



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