

208 The ABC's of Environmental Due Diligence

James R. Dodson*Attorney*

Sempra Energy Law Department

Jennifer K. Mailander, Esq.*Senior Corporate Counsel Consultant*

LEXIS-NEXIS

Paul M. Samson*President*

Fivepoint, L.L.C.

Dennis Walters*Director of Consulting*

National Fraud Center

R. Timothy Weston*Partner*

Kirkpatrick & Lockhart LLP

Faculty Biographies

James R. Dodson

Attorney
Sempra Energy Law Department

Jennifer K. Mailander, Esq.

Jennifer K. Mailander is a senior corporate counsel consultant with LexisNexis, where her responsibilities include consulting with Fortune 100 corporate legal and business clients regarding strategic use of information, identifying knowledge management solutions and other technology applications, and identifying and improving work processes and increasing productivity.

Prior to joining LexisNexis, Ms. Mailander was corporate counsel for Siemen's Building Technologies, where she was responsible for handling corporate and commercial transactions and environmental matters. Prior to joining Siemen's, she worked as a senior regulatory attorney specialist for Fluor Daniel specializing in environmental law at the U.S. Department of Energy's Fernald Site.

Ms. Mailander is a member of the Transactions Lawyers Working Group of the Public Interest Law Initiative (PILI) Pro Bono Implementation Committee. She is also a member of the ABA and the Ohio Bar Association.

Ms. Mailander received a BA from Miami University of Ohio and is a graduate of the University of Dayton School of Law.

Paul M. Samson

Mr. Samson is president of Fivepoint, LLC, a product development and consulting firm located in Dayton, Ohio, and specializing in design, production, deployment, and support of interactive self-service and other web-enabled devices, and related customer branding and marketing.

Prior to founding Fivepoint, he was general counsel of Team Linux Corporation, a Dayton, Ohio-based technology startup. Mr. Samson spent five years in-house with NCR Corporation at its headquarters in Dayton as the company's senior environmental, health & safety, and product compliance attorney. In that role, Mr. Samson had sole, worldwide responsibility for assuring compliance for NCR's facilities, conducting due diligence on a variety of acquisitions and divestitures, and managing cleanups at over 40 sites around the world including a precedent-setting natural resources damages claim for pcb-contaminated sediments in the Fox River, Wisconsin. Before joining NCR, Mr. Samson practiced environmental law and related litigation with the firms of White & Case in New York and McKenna, Conner & Cuneo in Los Angeles.

He is a graduate of the University of Virginia and Emory University School of Law.

Dennis Walters

Dennis H. Walters is director of consulting services for National Fraud Center, Inc., part of the LexisNexis Risk Solutions Group. He directs a team of consultants that address fraud and high risk concerns for vertical industries, including banking, telephony, insurance, gaming, energy environmental, transportation, and ecommerce.

Mr. Walters served as an investigator for contractors to the U.S. Environmental Protection Agency in investigations to identify potentially responsible parties (PRPs) that may have contributed to the disposal of hazardous materials at designated "Superfund" sites.

He is a Certified Fraud Examiner (CFE) by the Association of Certified Fraud Examiners and a Certified Protection Professional (CPP) by the American Society for Industrial Security (ASIS). He is a member of the board of directors of the Economic Crimes Investigation Institute at Utica College of Syracuse University and a member of the International Association of Financial Crimes Investigators (IAFCI).

Mr. Walters holds a BS from Elizabethtown College and a master of legal studies from the Antioch University School of Law.

R. Timothy Weston

R. Timothy Weston is a partner in the Harrisburg, Pennsylvania office of Kirkpatrick & Lockhart LLP (K&L). With over 28 years of experience in environmental counseling, Mr. Lockhart has handled an extensive range of complex project development, transactional, regulatory, and environmental litigation matters. His work has particularly included representation of companies selling, purchasing, and redeveloping industrial sites and businesses.

Prior to joining K&L, Mr. Weston served for 15 years as assistant attorney general and later associate deputy secretary for Resources Management in the Pennsylvania Department of Environmental Resources. There, he was responsible for a wide range of engineering projects, land management functions, and regulatory programs affecting water and other natural resources.

He has authored multiple articles on the subject of Brownfield redevelopment and environmental issues in transactions.

Mr. Weston received a BA *cum laude* from the University of California, Santa Barbara and a JD *cum laude* from Harvard Law School.

ABCs OF ENVIRONMENTAL DUE DILIGENCE - SESSION 208**Environmental Due Diligence in Corporate Transactions**

**Author: R. Timothy Weston,
Kirkpatrick & Lockhart LLP
Harrisburg, Pennsylvania**

Environmental due diligence is an increasingly significant and essential part of real estate and corporate transactions. An organized and thoughtful approach to due diligence – both by the seller and the buyer – can make the difference between a successful transaction (where the parties really understand and address the risks), and a transactional process that either craters or leads to unfortunate post-closing surprises and a contentious/litigious post-transactional relationship between the parties. Too frequently, due diligence regarding environmental conditions on the property, environmental compliance by the target business, or other liability risks is launched with insufficient forethought regarding targeting and schedule to provide meaningful input to the transaction process. As a result, transaction parties may confront unexpected liabilities or major roadblocks to closing – outcomes that may be avoided by an earlier and more complete understanding of the real world risks.

This ACCA session is intended to focus on how to frame, organize and focus a due diligence effort to the particular needs and risks of a transaction, and how to utilize information collected during environmental due diligence in a manner that allows all parties a better understanding of risks and solutions – generating maximum value for the transaction.

As an introduction to this session, the following outline is intended to provide an overview framework for thinking about the due diligence process.

I. Legal Background**A. *Understanding the range of due diligence standards and “drivers”***

Before launching any due diligence effort, the first question is “Why?”. Why is environmental due diligence necessary for this transaction? Understanding the legal, as well as business, “drivers” to due diligence, and the due diligence standards applicable to particular inquiries, is an essential starting point for any due diligence program. From a business perspective, due diligence is a component of the valuation / risk assessment process, as well as an ingredient in business planning for eventual integration of new operations and assets into an ongoing enterprise. At the same time, from a legal perspective, environmental due diligence serves important roles in terms of evaluating and managing potential liabilities, satisfying corporate fiduciary responsibilities, and developing information required to meet corporate disclosure requirements under SEC and accounting rules. In framing and scoping such due diligence, additional “drivers” may be found in applicable industry or commercial standards for environmental assessments, such as those developed by ASTM, state standards for environmental due diligence, and various federal and state audit laws and policies.

B. Environmental permitting and compliance issues.

Most transactions, and particularly those involving facilities or businesses with on-going operations, require an understanding of environmental permitting and compliance issues. Such an understanding is required to reach a reasoned assurance that the business facility can continue to operate, and can become or remain productive within anticipated ranges of capital and operating costs. At its most basic, such a permitting/compliance review is concerned with identifying “fatal flaws” – gaps in permits or other governmental approvals, or continuing or intermittent problems in complying with environmental limits and conditions, that may threaten shutdown of the facility. While such outright shutdowns are relatively rare, such due diligence needs to ferret out situations where substantial capital improvements and/or expensive operational adjustments will be required to meet current or imminently pending permit limits or regulatory requirements.

1. Range of potential permitting and compliance subjects
 - (a) Air emissions
 - (i) Air emission limitations
 - (ii) Monitoring requirements
 - (iii) Facility records regarding conformance with permit conditions.
 - (iv) Past or current actions that may trigger New Source Performance Standards (“NSPS”); pre-construction review requirement for meeting best available control technology (“BACT”) and prevention of significant deterioration (“PSD”) analyses; nonattainment area new source review requirements for meeting lowest achievable emission rates (“LAER”) and procuring “off-sets” for all new or increased emissions of particular pollutants; toxic air pollutant maximum achievable control technology (“MACT”).
 - (v) Requirements for risk management plans under the Clean Air Act §112(r) accidental release prevention program.
 - (b) Water supply
 - (i) Self-supplied facilities - permitting, treatment, monitoring, standard exceedance notifications, consumer confidence reporting and recordkeeping requirements under the Federal Safe Drinking Water Act, counterpart state statutes, and applicable implementing regulations.

- (ii) Permitting requirements for withdrawal or consumptive use of surface or ground waters requires permits, metering, monitoring and period reporting.
- (c) Wastewater discharges
 - (i) National Pollutant Discharge Elimination System (“NPDES”) permits for point sources of pollutant discharges to surface waters.
 - (ii) Stormwater associated with industrial activities and stormwater from construction sites.
 - (iii) Triggering of federal categorical treatment standards apply to new, modified and/or existing facilities in designated industrial categories.
 - (iv) General and specific “pre-treatment” requirements for facilities discharge to POTWs.
 - (v) Pre-construction permit requirements.
 - (vi) Discharge monitoring and reporting.
- (d) Waste management (classification, storage, treatment, disposal)
 - (i) Classification of residuals based on federal and state regulations (Resource Conservation and Recovery Act and state solid waste management statutes).
 - (ii) “Cradle to grave” manifesting system.
 - (iii) Accumulation and storage of wastes – specific time limitations and storage area standards.
 - (iv) Permits are for on-site treatment and disposal units, and longer-term storage facilities.
 - (v) Special rules for management of used oil and certain recyclable materials.
 - (vi) Waste reduction mandates.
 - (vii) Special insurance and bonding requirements.
- (e) Storage tanks
 - (i) Underground and aboveground storage tank permits.

- (ii) Technical design and operating standards, and upgrade mandates.
 - (iii) Leak detection monitoring
 - (iv) Financial assurance and corrective action requirements.
 - (f) Emergency planning, hazardous material management and toxic release reporting
2. Potential permitting and compliance issues
- (a) Compliance with permit requirements
 - (i) Permits for construction and operation of existing facilities and operations
 - (ii) Permits and potential technology upgrades triggered by past modifications to facilities or methods of operation
 - (iii) Regulatory changes on the horizon that may affect permits
 - (b) Compliance with limitations
 - (c) Compliance with monitoring, recordkeeping and reporting requirements
- C. *Federal and state laws imposing liabilities on facility owner and operators for remediation of inherited contamination and natural resource damages***
1. Scope of liabilities under CERCLA and counterpart state laws.
- (a) CERCLA¹ imposes retroactive liability that is both strict and joint and several in nature.
 - (b) Liability is imposed upon four categories of potentially responsible parties (“PRPs”): present owners of environmentally contaminated facilities, prior owners of a facility who owned it at the time it was used for hazardous waste disposal, owners of hazardous substances who contract for its removal, and any transporter of hazardous substances.
 - (c) Limited defenses available for contamination that was caused by an act of God, an act of war, or where the release of contaminant was caused by an unrelated third-party.

