



# Due Diligence and Emerging Transactional Issues

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# Business Trends

- ◆ Accelerated Timing
  - Bids
  - Exclusivity
- ◆ Auction Process
- ◆ Data Rooms and Intranets
- ◆ Reluctance to Give Indemnities
- ◆ “No Hunt” Provisions



## Business Trends Cont'd

- ◆ Bankruptcy Free and Clear Sales
- ◆ 1031 Exchanges
- ◆ Sale of Tax Liens
- ◆ Purchase of Secured Notes
- ◆ Tax Credit Investors
- ◆ Use of Fixed Price Remediation Contracts



# Legal Trends

- ◆ Retrenchment of Expanded Corporate Liability
- ◆ “As Is”
- ◆ CERCLA and ECL Post-Closing Obligations for Defenses
- ◆ Toxic Tort/Property Damage Claims
- ◆ Product Liability
- ◆ Mold



# Regulatory Trends

- ◆ Vapor Intrusion
- ◆ Indoor Air/OSHA
- ◆ NRD
- ◆ LIW
- ◆ **LBP**



## Regulatory Trends Cont'd.

- ◆ Asbestos- (Still in building products)
- ◆ Wetlands/Stormwater/Endangered Species-
- ◆ Use-Based Cleanups-
- ◆ MTBE-
- ◆ TCE-
- ◆ Perchlorate-



# Regulatory Trends Cont'd.

- ◆ Abandoned tanks
  - How were they closed?
  - What Protocol Used?
  - Who Supervised Work (e.g., Fire Marshall, DEC)?
- ◆ Inactive but not Closed Tanks
- ◆ Unregulated Tanks (e.g., heating oil)
- ◆ Properly Operating New Tanks



## Regulatory Trends Cont'd.

- ◆ Will Buyer be Owner of Old Tanks?
  - Control
  - Fixtures
- ◆ Remove Prior to Closing
- ◆ Sell to different entity





## Regulatory Trends Cont'd.

- ◆ Grayfields- old shopping centers
  - Former dry cleaners
  - Former gas stations
  - Asbestos
  - Former Use
  - Septics/Dry Wells
- ◆ Beware of Data Gaps
- ◆ Eligibility for State Dry Cleaner Funds



# ASTM E1527 and AAI

- ◆ Old Purpose- CERCLA Defenses
- ◆ No BFPP or CPO Exemptions Under ECL
- ◆ Non-Scope Issues
  - ACM
  - LBP
  - LIW
  - Radon
  - Wetlands



# ASTM and AAI

- ◆ AAI Will be Performance Based
  - No 1940 benchmark
  - Greater Subjectivity
  - Will be More Expensive
  - More Time-consuming
- ◆ ASTM Non-compliant with AAI
- ◆ Greater Reliance on Skill of Environmental Professional



# New Uses of Due Diligence

- ◆ Post-acquisition obligations for new CERCLA defenses
- ◆ Regulatory compliance
- ◆ Pre-settling NRD
- ◆ Toxic Torts
- ◆ Comply with Audit policies
- ◆ Eminent Domain Valuations
- ◆ SEC Disclosure and Sarbanes-Oxley
- ◆ Insurance Underwriting



# Transactional Considerations

- ◆ Knowledge Perspective of Seller- What does it know?
  - Beware of Releasing Seller Unless Contamination Delineated
  - Are remediation or closure cost estimates real or based on GAAP?
  - What if Assumptions Change or Remediation System Does Not Work?
  - Is Transaction Being Financed?
  - Tighter Lending Guidelines
  - What will lender need to get comfortable (e.g., indemnity, NFA letter, escrow, insurance)



## Deal Considerations Cont'd.

- ◆ How Long Will Buyer Hold Title?
- ◆ Former Facilities Sold or Closed
- ◆ Prior Agreements
  - Assumed Liabilities
  - Indemnifications
  - Insurance
- ◆ Pre-CERCLA contracts
- ◆ State Transfer Statutes



# Deal Considerations Cont'd.

## ◆ Indemnity-

- Cap
- Deductible
- When Triggered
- Kind of Cleanup- “Gold” Standard
- How Long
- Parent or Individual Guaranty of Indemnity





# Deal Considerations Cont'd.

## ◆ Escrow Issues

- Who manages the clean-up?
- Are Costs Related to Cleanup or Construction?

## ◆ Land Use Controls

- Who Will Maintain
- Who is the Enforcer?
- O & M Included?
- Who Pays For Access to Adjacent Property?
- Who Compensates For LUCs on Adjacent Property?





## Deal Considerations Cont'd.

- ◆ Assignment of Rights to Trust Funds
- ◆ Exit Strategy-
  - Fixed Price Remediation Contract
  - Pay for Performance
  - Insurance Enhancement of Reps or Indemnity
  - Insurance Cost Cap
  - Insurers Requiring State Ordered Cleanups



# Brownfield Considerations

- ◆ Diligence to Determine Extent of Contamination and NRD Impacts
- ◆ Coordinate Site Development With Cleanup to Minimize Costs
- ◆ Building Design Can Incorporate Remedy
- ◆ Real Time Data (e.g., Triad Approach, FAM)



# Brownfield Considerations Cont'd

- ◆ Focus on Historical Information
  - Identify Former Operators
  - Location of Former Operations
  - Identify Contaminant Source Areas
  - Regulatory Status (RCRA TSD or Interim Status)
- ◆ Fill Material



# Brownfield Issues Cont'd

- ◆ Land Use Controls
  - Maintenance and Monitoring
  - How After Sell Property?
  - Access For Off-Site LUCs?
- ◆ Annual Certifications
- ◆ Financial Assurances-
  - How do you calculate this?
  - Who Pays
- ◆ Who Pays for Increased Cleanup From Change in Use ?



# Top 10 Due Diligence Mistakes

- ◆ Commodity Style
- ◆ Reps & warranties
- ◆ Not enough time
- ◆ Lack historic info
- ◆ Omit former sites
- ◆ Omit disposal facilities
- ◆ Rely on old seller audits
- ◆ Letting Consultants Determine Scope of Due Diligence
- ◆ Fail to estimate all liability
- ◆ Not tailoring diligence to the transaction