

Due Diligence: Updates and Tips to Minimize Environmental Risk

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Reasons to Conduct Due Diligence

- Avoid CERCLA Liability (42 USC § 9607(a)(1))
 - ✓ Joint and Several Liability
 - ✓ One bucket or thimble of hazardous substance disposal could make your company liable for the remediation of all contamination at the site
 - ✓ Ownership of the property alone enough to impose liability

Reasons to Conduct Due Diligence

- Identify Financial Liability
 - ✓ Compliance
 - ✓ Cleanup
 - ✓ Business Environmental Risks
- Document Site History
 - ✓ Start of comprehensive Site Assessment

Triggers for Undertaking Due Diligence

- Acquisitions
- Divestiture
- Financial Transaction
- Insurance
- Corporate Re-Structuring
- Requirement for entry into VCP programs or prior to performing Site Investigation
- Vendor Selection (Supply Chain Evaluation)

Due Diligence - Legal Principles

- Limited exceptions for CERCLA Liability
- All require party to conduct All Appropriate Inquiry before acquiring property
 - Bona Fide Prospective Purchaser Defense
 - Innocent Landowner Defense
 - Contiguous Property Owner Defense

Due Diligence – Legal Principles

All Appropriate Inquiry

- Must perform before purchase or acquire the property
- Standard for performing AAI has evolved over time based on standard practices in the industry

Due Diligence – Legal Principles

All Appropriate Inquiry Rule, 40 CFR § 312, et seq.

- Purpose – identify “conditions indicative of release and threatened release of hazardous substances on, at, in or to the subject property”
- Must be conducted within one year of purchase and certain aspects must be updated or conducted within 180 days of purchase
- Inquiry must be conducted by an environmental professional

Due Diligence - Technical Guidance

- ASTM E1527-13 (current PH 1 Standard)
- ASTM E1527-05 (older PH 1 Standard)
- ASTM E1528-14 (TSA Standard)
- ASTM E2247-08 (Forestland or Rural Property)
- ASTM E2600-15 (Vapor)

- Others – Compliance, PH2, Liability Estimates

ASTM E1527-13 Updates

- Vapor Intrusion
- File reviews
- Updated Definitions
 - ✓ REC
 - ✓ Historical REC
 - ✓ Controlled REC

Types of Due Diligence Activities

- Phase I Environmental Site Assessments
- Transaction Screen Assessments
- EHS Compliance Audits
- Desktop Assessments
- Portfolio Screening, Prioritization, Summary
- Regulatory File Reviews
- Business Environmental Risk (BER)

Types of Due Diligence Activities (cont.)

- Phase II Environmental Site Assessments
- Regulated Materials Sampling/Assessments
- Property Condition Assessments
- Estimation of Liability Costs
- Evaluation of State Program Requirements
- Third Party Liability Review

Tips/Lessons Learned: Legal

R.E. Goodson Construction Co. v. International Paper Company, 2006 WL 4916336 (U.S. Dist. S.C. 2006).

- Construction company purchased property to use as fill for highway project
- Construction company aware general area was used for bomb testing and that remnants of a bomb had been found on property right of way
- Only due diligence conducted was digging of test pits on property to test the quality of the soil for fill in the highway project
- Court rejects BFPP defense – Company jointly and severally liable for contamination even though had nothing to do with the bomb testing facility

Tips/Lessons Learned: Legal

Voggenthaler v. Maryland Square, et al., 724 F. 3d 1050 (9th Cir. 2013)

- Shopping center property
- Seller disclosed dry cleaner previously operated in the shopping center and that there was PERC contamination
- Purchaser only retained consultant to do review of environmental agencies files and summarize – no other due diligence
- Purchaser buys property and demolishes center and disturbs contaminated soil
- Court holds Purchaser not a BFPP
- Purchaser liable for PERC contamination even though did not own the property when dry cleaner operated

Tips/Lessons Learned:

Dust

- Industrial warehouse with tenant using surface mount technology (SMT) for printed circuit board production
- Phase I ESA performed during acquisition
 - ✓ Dust not identified as an issue
- Phase I ESA performed during divestiture (by prospective buyer)
 - ✓ Although most operations had ceased at the time of the visit and building appeared visually clean, one production line remained
 - ✓ Dust considered a potential concern
- Phase II ESA performed (wipe sampling)
- Lead dust contamination identified throughout building including manufacturing area, hazardous waste storage area, restrooms, air ducts, and roof
- \$900,000 remediation costs

Tips/Lessons Learned: Experienced Team

- NPL Site – showed up in orphans database
- Phase I ESA did not identify as REC
- Plume extended under Subject Property
- School constructed on greenfield
- Vapor intrusion later identified after building was constructed
- Expense to school district for ongoing testing and mitigation

Tips/Lessons Learned: Compliance

- Phase I ESA performed per ASTM scope
- Compliance not included within scope of work
- Transaction was successful, Company X acquired 3 new facilities in three states
- Identified missing air permit when looking into permitting requirements to expand manufacturing operations 1 year later
- Careful correspondence with agency to obtain permits for current and planned operations without fines
- Cost for permitting could have been included in deal negotiations

Tips/Lessons Learned: Business Environmental Risks

- BER per ASTM E1527-13 : A risk which can have a material environmental or environmentally-driven impact on the business associated with the current or planned use of a parcel of *commercial real estate*, not necessarily limited to those environmental issues required to be investigated in this practice. Consideration of *business environmental risk* issues may involve addressing one or more non-scope considerations, some of which are identified in Section 13.

Tips/Lessons Learned: Business Environmental Risks

- Pre-acquisition due diligence for purchase large chemical manufacturing facility in TX (Company X)
- Due diligence identified area owned by adjacent company Z and used by company X and Y
 - ✓ One environmental consultant servicing all three companies
 - ✓ Spill and emergency response responsibilities shared by all three companies
 - ✓ Utilities billed to company Z who in turn provides services to company X and Y
- BER identified for potential complications with shared resources
 - ✓ Dispute resolution
 - ✓ Compliance responsibilities
 - ✓ Available resources

Closing Due Diligence Tips

- Perform due diligence when appropriate
- Hire an experienced due diligence team
- Craft your due diligence scope carefully
- Allow time to complete your scope and complete potential follow up issues (start early)

Resources

EPA AAI Website:

<https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries>

EPA Interim Guidance:

<https://www.epa.gov/enforcement/interim-guidance-common-elements-landowner-criteria-qualify-bfpp-cpo-or-ilo-superfund>

ASTM:

<https://www.astm.org/>

R.E. Goodson Construction Co. v. International Paper Company:

<https://casetext.com/case/re-goodson-construction-co>

Voggenthaler v. Maryland Square LLC., et al:

<https://www.gpo.gov/fdsys/pkg/USCOURTS-ca9-10-17520/pdf/USCOURTS-ca9-10-17520-0.pdf>

Questions?

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