¹ Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988))

- (d) To qualify for the third-party defense, a PRP must show that the third-party was the sole cause of the release, that the third-party's act or omission did not occur in connection with a direct or indirect contractual relationship with the PRP, the PRP exercised due care with respect to the hazardous substance, and that the PRP took precautions against the foreseeable acts or omissions of third-parties and the resulting foreseeable consequences of such acts.
 - (e) Third-party defense incorporates what is known as the "innocent landowner defense."
 - (f) Many states have enacted similar statutes, but not infrequently with differing liability provisions and defenses.
2. The "innocent landowner" exception to liability
- (a) CERCLA's innocent landowner exception
 - (i) Instead of simply amending the liability provisions of CERCLA §107(a)² to exempt innocent landowners, or adding an additional provision to the defenses in §107(b)³ for innocent landowners, Congress added a convoluted and lengthy definition for the previously undefined term "contractual relationship."⁴
 - (ii) This definition sprovide a liability shield to innocent landowners, but only those meeting all of the other requirements of a standard third-party defense under CERCLA §107(b).⁵
 - (iii) Party claiming innocent landowner defense must demonstrate that it had no reason to know of the contamination.
 - (iv) Must show that, at the time of acquisition, it made all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice.⁶

² 42 U.S.C. 9607(a).

³ 42 U.S.C. 9607(b).

⁴ CERCLA Section 101(35), 42 U.S.C. 9601(3).

⁵ 42 U.S.C. 9607(b).

⁶ CERCLA Section 101(35)(B), 42 U.S.C. 9601(3)(B).

- (v) CERCLA instructs courts to take into consideration several factors in making this determination, including: (1) any specialized knowledge or experience of the owner, (2) the relationship of the purchase price to the value of the property if uncontaminated, (3) commonly known or reasonably ascertainable information about the property, (4) the obviousness of the presence or likely presence of contamination at the property, and (5) the ability to detect such contamination by appropriate inspection.⁷
 - (vi) A party relying on the innocent landowner defense must demonstrate all four of the elements of the third-party defense to be successful, including showing that: (1) the release or threat of release of a hazardous substance and the resulting damages were caused solely by an act or omission of a third party; (2) the defendant exercised due care with respect to the hazardous substance; (3) the defendant took precautions against the third party's foreseeable acts or omissions and the foreseeable consequences resulting there from; and (4) the third party's act or omission did not occur in connection with a contractual, employment, or agency relationship with the defendant.⁸
 - (vii) Innocent landowner defense applies only to an assertion of liability based upon the defendant's status as a current owner under CERCLA §107(a)(1).
 - (b) State law "innocent landowner" provisions
3. Liability of intermediate landowners – passive migration under CERCLA and explicit state laws defining intermediate landowners as PRPs
 4. Defining "appropriate inquiry" under CERCLA and counterpart State "innocent landowner" provisions
 - (a) CERCLA fails to define precisely what constitutes "all appropriate inquiry."
 - (b) Based on legislative history, CERCLA has been interpreted to indicate that the standard varies depending upon the nature of the transaction and the parties involved.

⁷ Id.

⁸ CERCLA §107(b), 42 U.S.C. 9607(b).

- (c) What constitutes appropriate inquiry is a mixed question of law and fact and will depend on the totality of the circumstances.⁹
- (i) Some courts have interpreted appropriate inquiry as requiring at least a visual inspection of the site of the property.¹⁰
 - (ii) Others have interpreted it to require inspection of the actual soil.¹¹
 - (iii) The level of appropriate inquiry is to be gauged with regard to the defendant's relative sophistication and expertise.¹²
 - (iv) Some decisions indicate that the commercial buyer's failure to investigate the prior uses of the land and disposal

⁹ See Advanced Tech. Corp. v. Eliskim, Inc., 87 F.Supp.2d 780 (N.D. Ohio 2000) (refusing to grant summary judgment based upon the innocent landowner defense where defendant received assurances that contamination was limited to a particular area of the property and did not complete an environmental assessment); See also United States v. 150 Acres of Land, 204 F.3d 698 (6th Cir. 2000) (finding genuine issue of fact as to whether owner who acquired part interest by bequest and part interest through purchase from relatives engaged in sufficient appropriate inquiry to invoke the innocent landowner defense); Foster v. United States, 922 F. Supp. 642 (D. D.C. 1996) (given the commercial/industrial setting of the site, the high duty of inquiry attached to commercial transactions, the relative ease with which the contamination at the site could have been discovered prior to purchase, the collective real estate experience of the defendants, and the disparity between the purchase price and the appraised value of the site without contamination, it was incumbent upon the plaintiff to investigate possible contamination at the site).

¹⁰ See United States v. Serafini, 706 F. Supp. 346 (M.D. Pa. 1988) (refusing summary judgment motions by both parties finding that the key issue was what constituted appropriate inquiry when the defendant purchased the property, but also finding that no visual inspection whatsoever was inconsistent with the innocent landowner defense requirement of making "all appropriate inquiry").

¹¹ See U.S. v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996) (CERCLA contemplates that prospective purchasers will undertake all appropriate inquiry and will engage in appropriate inspection, including soil inspection).

¹² See New York v. Del Monte, No. 98-CV-0649E(M), 2000 U.S. Dist. Lexis 5149 (W.D.N.Y. Mar. 31, 2000) (a party found to be in the demolition and construction business should have conducted reasonable inquiry before transfer of the property); See also Wickland Oil Terminals v. ASARCO, Inc., 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20855 (N.D. Cal. 1988) (holding that buyer should have conducted soil borings and reviewed government records where it knew of the presence of slag metal piles on the property).

practices of its occupants fails to meet the appropriate inquiry” standard.¹³

- (v) Engaging in an environmental site assessment does not necessarily meet the level of appropriate inquiry, particularly if the audit proves to be inaccurate.¹⁴
- (d) Efforts by ASTM to define appropriate inquiry
 - (i) ASTM¹⁵ began its endeavor to define “appropriate inquiry” in its first set of standards entitled, “Standards on Environmental Site Assessments for Commercial Real Estate” in May, 1993.
 - (ii) ASTM has since released subsequent editions of these initial due diligence standards, the latest being released in 2000 (see below).

D. Toxic tort liabilities for on-going or latent off-site migration of contamination from business assets

E. Successor liability issues

1. Stock, merger, and consolidation transactions –
2. Asset transactions – scope and tests of successor liability under federal and state environmental laws
3. Examples of successor liability problems
 - (a) Federal and state laws imposing liability for off-site conditions – facilities where hazardous substances were transported for treatment or disposal.

¹³ United States v. A&N Cleaners & Launderers, Inc., 854 F.Supp. 229 (S.D.N.Y. 1994) (not appropriate inquiry where defendant failed to investigate the disposal practices of a dry cleaning operator, even though newspaper articles described the area of the property as the source of local groundwater contamination).

¹⁴ BCW Assocs., Ltd. v. Occidental Chemical Corp., No. 86-5947, 1988 WL 102641 (E.D. Pa. Sept. 29, 1988) (landowners who had performed environmental site assessments prior to their purchase of the property were not allowed to avail themselves of the innocent landowner defense).

¹⁵ The American Society for Testing and Materials.

- (b) Potential statutory and common law liabilities for toxic tort – personal injury and property loss – resulting from past operations

F. Disclosure requirements under SEC rules

1. Sources of requirements: Securities Act of 1933, 15 U.S.C. §§77a-77aa; Securities Exchange Act of 1934, 15 U.S.C. §78a-78jj); Rule 10b-5, 17 C.F.R. §240.10b-5
2. Regulation S-K, 17 C.F.R. §229.10 *et seq.* (Items 101, 103, 303)
3. Staff Accounting Bulletin No. 92.
4. AICPA Statement of Position 96-1, Environmental Remediation Liabilities

G. ASTM Standard for Transaction Screens, Phase I and Phase II Environmental Assessments

1. Levels of inquiry:
 - (a) Transaction Screen.¹⁶
 - (b) Phase I Environmental Assessment¹⁷
 - (c) Phase II Environmental Assessment¹⁸
2. While each of these three standards provide a different level of inquiry based on various factors, all were intended to provide an outline of activities to form the basis of appropriate inquiry to be conducted before acquisition of commercial property.
3. While ASTM standards have not been statutorily or judicially adopted, they are widely accepted by environmental consultants as forming the practical basis for numerous real estate preacquisition environmental audits, known commonly as Environmental Site Assessments (“ESAs”).

H. Federal and State environmental audit laws and policies – privileges and modifications to enforcement practices

1. Incentives for Self-Policing, Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (April 11, 2000).

¹⁶ ASTM E 1528-00

¹⁷ ASTM E 1527-00

¹⁸ ASTM E 1903-97

2. State audit privilege laws and enforcement policies (See C.M. Price, *Environmental Audits*, Ch. 6 of ENVIRONMENTAL LAW PRACTICE GUIDE (Matthew Bender 2000)).

II. Procedural Guide

A. *What are the purposes of due diligence*

1. Identify risks and frame issues to be addressed at the negotiating table.
2. Obtain a required level of comfort that the deal is a worthy investment, and determine an appropriate purchase price or contingency.
3. Address requirements for “due diligence” as prerequisite to “innocent landowner” defense under CERCLA and counterpart state laws.
4. Provide a basis for developing workable action plans, to address known environmental compliance or contamination problems and to implement facility improvements or property development that may be considered for various business reasons.
5. Establish a basis for utilizing brownfield or voluntary cleanup programs which provide liability protection for involved parties.
6. Establish a basis for possible use of insurance to deal with potential known or unknown environmental contamination or liability risks.
7. Evaluate how prospective facilities or assets will fit into the purchaser’s current structure, and assess the cost of streamlining or restructuring operations (including potential costs and hurdles of any future disposition of certain of the assets being acquired).
8. Identify practices of a seller that may differ from the purchaser’s approach, and project costs of physical, operational, or cultural changes necessary to integrate the business unit or asset into the purchaser’s operations.
9. Fulfill fiduciary duties to shareholders and investors.
10. Provide information for fulfilling environmental disclosure requirements imposed on public companies by the Securities and Exchange Commission (SEC).
11. Potential use of due diligence assessment information in seeking relief under Federal and State self-audit policies.
12. Satisfy conditions for financing of the transaction or post-transaction development projects. (i.e., provide information to lenders allowing

evaluation of the asset as potential collateral, and the risks of cleanup costs affecting the credit worthiness of the borrower.)

