Top Ten Due Diligence Mistakes

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Top 10 Due Diligence Mistakes

- Commodity Style
- Reps & warranties
- Not enough time
- Lack historic info
- Omit former sites
- Omit disposal facilities
- Rely on old audits
- Rely on seller audits
- Liability estimates
- Rely on data room
Why Due Diligence?

- Innocent Purchaser’s Defense
- Third Party Defense
- Allocate Liabilities
- Environmental Compliance (NSR, Permits)
- SEC Disclosure
- Audit Policies
- UST or Dry Cleaner State Funds
- Toxic Torts
- Institutional Controls
“Commodity-Style” Reports

- Do Not Assume Comprehensive
- Desktop records Review
- Cursory Site Visit
- Little Historical Information
- 70% Fail to discover RECs
ASTM

- Purpose- Innocent Purchaser’s Defense
- Need to Add Business Risks or Institutional Controls
- Non-Scope Issues
  - ACM
  - LBP
  - lead in drinking water
  - Radon
  - Wetlands
  - Regulatory compliance
ASTM continued

– Ecological resources
– Industrial hygiene
– Indoor air quality
– Endangered species
– Health and safety
– Power lines and electromagnetic fields
– Cultural and historical resources
ASTM Continued

- Recognized Environmental Conditions (RECs)
- Historical RECs
- Web Sites Make Information More “Reasonably Ascertainable” or “Practically Reviewable”
Relying on Representations & Warranties

- Not a Substitute for Due Diligence
- Starting Point of Due Diligence
- “As Is” Contracts
Insufficient Time

- Minimum time is one month
- Additional time needed for
  - Multi-site transactions involving manufacturing operations
- Real Time Data Possible
- Phase II Time/cost trade-off
  - Expediting analysis drives up cost
  - Remobilization is expensive
Insufficient Historical Information

- Review Local Records
- Interview Local Officials
- Identify Prior Tenants and Operations
- Check Former USTs and Closed USTs
Failing To Focus On Former Facilities

- Successor and Parent Liability
- Former Facilities Sold or Closed
- Contractual Liabilities for Former Sites
  - Assumed Liabilities
  - Indemnifications
  - Insurance
- Pre-CERCLA contracts
Failing to Review Disposal Facilities

- Establish Database Of Disposal Facilities
  - Current sites used by current facilities
  - Former sites used by current facilities
  - All sites used by discontinued or sold facilities
- Are Cleanups On-going Or Likely?
- Federal and State Cleanup Laws
Relying on Old Audits

- No More Than Six Months Old
  - look for changed conditions

- Problems With Older Audits
  - May be out of date
  - May not have been comprehensive

- Use same consultant for Rundown
Relying on Seller’s Audits

♦ Not “appropriate inquiry”

♦ May not Be Sufficiently Thorough

♦ If seller’s audits are part of due diligence
  • Review the scope
  • Augment as necessary
Improperly Estimating Liabilities

- Use Actual Cleanup Standards
  - State-specific, site-specific
  - Other standards under- or over-inflate costs

- Escrow Issues
  - Who manages the clean-up?
  - Are Costs Related to Cleanup or Construction
  - Deed restrictions?
Relying solely on bid data rooms

- Review data room documentation
- Review all additional documents
- Request access to environmental managers
- Schedule site visits