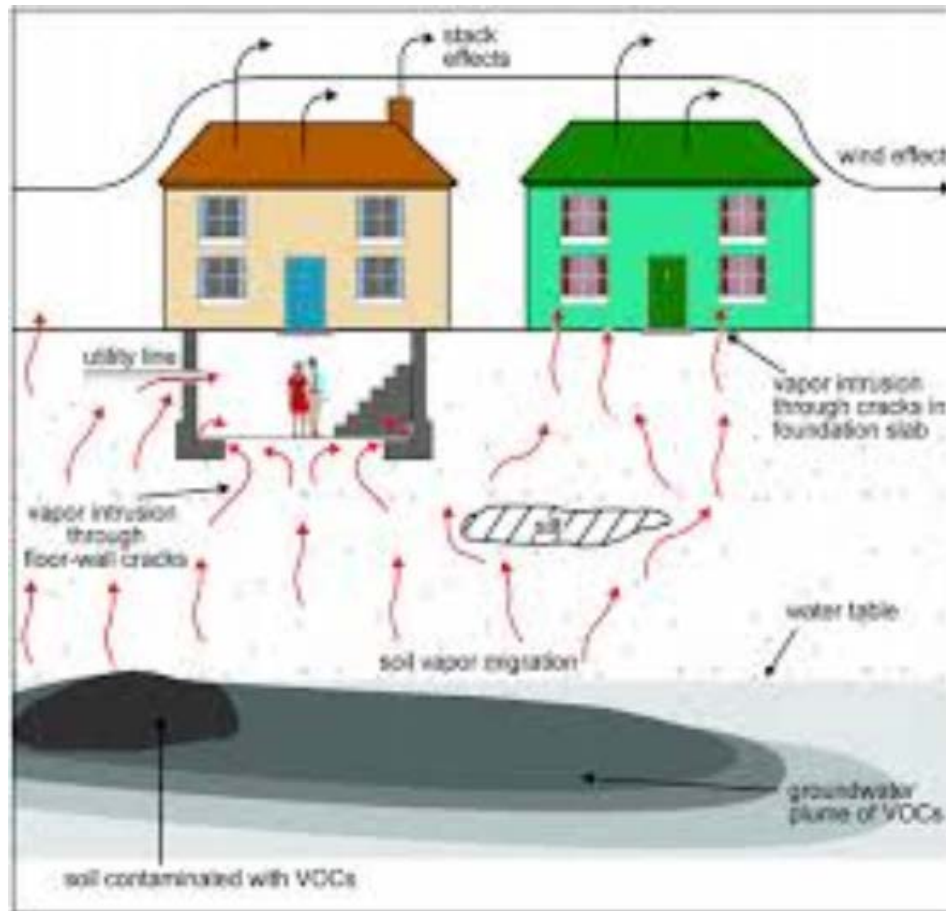
PCBs

Mold

Radon

UNS

Vapor Intrusion



The Quick and (allegedly) Dirty

Basic framework of all deals

Physical – On-site & off-site

Operational – permits and compliance

What Tools Do You Have To You Protect Yourself?

Due Diligence and yet another...

AAI

What should Due Diligence include?

Environmental Due Diligence Requests

(all requests apply to each parcel of real property involved in the transaction)

1. All environmental permits, licenses or certificates currently held by the facility (including without limitation any air permits, wastewater or stormwater permits, solid and hazardous waste disposal permits, and EPA identification numbers).
2. A list of and copies of all pending environmental permit applications for the facility.
3. A site map showing the layout of the facility, including the locations of any groundwater monitoring wells, aboveground storage tanks, underground storage tanks, or waste oil/hazardous waste storage areas.
4. Air and water discharge monitoring reports which show any exceedances of permit limits at the facility.
5. Copies of all SARA Title III chemical release reports and community right-to-know reports pertaining to the facility.
6. Any EPCRA Tier I or Tier II forms submitted by the facility.
7. A list of all materials used or stored at the facility and copies of Safety Data Sheets for such substances.
8. Copies of hazardous waste manifests, bills of lading, contracts and other hazardous waste shipment or disposal records related to the facility.
9. A list of all prior and present off-site disposal facilities used in connection with the facility.
10. A list of all hazardous and solid wastes generated by the facility, with analytical results if they are available.
11. Copies of RCRA hazardous waste generator reports or notifications related to the facility.
12. A list of and documents related to underground storage tanks at the facility, including information on size, age, contents, registration, annual fees and any releases from such tanks.
13. A list of and documents related to aboveground storage tanks at the facility, including information on size, age, contents, and releases from such tanks.
14. All correspondence with governmental agencies regarding underground and aboveground storage tanks at the facility.
15. Documents and information on the removal or closure of any underground storage tanks at the facility, including closure reports and soil or groundwater testing.
16. Documents pertaining to the presence, removal and abatement of known or suspected PCBs or PCB-containing equipment (such as transformers) at the facility.

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17. Documents pertaining to known or suspected asbestos or asbestos-containing materials at the facility.
18. Documents pertaining to known or suspected lead-based paint at the facility.
19. Documents pertaining to known or suspected radon gas or mold at the facility.
20. Documents pertaining to known or suspected PFAS/PFOS at the facility.
21. Documents pertaining to impacts or potential impacts to creeks, streams, surface water bodies or wetlands at the facility.
22. Documents pertaining to impacts or potential impacts to federal, state and municipal lands.
23. Documents pertaining to impacts or potential impacts to rare, threatened or endangered plant or animal species.
24. Documents pertaining to NEPA/SEPA applicability and compliance at the facility.
25. Copies of all contingency, spill prevention, or emergency plans for fires, explosions, or releases of hazardous materials at the facility, including copies of hazard communication programs.
26. Documents pertaining to any building or fire code violations at the facility.
27. Information on any current or past noncompliance with environmental or health and safety laws at the facility, including copies of any notices of violation, notices of noncompliance, notices of permit violations or any other such notifications from any federal, state, or local environmental agency, including without limitation any Potentially Responsible Party (PRP) notifications under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) related to the facility.
28. A detailed description of and all documents pertaining to any known or suspected contamination, spills, releases, landfills, lagoons or disposal sites at the facility or located within one mile of the facility.
29. Information on any environmental liens or other restrictions on the facility.
30. Copies of all environmental investigation, audit or assessment reports related to the facility, including without limitation any soil or groundwater testing or analytical results, whether or not being withheld or protected by any attorney-client, audit or other applicable privilege or protection.
31. Documents and information pertaining to the monitoring of groundwater at the facility.
32. Copies of any corporate environmental compliance policy and any industrial safety and hygiene compliance policy.
33. Documents relating to OSHA compliance at the facility, including audits, inspections, compliance reports, etc.

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Impact of COVID on Due Diligence

Contractual Provisions (Allocating the Risk)

- Definitions
 - “As-Is”
 - Knowledge
 - Materiality
 - Remediation
- Representations and Warranties
- Indemnities

Other Tools

- Environmental Liability Insurance
- Brownfields
- Clarity in Drafting

Wrap-up

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Questions & Contacts



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