13. Potential consideration of state financial assistance programs to address particular conditions

B. *Where to start the due diligence process*

1. Understanding the potential risks and targeting due diligence to address and evaluate those risks.
2. Identifying the types of risk to be considered
 - (a) Environmental compliance risks
 - (i) Costs of obtaining missing governmental approvals necessary to conduct the business.
 - (ii) Enforcement actions and penalties for pre-closing operations of business without necessary governmental approvals.
 - (iii) Penalties for continued operation of business without necessary governmental approvals (*i.e.*, finding missing permit during transition holding period following closing).
 - (iv) Cost of installing/upgrading equipment or modifying operations to correct exceedance of emission or effluent limits, or non-compliance with permit conditions.
 - (v) Potential business interruption if facility is shut down due to missing permit, or production is hampered pending facility upgrades to attain compliance.
 - (b) Environmental remediation risks
 - (i) Identifying and characterizing existing conditions that may trigger requirements or liability for remediation
 - (ii) Establishing a baseline to distinguish between preexisting and post-transactional conditions.
 - (c) Toxic exposure liability risks
 - (d) Property damage liability risks
 - (e) Natural resource damage risks

- (f) Off-site liability risks arising from arrangement for transpiration, treatment or disposal

C. *Defining the appropriate scope of due diligence for the particular transaction.*

1. Assessment of areas of potential environmental concern – ASTM Phase I Assessments
2. Issues beyond ASTM Phase I Assessments
 - (a) Environmental permitting and compliance
 - (b) Environmental reporting
 - (c) Functioning of environmental management systems
 - (d) Asbestos containing materials
 - (e) Lead-based paint
 - (f) Drinking water supply quality (lead in drinking water, etc.)
 - (g) Wetlands and other conditions that may inhibit development
3. ASTM Standard for Phase II Environmental Assessments
 - (a) Triggers to a Phase II assessment
 - (b) Scope of a Phase II
 - (c) Potential outputs – outline of anticipated remedial requirements, probabilistic estimate of potential remedial costs.

D. *Factors affecting the defined scope of due diligence*

1. The number and the of facilities to be investigated.
2. The value of the transaction
3. Time allotted for performing the investigation (and is it realistic)
4. Funds available for performing the investigation
5. The definition of “materiality” for each party – what levels of risk would upset the deal
6. Nature and levels of known or unknown risk the respective parties are willing to accept regarding potential remediation requirements or liabilities.

7. Issues of previously or simultaneously divested facilities – particularly in stock, combination and merger transactions.

E. Confidentiality and disclosure issues in due diligence

1. Risks that assessment will trigger requirements to disclose conditions to government.
2. Risk site assessment or other due diligence work will alert regulators to problems they were previously not aware of.
3. Risk that site assessment work or due diligence work will lead to public disclosure of a confidential transaction
4. Challenges of conducting due diligence where a company's workforce is not aware of the transaction, and buyer can only deal with top management.
5. Challenges in conducting due diligence for a contemplated hostile takeover, where cooperation by target company is not available.

F. Seller due diligence – preparing for the transaction

1. Collect and ***organize*** relevant regulatory documents (anticipate the buyer's questions)
 - (a) Facility by facility organization of relevant documents
 - (b) Permits and other governmental approvals, and related applications
 - (c) Discharge and emission reports
 - (d) Enforcement documents (notices of violation, orders, consent orders, etc.)
 - (e) Agency correspondence
 - (f) Waste characterization information and testing
 - (g) Hazardous waste manifests
 - (h) Waste management (transport, treatment and disposal) contracts
 - (i) Hazardous and toxic material inventories and reports
 - (j) Documents regarding pending or recent litigation or administrative proceedings

- (k) Environmental assessments, audits and reports of conditions at business assets
- 2. Review documents for privileged and extraneous material
- 3. Compile lists of permits and governmental approvals, and check current status
 - (a) Assure approvals are current, and renewal applications are timely.
- 4. Consider conducting Seller Phase I and Phase II investigations
 - (a) Understand potential problems and frame potential solutions before the buyer raises issues
 - (b) Provide potential buyers with a starting point for understanding the asset
- 5. Seller team (counsel and consultants) site visits
- 6. Prepare Seller management and personnel for potential questions and interviews
 - (a) Face the “hard” issues, and prepare to field the tough questions.
- 7. Prepare rules of engagement
 - (a) Establishment of a data room or virtual data room
 - (b) How questions will be handled, distributed and answered
 - (c) Tracking of responses and document distribution

G. *Buyer due diligence – preparing for the process*

- 1. Formation of the environmental due diligence team
 - (a) In-house technical and legal personnel
 - (b) Outside environmental counsel; potential local counsel in states where facilities are located
 - (c) Expert technical consultants (environmental, industrial hygiene, special issues)
 - (d) Framing engagements; engagement letters with outside counsel and counsel specifying expected depth of investigations.
- 2. Review of readily-available information

- (a) SEC disclosure statements
 - (b) Electronic data bases – environmental court and administrative case reports, environmental news reporting services, VISTA, etc.
 - (c) On line agency compliance records
 - (d) SEC disclosures (Edgar)
3. Preparation of the initial due diligence checklist
- (a) The “generic” checklist
 - (b) Refining the generic checklist
 - (i) Review of applicable state laws in light of locations, nature of property and particular types of business operations
 - (ii) Items identified from initial review of available information
4. Selecting and engaging the environmental consultant
- (a) Reasons for engaging an environmental consultant
 - (b) Who should engage the consultant - privilege issues
 - (c) Request for proposal process
 - (i) Qualifications and experience
 - Who is really on the team and will perform the work?
 - Real experience in the particular jurisdiction
 - (ii) Pricing – “low” bids may not be low; commodity reports vs. obtaining cost-effective service that provides meaningful information
 - (d) Negotiation of the consulting agreement
 - (i) Scope of work
 - (ii) Confidentiality
 - (iii) Ownership and disposition of work product; disposition of draft reports, field notes

- (iv) Responsibility for hazardous substances
- (v) Standard of care
- (vi) Limitations on liability
- (vii) Insurance
- (viii) Disposition of testing residuals

H. Steps in the due diligence/environmental assessment process

1. Environmental due diligence questionnaire to seller
2. Review of documentation made available by seller (i.e., data room/virtual data room or other production)
 - (a) Permits and governmental approvals (and related applications providing background on the facility)
 - (b) Discharge monitoring reports, emission reports, etc.
 - (c) Compliance information (notices of violation, complaints, settlements, orders, consent orders, civil penalty assessments)
 - (d) Agency inspection reports and correspondence
 - (e) Claims, requests for information, PRP notices regarding on-site or off-site liabilities.
 - (f) Toxic release inventory reports (and background behind estimated emissions)
 - (g) Documents relating to reportable releases and spills
 - (h) SPCC plans, pollution prevention plans, §112(r) accidental release plans
 - (i) Environmental assessments and compliance audits
 - (j) Waste characterization information
 - (k) Lists of facilities to which seller sent wastes for treatment, disposal or recycling
 - (l) Waste hauling, treatment and disposal contracts
 - (m) Waste manifests

3. Interviews of personnel responsible for environmental matters at target company
4. Phase I Environmental Assessment
 - (a) Who conducts – consultant (alone or in conjunction with other members of due diligence team)
 - (b) Elements
 - (i) Review of available documents (see above)
 - (ii) Site visit and walkover – process for laying out imaginary grid of property and assuring walkover of entire site (including the “back 40”, vacant and overgrown areas where wastes may be buried).
 - (iii) Interviews with target company personnel responsible for environmental compliance, facility management, waste management and disposal
 - (iv) Environmental database searches for subject site and surrounding properties
 - (v) Review of relevant federal, state and local environmental regulatory files; fire department and emergency management information (re: spills and releases)
 - (vi) Interviews with regulatory personnel.
 - (c) Preparation and review of draft work product – discussion of findings with counsel and client prior to production of written recommendations.
 - (d) Outputs
 - (i) Identification of areas of potential environmental concern
 - (ii) Recommendation of further testing or investigations to confirm or preclude existence of areas of environmental concern, and to characterize nature and potential extent of risk.

5. Phase II Environmental Assessment
 - (a) Elements
 - (i) Non-invasive screening for subsurface conditions, such as ground penetrating radar, magnetic screening for metal, voltaic organic analysis of soil gasses, etc.
 - (ii) Testing of environmental media (surface water, groundwater, soils, air) if warranted based on Phase I findings.
 - (iii) Testing of building materials for asbestos, PCBs or other materials of potential concern.
 - (b) Preparation and review of draft work product – discussion of findings with counsel and client prior to production of written recommendations.
 - (c) Outputs
 - (i) Comparison of conditions disclosed with existing remediation standards (e.g., state brownfield cleanup criteria)
 - (ii) Recommendations for further characterization testing
 - (iii) Initial view of potential remedial approach
 - (iv) Probabilistic estimate of remedial costs
6. Review of waste transportation, treatment and disposal contracts and documents
 - (a) Compile list of facilities used, and check on status of facilities (CERCLIS and counterpart state lists of hazardous sites)
 - (b) Determine allocation of risks, indemnifications, etc.
7. Review of historical acquisition and divestiture documents
 - (a) Determine allocation of risks in past transaction, including potential liabilities retained or assumed by seller.
 - (b) Identify potential indemnifications to seller for certain risks, and whether they are assignable or will pass through to buyer.
 - (c) Determine nature and extent of any indemnification obligations owed to others

8. Review of current and historical lease agreements for facilities leased by or to seller
 - (a) Determine scope of what facilities were leased
 - (b) Determine allocation of environmental risks between landlord and tenant in each lease
9. Review of historical and current insurance policies
 - (a) Scope of potential coverage that may be available to address known or unknown environmental liabilities
 - (b) Review claims history to identify potential liabilities.
10. Review attorney responses to audit inquiries regarding environmental litigation or claims
11. Review litigation files relating to pending or recent litigation, including compliance proceedings, and toxic tort/property damage claims.
12. Review seller's environmental assessments and compliance self-audits.
13. Review existence and functioning status of environmental management systems.

I. Documenting the results of due diligence

1. Reports of the environmental assessment
 - (a) Confine to objective observations and results, and engineering estimates (where requested) of particular courses of action
 - (b) Additional observations (such as potential non-compliance problems), reported to counsel, would appear in counsel's due diligence report.
 - (c) Review of drafts prior to issuance of final reports
2. Interim reports of due diligence results – providing early warning of risks to transaction decision makers.
3. Scope of a final due diligence report
 - (a) Executive summary
 - (b) Explanation of what was done (scope of effort), and its limitations

- (c) Identification of key observations and results – focusing on risks identified and their potential impact on the business or transaction.

J. *Assuring meaningful due diligence*


1. Allow sufficient time – plan ahead
2. Don't rely on representations and warranties.
3. Assure environmental assessments are performed by experienced personnel.
4. Avoid cookie cutter/commodity-style Phase I environmental assessments.
5. Understand the importance of historical information.
6. Don't rely on prior assessments and audits without an update.
7. Don't rely on "data rooms" – confirm information where possible.
8. Watch for caution flags, skeptical "instincts" are important
 - (a) If a seller's documents seem disorganized or incomplete
 - (b) Where a seller insists that questions be narrowly channeled through certain individuals, and direct access to knowledgeable personnel is withheld.
9. Seek realistic views of the material risks (neither underestimating, nor overstating the nature and range of the risks).

III. References

Quick Searches 

Get A

Case



(Enter Citation)

Environmental Site Records

Aerometric Information Reporting System (AIRS)



(Enter Search Terms)

Federal Agency Decisions

Department of Interior ALJ Decisions



(Enter Search Terms)

State Agency Decisions

Environmental Agency Decisions, Selected States



(Enter Search Terms)

Federal and State Environmental Cases

Environmental Cases, Federal



(Enter Search Terms)

Federal Statutes & Regulations

USCS Environmental Titles



(Enter Search Terms)

State Environmental Regulations -- 50 States*

ENFLEX Environmental, Health & Safety Regulations, All States



(Enter Search Terms)

Environmental Law Reporter

All Environmental Law Reporter Materials



(Enter Search Terms)

Enter a Citation

SHEPARDIZE[®] Get a Case Get a Statute

Research Links 

[Recent EPA Notices \(Last 30 Days\)](#)
[Environmental Law Institute -- EPA Policy/
Guidance Documents](#)
[State Statutes - Table of Contents](#)

[Matthew Bender Publications--Table of
Contents*](#)

[The Brownfields Law & Practice*](#)

[The Bureau of National Affairs, Inc.
Publications*](#)

[BNA Chemical Regulation Daily*](#)

[BNA International Environment Daily*](#)

[BNA National Environment Daily*](#)

[BNA Occupational Safety and Health Daily*](#)

[BNA State Environment Daily*](#)

[BNA Toxics Law Daily*](#)

Search Forms 

[Federal Environment Cases & Agency
Decisions](#)
[Federal Environment Statutes & Regulations
Site Records](#)

Web Links 

[lexis.com research](#)
[Get A Document](#)
[SHEPARDIZE[®]](#)

[LexisNexis Document Solutions - Federal
Document Services](#)
[LEXIS Search Advisor Environmental Topics](#)
[lexis.com Corporate Sources](#)
[lexis.com Energy Sources](#)
[lexis.com Environment Sources](#)
[lexis.com Environmental News Publications*](#)
[lexis.com Healthcare & Medical Sources](#)
[lexis.com International Environmental
Statutes and Regulations*](#)
[lexis.com Litigation Sources](#)
[lexis.com Mergers & Acquisitions Sources](#)
[lexis.com Patent Sources](#)
[lexis.com Public Health & Welfare Sources](#)
[lexis.com Real Estate Publications*](#)
[lexis.com Real Estate Sources](#)
[lexis.com Transportation Sources](#)
[Martindale-Hubbell Law Directory Listings](#)

Secondary Sources



(Enter Search Terms)

*All sources may not be included in your LEXIS-NEXIS subscription and may incur an additional charge. Please consult your account representative for full details of your LEXIS-NEXIS subscription agreement.

Download this page for your Intranet



Copyright ' 2001 LexisNexis a division of Reed Elsevier Inc.° All rights reserved.
Your use of this service is governed by [Terms & Conditions](#).
Please review our initiatives on protecting consumers [privacy](#).

<http://www.corpcounsel.lexisnexis.com/forms/diligence.htm>

Enter a Citation

 SHEPARDIZE® Get a Case Get a Statute

Table of Contents

[Assets / Real Property](#)
[Capital Structure / Ownership](#)
[Credit Facilities / Solvency](#)
[Employee Benefit Plans](#)
[Environmental Issues](#)
[General Financial Information](#)

[Industry and Competitive Information](#)
[International / Global Information](#)
[Litigation / Regulatory Compliance](#)
[Materials Contract / Material Announcements](#)
[Organization, Authority, Existence](#)

* Organization, Authority, Existence

Good Standing or Tax Status ([back to top](#))

[ALL STATES](#)--46 States available
[INDIVIDUAL STATES](#) (choose states online)

States in which qualified to do business

[ALL STATES](#)—46 States available
[INDIVIDUAL STATES](#) (choose states online)

Doing Business as Information

[ALL STATES](#)—46 States available
[INDIVIDUAL STATES](#) (choose states online)

Parent/subsidiary list

[Directory of Corp Affiliations](#)
[S&P Corporate Descriptions](#)

Officers and Directors list

[Directory of Corp Affiliations](#)
[D&B Executive Background Information](#)
[Sources](#)

By-Laws (if public company)

[SEC Filings Exhibit 3](#)

Articles of Incorporation (if public company)

[SEC Filings Exhibit 3](#)

Partnerships or joint ventures

[Company News](#)
[Business News Publications](#)
[SEC Filing Exhibits](#)

Property Ownership

* Assets / Real Property

Real property owned by the company, property tax and mortgage information ([back to top](#))

[ALL STATES](#) (See list online for States Available)
[INDIVIDUAL STATES](#) (choose state online)
[INDIVIDUAL COUNTIES](#) (choose county online)

Liens or judgments against real property

[State Judgements and Liens Combined](#)
[Individual State Judgements and Liens](#)
 (choose state online)

LexisNexis Document Solutions - Transaction-critical document solutions

[Secured Transaction Services](#)
[Corporate Services](#)
[Representation Services](#)
[Intellectual Property Services](#)
[Federal Document Services](#)
[Integration Consulting Services](#)

Intellectual property rights owned by or licensed to the company

[Utility, Design & Plant Patents](#)
[Combined Federal & State](#) Trademarks
[European Patents--Full Text](#)

Copies of patent and trademark licensing agreements

[SEC Filing Exhibits](#) (if public company)

* Environmental Issues

[ALL STATES](#) (See list online for States Available)

[INDIVIDUAL STATES WITH ALL OR SELECTED COUNTIES](#)

LexisNexis Document Solutions - Transaction-critical document solutions

[UCC Lien Searching](#)
[Corporate Searching and Filing](#)
[Registered Agent Filing](#)

* Capital Structure / Ownership

Parent/subsidiary list ([back to top](#))

[Directory of Corp Affiliations](#)
[S&P Corporate Descriptions](#)

Equity/Debt ownership –Persons holding 5% or more of any class of equity or debt

[Vickers Institutional Holdings](#)
[Vickers Security Report](#)

Options, warrants, calls or other features of debt or equity

[S&P Corporate Descriptions](#)

Copies of any pledge agreements, esops, trusts, voting or other agreements in respect of shares (if public company)

[SEC Filing Exhibits](#)

Merger Activity and Terms of the Transaction

[Mergerstat](#)
[M&A News Articles](#) (choose publication online)

Tender Offers

[Williams Act Filings](#)

* Credit Facilities / Solvency

Copies of credit and loan agreements, guaranties, letters of credit, reimbursement agreements or promissory notes ([back to top](#))

State environmental agency orders or consent decrees
([back to top](#))

[Environmental Agency Decisions](#)
(selected states)

Decisions and orders of various federal agencies involving environmental matters

[Environmental Agency Decisions](#)
(selected Federal agencies)

Federal and state environmental site reports

[State Priority Lists](#)
[National Priority List of Hazardous Waste Sites](#)

EPA Enforcement actions

[EPA Civil Enforcement Docket](#)

Underground storage tank information

[Leaking Underground Storage Tank Site Records](#)
[Underground/Above Ground Storage Tank Records](#)

Superfund potentially responsible parties

[Potentially Responsible Parties](#)
[Superfund Tracking System](#)

Federal Agency Settlements or Consent Decrees

[EPA Consent Decrees](#)

Pending Litigation Reports

[Environmental Law Reporter Briefs](#)

* International / Global Information

Importing and Exporting Activities

[Piers Import/Export Reporting Service](#)

International Patents Owned

[European Patents--Full Text](#)
[Patents Family & Legal Status](#)

[S&P Corporate Descriptions](#) (if public company)
[SEC Filing Exhibits](#)

Occurrence or potential occurrence of a default

[Current News Articles](#) (most recent two years)
[S&P Corporate Descriptions](#) (if public company)
[SEC Filings--Full Text Only](#) (if public company)

Bankruptcy filings

[Combined Bankruptcy Filings](#)
[Individual State Bankruptcy Filings](#) (choose jurisdictions online)

Credit Ratings

[Experian Business Reports](#)

* Litigation

Federal and state case law involving the company [\(back to top\)](#)

[Federal and State Case Law Combined](#)
[Federal and State Case Law](#) (only cases within the last year)

Pending or recently filed litigation

[US District Court Dockets Combined](#)
[US District Court Docket](#) (choose court online)
[State Civil Court Dockets Combined](#)
[Civil Court Docket](#) (choose jurisdiction online)

Judgments against the company

[State Judgements and Liens Combined](#)
[Individual State Judgements and Liens](#) (choose state online)

Bankruptcy filings

[Combined Bankruptcy Filings](#)
[Individual State Bankruptcy Filings](#) (choose jurisdiction online)

Verdicts or settlements involving the company

[Database](#)

D&B Global Reports

[Global Duns Market Identifiers](#)

Global Company Profiles

[Asia/Pacific Stories](#)

International Cases Involving the Company

[Australian Cases](#)
[Canadian Cases](#)
[England Cases](#)
[European Court of Justice cases](#)
[Hong Kong cases](#)
[Ireland Cases](#)
[Malaysia Cases](#)
[Mexico Cases](#) (In Spanish)
[New Zealand Cases](#)
[South African Cases](#)
[Singapore Cases](#)
[United Kingdom Cases](#)

England, Scotland and N. Ireland

General International Company Reports by various International publishers

[International Company Profiles](#)
 (Choose source online)

Country Profiles

[Country Profiles Combined](#)
[Country & Region Reports](#) (Choose sources online)

Lawyers in Other Countries

[Martindale Hubbell International Listings](#)

News Stories From /About Other Countries

[World News](#) (most recent two years)

Legal and Regulatory Information Commission of the European Union

[European Union Materials](#) (choose source online)

* General Financial Information

[Jury Verdicts Combined](#)
[Individual State Jury Verdict Reporters](#)
 (choose jurisdiction online)
[Individual Nationwide Jury Verdict Reporters](#)
 (choose jurisdiction online)

State environmental agency orders or consent decrees

[Environmental Agency Decisions](#) (selected states)

Decisions and orders of various federal agencies involving environmental matters

[Environmental Agency Decisions](#) (selected Federal agencies)

Occupational Safety and Health Administration Inspection reports

[OSHA Inspection Reports](#)

Patent or trademark litigation

[Intellectual Property Cases & Administrative Decisions](#)

* Materials Contracts / Material Announcements

Copies of material agreements such as employment, confidentiality, asset purchase, stock purchase agreements, etc. ([back to top](#))

[SEC Filing Exhibits](#) (if public company)

Material events

[S&P Corporate Descriptions](#)
[Company News Combined](#)
[Current News Articles](#) (most recent two years)
[Bloomberg News Articles](#)

Merger Activity and Terms of the Transaction

[Mergerstat Reports](#)

Recent judgments or settlements

[State Judgements and Liens Combined](#)
[Individual State Judgements and Liens](#)
 (choose state online)
[Jury Verdicts Combined](#)
[Individual State Jury Verdict Reporters](#)
 (choose jurisdiction online)

Annual reports ([back to top](#))

[Annual Reports to Shareholders](#)

Proxy statements

[Proxy Statements](#)

Periodic reports

[Form 10-k](#)
[Form 10-g](#)
[Form 8-k](#)
[SEC Filings--Full Text Only](#)

Overview of company financials

[Disclosure Online Database--US Public Company Profiles](#)

Credit Ratings

[Experian Business Reports](#)

Bankruptcy Reports

[Bankruptcy DataSource-Company Profiles, News and Reorganization Plans](#)

* Industry and Competitive Information

Overview of the industry and competitors within the industry ([back to top](#))

[Various Industry Publications](#) (Choose Industry and Publication online)

Information on new product releases and future competitive strategy

[Overview of Markets & Technology](#)

Market research reports, including industry structure, market size and trends

[ICC Full Text Keynote Market Reports--International Company Profiles](#)

Analysis of foreign markets for U.S. goods

[National Trade Data Bank Market Reports](#)

[Individual Nationwide Jury Verdict Reporters](#)
(choose jurisdiction online)

Market share

Secured loans/UCC financing statements--50 States available

[The Market Share Reporter](#)

[All UCC Filings Combined](#)
[Individual States UCC Filings](#) (choose state online)

LexisNexis Document Solutions - Transaction-critical document solutions

[UCC Lien Searching](#)

Copies of collective bargaining agreements involving the company

[SEC Filing Exhibits](#) (if public company)

Copies of patent and trademark licensing agreements

[SEC Filing Exhibits](#) (if public company)

Tender Offers

[Williams Act Filings](#)

*** Employee Benefit Plans**

Copies of employee benefit plans, including stock option or other incentive compensation plans
[\(back to top\)](#)

[SEC Filing Exhibits](#) (if public company)

Pension and benefits case law, Pension and Benefits Guaranty Corporation opinions and Department of Labor opinions

[Benefit Cases & ERISA, PBGC Letter Opinions](#)

IRS rulings, letters and releases

[Federal Tax Cases & IRS Administrative Decisions Combined](#)

Copies of employment agreements and consulting agreements

[SEC Filing Exhibits](#) (if public company)

Copies of confidentiality agreements or non-competition agreements

[SEC Filing Exhibits](#) (if public company)

Copies of collective bargaining agreements

[SEC Filing Exhibits](#) (if public company)



[Download this page for your Intranet](#)

***WARNING:** Some of the sources included in the Due Diligence Checklist may not be included in your LEXIS-NEXIS subscription agreement and will incur an additional search charge. In some cases you will not have access to these excluded sources and any attempt to link to them will result in an error message. In other cases you will have access to these excluded sources but they will be designated with a \$, indicating an additional charge will be incurred to search the source. Please consult your account representative for full details of your LEXIS-NEXIS subscription agreement.



[Copyright](#) © 2001 **LexisNexis** a division of Reed Elsevier Inc. All rights reserved.
Your use of this service is governed by [Terms & Conditions](#).
Please review our initiatives on protecting consumers [privacy](#).

ABCs OF ENVIRONMENTAL DUE DILIGENCE - SESSION 208

Site Access and Confidentiality Agreement Between Prospective Seller and Prospective Buyer*

Author: R. Timothy Weston
Kirkpatrick & Lockhart, LLP
Harrisburg, Pennsylvania

This is an example of an access and confidentiality agreement for the purpose of conducting environmental due diligence. It is a separate, "free-standing" agreement. Often, parties will instead insert these provisions into the body of the purchase and sale agreement.

This Site Access and Confidentiality Agreement ("Agreement") is made this [day] day of [month], [year] between [Owner] ("Owner") and [Prospective Buyer] ("Prospective Buyer"), collectively referred to herein as the "Parties" and individually as a Party.

WHEREAS,

A. Owner is the owner of [certain business assets and operations relating to the _____ (the "Business") and] certain real property consisting of approximately [amount] acres, identified as Parcel Numbers _____, located at [location], [jurisdiction], as depicted on the map attached hereto as Exhibit "A" (the "Property");

B. The Prospective Buyer is interested in potentially acquiring the [Business and] Property [and redeveloping the Property];

C. Prior to entering into a definitive arrangement for the acquisition of [the Business and] the Property, the Prospective Buyer wishes to undertake certain due diligence with respect to [the Business and] the Property (in the form of review of certain information and conduct of certain environmental assessments), and Owner is willing to provide access to the Prospective Buyer for such purposes subject to the terms and conditions of this Agreement; and

D. As part of such due diligence, Owner will be furnishing Prospective Buyer access to, and will allow the copying by or for Prospective Buyer of certain information as to [the Business and] the Property, including information relating to environmental assessments concerning the properties owned and operated by Owner [and the Business], environmental conditions at the Property [and other Business assets], the condition of equipment and inventory at the facilities, and other matters mutually agreed to by the parties (collectively, the Information), which Information is non-public, confidential or proprietary in nature. All information furnished to Prospective Buyer, its directors, officers, employees, agents, or representatives, including without limitation attorneys, accountants, consultants and financial advisors (collectively "representatives"), by Owner or any of its representatives; all information reflecting observations, notes, or assessments by Prospective

Copyright ©2001 by Matthew Bender & Co., Inc. Reprinted with permission from BROWNFIELDS LAW AND PRACTICE, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group.

ABCs OF ENVIRONMENTAL DUE DILIGENCE - SESSION 208

Buyer representatives concerning the Property, business or assets of Owner; and all information developed by any consultants individually or jointly engaged by the parties shall hereinafter collectively be referred to as the "Information."

NOW, THEREFORE, for \$ [amount] and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the parties hereby agree as follows:

1. Term. The date on which the last of Owner or the Prospective Buyer executes and delivers this Agreement shall be referred to herein as the "Effective Date." The term of this Agreement shall be for [amount] days, unless the Parties agree to an extension of such period in writing.

2. Access Rights and Conditions. Subject to the terms and conditions hereinafter set forth, Owner grants to the Prospective Buyer, its employees, agents and contractors ("Designated Representatives") a license for reasonable access to the Property [and other Business assets], to conduct such evaluations of compliance with environmental laws and additional observations and sampling by the Prospective Buyer's independent consultant of environmental media at the Property as the Prospective Buyer deems appropriate, in accordance with the following terms and conditions:

(a) The Prospective Buyer shall notify Owner at least [three] business days in advance of any required access to the Property.

(b) The Prospective Buyer shall consult with designated representatives of Owner prior to undertaking any testing or sampling which involves boring, drilling, or similar intrusive penetration of the soil or structures on the Property.

(c) The Prospective Buyer agrees to split any samples that are taken of environmental media at the Property, and the Prospective Buyer agrees to identify the parameters and test methods which will be utilized in analyzing such sampling.

(d) The Prospective Buyer shall assume full responsibility for proper characterization, manifesting, storage and disposal of any materials or wastes generated as a result of sampling by the Prospective Buyer.

(e) The Prospective Buyer agrees, and will require its agents, consultants, employees and contractors to agree to comply with all applicable laws, regulations, rules and permits pertaining to the Property, including, but not limited to, the Occupational Health and Safety Act and all applicable environmental laws, health and safety laws and regulations. Owner shall be a third party beneficiary of such agreements by the Prospective Buyer's agents, consultants, employees and contractors.

(f) Upon completion of its investigations, the Prospective Buyer shall promptly restore the Property to substantially the condition it was in prior to engaging in the investigations, including the repair or replacement of any and all damage to the Property.

ABCs OF ENVIRONMENTAL DUE DILIGENCE - SESSION 208

(g) The Prospective Buyer agrees to indemnify and hold harmless Owner from and against any and all claims, suits, actions, damages, costs, liabilities, obligations, fines or penalties (collectively "Claims") resulting from or arising out of injury or death of any person, damage or loss to any property, any non-compliance with Section 2(e) above, or any damage to the environment, resulting from or arising out of the performance of the investigations by the Prospective Buyer or the Prospective Buyer's consultants, contractors or agents, except to the extent that such losses, damages, liabilities, or expenses result from the negligence or willful misconduct of Owner or Owner's employees, agents or contractors. Owner and the Prospective Buyer recognize and agree that the Prospective Buyer has neither created nor contributed to the existence of any regulated substances or other environmental conditions on the Property existing as of the date of this Agreement, and that (i) by virtue of the investigations conducted under this section, the Prospective Buyer is not an owner or operator of the Property, or the generator, transporter, storer, treater, or disposer of any regulated substances found or identified at the Property, and (ii) the Prospective Buyer is not undertaking or arranging for the handling, removal, treatment, storage, transportation or disposal of Regulated Substances found or identified at the Property, except in either case with respect to the specific materials generated as the result of the Prospective Buyer's sampling and investigation work. The provisions of this Section 2(g) shall survive termination of this Agreement.

(h) Prior to entering the Property and undertaking any work under this Section 2, the Prospective Buyer shall acquire and maintain the following minimum insurance coverage:

- (1) Worker's compensation insurance in statutory amounts.
- (2) Employer's liability insurance with a limit of \$_____ per claim and in the aggregate.
- (3) Comprehensive liability coverage, for third party personal injury, bodily injury and property damage in a form providing coverage not less than standard commercial general liability coverage, and with a limit of not less than \$_____ per occurrence and \$_____ annual aggregate. The maximum deductible for such coverage shall be for such coverage shall be mutually agreed upon by both Owner and Prospective Buyer.
- (4) Commercial automobile liability insurance, including owned, non-owned, and leased or hired vehicles, with a \$_____ combined single limit for bodily injury and property damage.

Such insurance policies shall be procured and maintained from insurance companies authorized to transact business in, and which have an agent for service of process in the [State], having at least an "A" Best's Rating and a Class VIII or better financial size category in accordance with the most recent A.M. Best Company rating. Such insurance policies, other than Workers Compensation coverage, shall name Owner as an additional insured. Such insurance policies shall be endorsed as waiving the carrier's rights of recovery under subrogation against Owner and Owner's employees, agents or contractors. Prior to entering the Property, Prospective Buyer shall provide to Owner certificates of insurance evidencing such coverage.

ABCs OF ENVIRONMENTAL DUE DILIGENCE - SESSION 208**3. Confidentiality.**

(a) All Information, whether oral or written, relating to the Property, Business or assets of Owner, exchanged between or developed by the parties or their representatives shall be kept confidential. All such information shall be treated as confidential whether or not so marked. Prospective Buyer agrees to transmit the Information only to those representatives who need to know the Information for the purpose of evaluating the joint venture transaction referred to above. Any reference in written reports provided to Prospective Buyer by its representatives or as a result of Prospective Buyer's own internal memoranda and which refer to such Information shall include a notation in such report or memorandum that such Information referenced is "Confidential and Subject to the Confidentiality Agreement dated _____."

(b) Except for such disclosures as are required by law (after notice as provided in Section 3(e)), no Information shall be disclosed by Prospective Buyer or its representatives to any other person without the express written consent of Owner, and no such Information shall be used by Prospective Buyer or its representatives for any purpose other than evaluating the joint venture transaction described above. Prospective Buyer agrees that it will be responsible for any breach of this Agreement by its representatives of this Agreement.

(c) Any Information exchanged between the parties shall be exchanged in confidence without waiver of any privilege or immunity which may protect such information from disclosure to third parties. The parties and their respective representatives shall take all precautions necessary to preserve the confidentiality of such information and to protect it from disclosure to third parties, except as is required by law.

(d) All work product of any environmental consultant, or of any other consultant retained by the parties in connection with the present negotiations, as well as all information conveyed to or by such consultants in relation to such work, shall be maintained in confidence in accordance with this Section 3, and any such consultant must agree to these terms of confidentiality before it may be retained by the parties for such work.

(e) In the event that Prospective Buyer or its representatives are requested or become legally compelled (by oral questions, interrogatories, request for Information or documents, subpoena, civil investigative demand or similar process) to disclose any of the "Information," Prospective Buyer shall provide Owner with prompt written notice so that Owner may take such legal action as they deem appropriate to dispute such process and to protect the information from disclosure to a third party. In the event a protective order or other remedy is not obtained, or that Owner waive compliance with the provisions of this Agreement, Prospective Buyer will furnish only that portion of the Information which Prospective Buyer is legally required to disclose.

(f) In the event that the parties do not, prior to (date), enter into an agreement to consummate the contemplated acquisition of the Property, or closing under such acquisition agreement does not occur prior to the date provided in any such agreement, Prospective Buyer and its representatives shall return the originals and all copies of any Information to Owner, and shall destroy any notes, memoranda or other analyses prepared by Prospective Buyer and Prospective Buyer's representatives relating to the Owner's assets and the Business.

ABCs OF ENVIRONMENTAL DUE DILIGENCE - SESSION 208

(g) The provisions of this Section 3 shall survive termination of this Agreement.

4. Specific Performance. The parties acknowledge and agree that in the event of a breach of this Agreement, no adequate remedy at law is available to Owner, and Owner shall have the right to seek specific performance of any and all obligations by Prospective Buyer and Prospective Buyer's representatives under this Agreement. Such right to specific performance shall be in addition to, and shall not limit, any other remedy available at law or equity for any such breach.


5. Modification. This Agreement shall not be modified except in writing signed by both Parties.

6. Non-Waiver. No failure by either party to insist upon strict performance of any term or condition of this Agreement shall constitute a waiver of such term or condition or of a breach thereof. Any such waiver must be in writing and signed by the waiving party.

7. Choice of Law. This Agreement shall be construed in accordance with the laws of the State of [state].

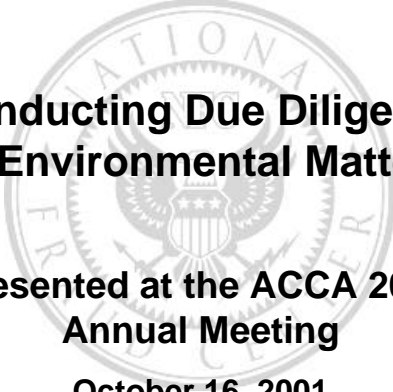
8. Capitalized Terms. All capitalized terms not defined herein shall have the meanings given to them in this Agreement.

9. Counterparts. This Agreement may be executed in counterparts all of which taken together shall be deemed one original.



Conducting Due Diligence In Environmental Matters



Presented at the ACCA 2001
Annual Meeting
October 16, 2001




www.nationalfraud.com 1.800.999.5658

Why Due Diligence?


- In today's litigious society, no business transactions are more likely to result in liability than those involving land transactions where a complete chain of title and history of the use of the land is not fully known.




The Due Diligence Team



- Environmental law and due diligence is a highly specialized field. Pick the right team.
 - ◆ Qualified counsel.
 - ◆ Qualified geologists.
 - ◆ Qualified investigators.
- Use all possible public information sources.




The Due Diligence Team



- Be sure your investigative firm has knowledge and experience in:
 - ◆ Environmental law
 - ◆ Employment law
 - ◆ Labor law
 - ◆ Public records research

Just what is a "PRP"?



The Due Diligence Investigation

Don't just think outside the box. Create new boxes. Valuable evidence may come from unusual sources.

- Aerial/Satellite photos
- Community archives
- Advertisements
- Old calendars
- Police cases
- **News papers**


One case was solved when the investigator learned that bodies from a local serial killer had been dumped at the site in 1941.

Old police photos showed drums with content labels in the background.

The Due Diligence Investigation

Surface v. Mineral Rights

- In some states land is sold, but mineral rights are reserved.
- When searching chains of title, there may be "PRPs" connected with those who reserved mineral rights.



The Due Diligence Investigation



Who should be interviewed first?

- Try to avoid adversarial interviews as long as possible.

NO!

- Company managers
- Current employees
- Retired employees
- Corporate counsel

YES!

- Former employees (Not Fired)
- Local merchants
- Truck drivers
- Town gossips


The Due Diligence Investigation



Be sensitive to employment/labor issues.

- Retired employees may still have union status.
- Fired employees may have a vendetta motive.
- Witnesses could be exposed to potential liability.
- There are usually more than enough of witnesses.
- Respect everyone, trust no one.
- Don't become too familiar.






The Due Diligence Investigation

Control the environment.

- Witnesses are naturally intimidated by counselors, union representatives and HR staffs.
- Try to make the atmosphere as non – adversarial as possible for the witness.

On a nice summer day, the investigator had a deposition moved to a tree in the company yard. Five lawyers stood in sun in their suits while the witness and investigator and sat on the grass in the shade.



The Due Diligence Investigation

Automate your due diligence investigation process.

Web Enhanced Due Diligence: The ability to use the Internet to submit and track the status of requests for due diligence searches.

Due Diligence Subjects

Environmental Due Diligence investigations may include:

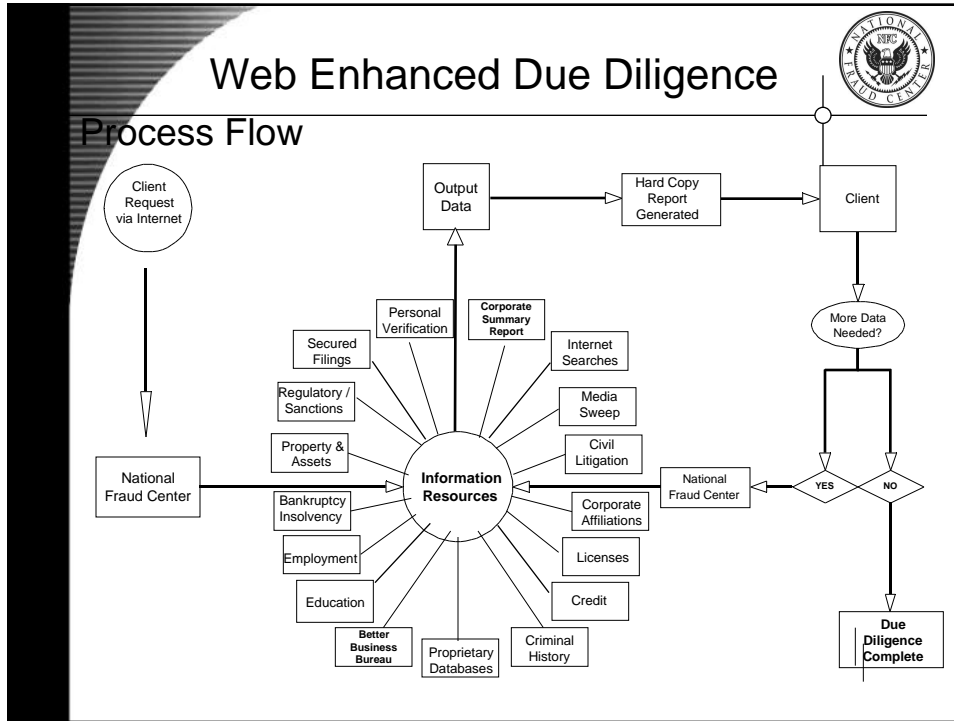
- Buyers and Sellers
- Vendors/Suppliers
- Contractors
- Merger/Acquisition Candidates
- New Accounts/Customers
- Existing Customers
- Business Partners
- All Potentially Responsible Parties
- Other Litigation Participants

The Due Diligence Investigation

Online Data →

Offline Data →

Interpretation
(Investigator and Analyst) = **Final Report**



National Fraud Center, Inc.

- Due Diligence
 - New Request
 - Pending Cases
 - Completed Cases
 - User Info
 - Release Forms
 - Contact Us

Case Worksheet Help

Case Information:		Action List	
User Reference:	File No. 5-00-29	Quote Requested:	
Due Date:	02/02/2001 (mm/dd/yyyy)	Quoted Due Date:	
Financial Limit:	3000 (US \$)	Quote By:	
Estimated Price:	0 - 0 (US \$)	Quoted Price (US \$):	
Entry Date:		Approval Date:	
Status:	Pending Data Entry	Assigned To:	

Action List:

The status of this case is **Pending Data Entry**, as of . Your possible actions are:

- view or edit data associated with this case by clicking on any of the links shown above.
- [Add a company](#) to this case.
- [Add an individual](#) to this case.
- [Save changes](#) made on this page.
- [Cancel changes](#) made on this page.
- [Authorize](#) work to begin on this case.
- [Re-Open](#) this case.

Copyright © 2001
National Fraud Center, Inc.
All rights reserved.

National Fraud Center, Inc.
Worksheet | Company

Companies [Help](#)

Select an existing Company to edit, or enter a new one:

Company Information:
 * Company Name:
 Company Type:
 Relationship: [Principals\(0\)](#)
 [Contacts\(0\)](#)
 [DBA\(0\)](#)
 [Notes\(0\)](#)

Phone Number: Fax:
 Tax ID:
 * Classification: US Non-US Unknown

Where Incorporated:
 Country:
 State/Province:
 (pick)
 Year Established:

Address:
 Country:
 Street Address:

 City:
 State/Province: Zip/Postal:

Basic Searches (pick one):
 None
 Standard Company Due Diligence

Optional Searches (click on the link to extend information):
[Professional Licensure\(0\)](#) [Bank Account Verification\(0\)](#)
[Asset Search\(1\)](#) [Business Information Report\(0\)](#)
[Membership Verification\(0\)](#) [ADR Regulatory Check\(s\)\(0\)](#)
[Reference Verification\(0\)](#)

[Top of page](#)

Copyright © 2001
National Fraud Center, Inc.
All rights reserved.

Enter applicable information on subject company

Optional searches available:

Notes field is available for additional information not included in data fields. The Notes field can also be used instead of the data fields.

National Fraud Center, Inc.
Worksheet | Individual

Individuals [Help](#)

Select an existing Individual to edit, or enter a new one:

Personal Information:
 Name (First, middle, last): [Notes\(0\)](#)
 Former/Maiden Name: [Aliases\(0\)](#)
 Birth Date: (MM/DD/YYYY) Age: [Spouse\(0\)](#)
 Home Phone:
 Work Phone:
 * Classification: US Non-US Unknown

Citizenship:
 Country: [Multiples\(1\)](#)
 SSN:
 Citizen/Cedula ID:
 Passport #:
 (Please supply a photocopy of passport via fax)

Home Address:
 Country:
 Street Address: [Prior and Work Addresses\(0\)](#)

 City:
 State/Province: Zip/Postal:

Basic Searches (pick one):
 None
 Standard Individual Due Diligence

Optional Searches (click on the link to extend information):
[Professional Licensure\(1\)](#) [Education Verification\(0\)](#)
[Criminal History\(0\)](#) [Resume Verification\(0\)](#)
[Drivers License Verification\(0\)](#) [Consumer Credit Report\(0\)](#)
[Asset Search\(0\)](#) [Bank Account Verification\(0\)](#)
[Membership Verification\(0\)](#) [Corporate Affiliations\(0\)](#)
[Reference Verification\(0\)](#) [ADR Regulatory Check\(s\)\(0\)](#)
[Employment Verification\(0\)](#)

[Top of page](#)

Copyright © 2001
National Fraud Center, Inc.
All rights reserved.

Enter applicable information on subject individual

National Fraud Center, Inc.

Case Worksheet [Help](#)

Due Diligence
New Request
Pending Cases
Completed Cases
User Info
Release Forms
Contact Us

Case Information:

User Reference:	File No. S-00-29	Quote Requested:	
Due Date:	02/20/2001 (mm/dd/yyyy)	Quoted Due Date:	
Financial Limit:	3000 (US \$)	Quote By:	
Estimated Price:		Quoted Price:	0 (US \$)
Entry Date:	02/16/2001	Approval Date:	
Status:	Pending Data Entry 02/16/2001	Assigned To:	

Unknown Company
Oakdale Health Care
123 Pecan Road
Grapevine, TX 12345 USA
Incorporated: USA
Phone: 555-555-1122
Fax: 555-555-1122

Standard Company Due Diligence
Asset Search
USA TX

Standard Individual Due Diligence
US Individual:
Gilbert R. Crane (H) 555-555-1234
P.O. Box 123
Mesquite, TX 75488 USA
Citizenship: USA SSN: 123-12-1234

Standard Individual Due Diligence
Professional Licensing
1. USA Doctors/Physicians

Action List:
The status of this case is **Pending Data Entry, as of 02/16/2001**. Your possible actions are:
- view or edit data associated with this case by clicking on any of the links shown above.
- Add a company to this case.
- Add an individual to this case.
- Save changes made on this page.
- Cancel changes made on this page.
- Request a quote for this case.
- Authorize work to begin on this case.
- Cancel the case. No work will be done on the case, and no charges will be incurred.

Top of page

Copyright © 2001
National Fraud Center, Inc.
All rights reserved.

Case Worksheet allows user to review information entered prior to authorizing or requesting a quote.

National Fraud Center, Inc.

Request Quote [Help](#)

Due Diligence
New Request
Pending Cases
Completed Cases
User Info
Release Forms
Contact Us

Send quote via the following method:

Email me at the Email address listed below

Telephone me at the phone number listed below

Fax me at the fax number listed below

Copyright © 2001
National Fraud Center, Inc.
All rights reserved.

Request a quote via email, phone or fax

National Fraud Center, Inc.

Case Worksheet Help

- Due Diligence
- New Request
- Pending Cases
- Completed Cases
- User Info
- Release Forms
- Contact Us

Case Information:	Action List
User Reference: File No. 5-00-293	Quote Requested: 02/19/2001
Due Date: 02/20/2001	Quoted Due Date: 02/20/2001
Financial Limit: 3000 (US \$)	Quote By: Renee B Carlson
Estimated Price:	Quoted Price: 0 - 0 (US \$)
Entry Date: 02/16/2001	Approval Date:
Status: Pending Approval 02/19/2001	Assigned To:

Unknown Company	
Oakdale Health Care	Incorporated: USA
123 Pecan Road	Phone: 555-555-1122
Grapevine, TX 12345 USA	Fax: 555-555-1122

Standard Company Due Diligence	
Asset Search	
1. USA TX	

Standard Individual Due Diligence	
US Individual:	
Gilbert R. Grape	(H) 555-555-1234
PO Box 123	
Mesquite, TX 75488 USA	
Citizenship: USA SSN: 123-12-1234	

Standard Individual Due Diligence	
Professional Licensing	
1. USA Doctors/Physicians	

Action List:
 The status of this case is **Pending Approval, as of 02/19/2001**. Your possible actions are:
 - **Authorize** work to begin on this case.
 - **Decline the quote**. No work will be done on the case, and no further charges will be incurred.
 - **Re-Open** this case to allow additional changes. All quote information will be erased.
 - After making your changes, you can either request another quote or authorize work to proceed.

[Top of page](#)

Copyright © 2001
National Fraud Center, Inc.
All rights reserved.

Case Worksheet now gives user the option to authorize work or decline the quote

National Fraud Center, Inc.

Case Worksheet Help

- Due Diligence
- New Request
- Pending Cases
- Completed Cases
- User Info
- Release Forms
- Contact Us

Case Information:	Action List
User Reference: File No. 5-00-293	Quote Requested: 02/19/2001
Due Date: 02/20/2001	Quoted Due Date: 02/20/2001
Financial Limit: 3000 (US \$)	Quote By: Renee B Carlson
Estimated Price:	Quoted Price: 0 - 0 (US \$)
Entry Date: 02/16/2001	Approval Date:
Status: Active 02/19/2001	Assigned To:

Unknown Company		
Oakdale Health Care	Incorporated: USA	
123 Pecan Road	Phone: 555-555-1122	
Grapevine, TX 12345 USA	Fax: 555-555-1122	

Standard Company Due Diligence		
Asset Search		Completed
1. USA TX		Completed

Standard Individual Due Diligence		
US Individual:		
Gilbert R. Grape	(H) 555-555-1234	
PO Box 123		
Mesquite, TX 75488 USA		
Citizenship: USA SSN: 123-12-1234		

Standard Individual Due Diligence		
Professional Licensing		In Progress
1. USA Doctors/Physicians		In Progress

Action List:
 The status of this case is **Active, as of 02/19/2001**. Your possible actions are:
 - Contact the investigator on this case via email at ssmith@nationalfraud.com or by telephone at 2156570800258.

[Top of page](#)

Copyright © 2001
National Fraud Center, Inc.
All rights reserved.

Once a case is authorized, the user can check the status on the Case Worksheet

National Fraud Center, Inc.

Completed Cases

- Due Diligence
 - > New Request
 - > Pending Cases
 - > Completed Cases
 - > User Info
 - > Release Forms
 - > Contact Us


Entry Date	User Ref NFC File#	Subject	Approved	Due Date	Status	Report(s)
02/07/01	SJS N-2654	Frank's Car Service	02/07/01	02/22/01	Completed 02/07/01	02/07/2001
02/07/01	SJS-674212 N-34211	Adam's Carpet Service	02/07/01	01/15/01	Completed 02/07/01	02/07/2001
02/14/01	Western Div. A3948 N0006080-B	XYZ Widgets	02/14/01	02/15/01	Completed 02/14/01	02/14/2001
02/16/01	File No. 5-00-293 N12345-B	Oakdale Health Care	02/19/01	02/20/01	Completed 02/19/01	02/19/2001

[Top of page](#)

A Completed Cases grid shows all completed cases with a link to the respective report.

Copyright © 2001
National Fraud Center, Inc.
All rights reserved.

Executive Summary




Mr. Ted Mapes
SMITH, JONES AND SMITH
324 Main Street, Suite 4
Chicago, IL 29383

Summary report is available online. Final report with supporting documentation will be delivered by courier.

OAKDALE HEALTH CARE
N12345-B


(GRAPEVINE, TX)


Prepared by: Galen R. Clements, Director of Investigations



Summary

- There cannot be too much due diligence in any transaction involving land ownership.
- Knowledgeable and experienced resources are essential.
- Pick the right team.
- Utilize the latest resources to make the process cost-effective.







National Fraud Center, Inc. thanks you for giving us this opportunity.

Point of Contact:

Dennis H. Walters, CFE, CPP
Director of Consulting Services
800-999-5658
dwalters@nationalfraud.com



American Corporate Counsel Association

Legal and Practical Drivers of Environmental Due Diligence in Corporation Transactions

R. Timothy Weston
Kirkpatrick & Lockhart LLP
Harrisburg, Pennsylvania

The First Questions

- Before launching due diligence, ask the key questions:
 - What am I looking for?
 - Why am I looking for it?
- Two interrelated perspectives
 - The business perspective
 - The legal perspective
- Business perspective
 - Component of valuation/risk assessment process
 - Ingredient in business planning, eventual integration of assets and operations

Drivers from the legal perspective

- Understand permitting and compliance issues
- Evaluate potential remediation and natural resource damage liabilities
- Gain information needed to utilize “Brownfields” laws & qualify for prospective purchaser liability protection
- Assess potential toxic tort liabilities
- Analyze potential successor liability issues
- Satisfy corporate fiduciary responsibilities
- Develop information to meet corporate disclosure requirements (SEC and accounting rules)

Additional drivers

- Meet industry / commercial standards for due diligence
- Satisfy lender requirements
- Meet regulatory or corporate requirements regarding environmental management systems.

Compliance drivers

- A plethora of potentially applicable requirements
 - Air
 - Water discharge
 - Water withdrawal
 - Waste and residuals management
 - Storage tanks
 - Toxics inventory and release disclosure

Compliance drivers

- Legal requirements attach to the current owner / operator
 - Permits and licenses for construction and operation
 - Emission/discharge limitations
 - Inspections and maintenance
 - Recordkeeping and reporting
 - Maintaining best management practices
 - Stiff civil and criminal sanctions (corporate responsible officer doctrine)
- On Closing, **you** will be the current owner / operator

Hazardous sites liability

- CERCLA and counterpart state laws
- Liability = retroactive, strict, joint and several (*with few exceptions*)
- 4 categories of potentially responsible parties
 - Present owner
 - Prior owner who owned facility at time of disposal
 - Owners of hazardous substances who arranged for treatment or disposal
 - Transporters

The third party defense

- Defense for contamination caused by unrelated third party
 - Third party's act or omission was sole cause of release, and did not occur in connection with a direct or indirect relationship
 - PRP exercised due care with respect to the hazardous substance
 - PRP took precautions against foreseeable acts or omissions of third parties, and resulting foreseeable consequences

The “innocent landowner” defense

- All requirements of third-party defense +
- No reason to know of contamination at time of acquisition
 - All appropriate inquiry into previous ownership and use of property consistent with good commercial or customary practice

Factors to be considered

- Any specialized knowledge or experience of the party
- Relationship of purchase price to value of property if uncontaminated
- Commonly known or reasonably ascertainable information about the property
- Obviousness of likely presence of contamination
- Ability to detect contamination by appropriate inspection

“All appropriate inquiry”

- Mixed question of law and fact – totality of circumstances
- Gauged with regard to buyer’s sophistication and expertise
- Must investigate prior uses of land and disposal practices
- Inspection required in most cases
- Environmental site assessment is no panacea

ASTM’s effort to define “appropriate inquiry”

- Standards on Environmental Site Assessments for Commercial Real Estate (May 1993)
- Specific standards:
 - ASTM E 1528-00 – Transaction Screen
 - ASTM E 1527-00 – Phase I Environmental Assessment
 - ASTM E 1903-97 – Phase II Environmental Assessment

Objectives of the ASTM Process

- Synthesize and put in writing good commercial and customary practice for environmental site assessments
- Facilitate high quality, standardized environmental site assessments
- Ensure a practical and reasonable standard of appropriate inquiry
- Clarify the industry standard for appropriate inquiry in order to guide legal interpretation of the innocent landowner defense
- NOTE: Process is guidance only, and may not be sufficient

ASTM Process – Transaction Screen

- Asking questions contained within screen questionnaire
- Observing site conditions at property
- Limited research in certain government record and historical sources

ASTM Process – Phase I Assessment

- Performed by professional
- Elements
 - Review of records
 - Site reconnaissance
 - Interviews of owners, occupiers, and local govt. officials
 - Preparation of assessment report
- User responsibilities
- Environmental professional responsibilities
- Outcome: identification of known or suspect environmental conditions

ASTM Process – Phase II Assessment

- More detailed examination of known or suspected environmental conditions
- Elements:
 - Scope of work –broad or focused on specific areas
 - Review of existing site characteristics information
 - Design of sampling program – aimed at highest concentration
 - Sampling of environmental media
 - Analysis of data
- Outputs: Further characterization and quantification of environmental conditions; evaluation of potential remediation costs

Utilizing brownfield programs; prospective purchaser programs

- Wide range of state laws and programs
- State and EPA programs accord certain protections to prospective purchasers
- Typical requirements:
 - Adequate characterization of conditions
 - Commitment to cleanup to selected remediation standard (may be published number or risk-based)
- Protection may extend to both seller and buyer
- May be element necessary for financing
- May link to transaction insurance programs

Disclosure requirements under SEC rules

- Source of requirements
 - Securities Act of 1933; Securities Exchange Act of 1934
 - Regulation S-K – requiring that material information, such as environmental liabilities, be disclosed when securities are registered
 - Rule 10b-5 – prohibition on making of material misstatements or omissions

SEC Regulation S-K (17 CFR §229.10 *et seq.*)

- Item 101
 - Disclose any material effect that compliance with environmental laws may have on company's financial situation
 - Disclose capital expenditure for environmental control facilities for current fiscal year, next year and future years if material.
- Item 103
 - Disclosure of pending legal proceedings against issuer other than ordinary, routine litigation

SEC Regulation S-K

- Management's Discussion and Analysis
- Disclose "any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way"
- Material commitments for capital expenditures, the general purpose of such commitments, and anticipate source of funds
- Disclose unusual or infrequent events or significant economic changes that materially affect reported income, and known trends or uncertainty that may have a material impact

Whether contingent environmental liabilities are material

- SEC Staff Release, 54 Fed. Reg. 22427 (May 24, 1989)
- Analysis:
 - (1) if an uncertainty is known to exist, disclosure is required if the uncertainty is determined to be reasonably likely to occur; and
 - (2) if this determination cannot be made, management must make disclosure

Staff Accounting Bulletin 92

- Guidance regarding accounting and disclosures relating to loss contingencies
- Certain environmental contingencies must be disclosed on registrant's balance sheet
 - currently available facts, existing technology and presently enacted laws and regulations
 - likely effects of inflation, other societal and economic factors, and available evidence including the registrant's prior experience in remediation of contaminated sites, other companies' clean-up experience, and data release by organizations such as EPA

SAB-92

- Registrant is not required to recognize liability of other PRPs where, although liability is joint and several, a reasonable basis exists for apportionment of costs.
- If probable that other PRPs will not pay their apportioned share, registrant must include a reasonable estimate of the additional costs expected
- Gross liability and related claims for recovery must be separately presented (*may not net insurance coverage*)

SAB-92 (Seller Obligations)

- Company choosing to sell, dispose, or abandon an asset must disclose any material site restoration costs or other “environmental exit costs” in the financial statement notes.
 - Nature of the costs involved
 - Total anticipated cost
 - Total costs accrued
 - Balance sheet classification of accrued amounts
 - Range or amount of reasonably possible additional losses

AICPA Statement of Position 96-1

- Accrual and reporting of environmental liabilities
- Under FASB Statement of Financial Accounting No. 5, *Accounting for Contingencies*, liability must be accrued if:
 - 1) information indicates that it is probable that an asset has been impaired; and
 - 2) the amount of loss can be reasonably estimated
- SOP 96-1 requires re-evaluation at certain benchmark points in process

AICPA SOP 96-1

- Measuring and reporting liabilities
 - Includes allocable share for the specific site, and any share that will not be paid by other responsible parties
 - Incremental direct costs of remediation + compensation and benefits for employees who devote a significant time to remediation
 - May discount costs for time value of money if timing is fixed or reliably determinable
 - May not reflect possible future changes in law or regs.
 - Most disclose liability with no offset for potential recoveries

AICPA SOP 96-1

- For reasonable possible loss contingencies, should disclose:
 - 1) the nature and estimate of possible loss exposure; and
 - 2) if the standard of SOP 94-6 is met, an indication that a change in the estimate will occur in the near term
- For probable, but not reasonable estimable, contingencies, statements must disclose best estimate of loss. If range, minimum amount must be disclosed.

Starting the Process – Understand the Risks

- Environmental compliance risks
- Environmental remediation risks
- Toxic exposure liability risks
- Property damage liability risks
- Natural resource damage risks
- Off-site liability risks from arranging for transportation, treatment or disposal

Remember the “why”

- Identify risks; frame issues to be addressed at negotiating table
- Obtain comfort that the deal is worthy investment
- Qualify for “innocent” landowner defense for unknown
- Provide basis for workable action plans to address known issues
- Establish basis for use of brownfield/voluntary cleanup programs
- Establish basis for use of insurance to deal with known/unknown risks

-
- Evaluate how assets will fit into purchaser’s current structure; assess cost of streamlining or restructuring operations
 - Identify practices that may differ; project costs to integrate into current operations
 - Fulfill fiduciary duties; and SEC requirements
 - Satisfy conditions to financing
 - Consider state financial assistance to address particular problems