



# Environmental Due Diligence

# Objectives

- ❖ Understand basics of environmental due diligence
- ❖ Understand various diligence options
- ❖ Understand key definitions, objectives, procedures, and limitations of a Phase I Environmental Assessment (ESA)
- ❖ Understand ways environmental diligence can assist in managing risk

# What is Environmental Due Diligence?

- It consists of procedures to identify, assess, and mitigate the risk of incurring environmental liability
- Environmental due diligence can take many forms, and will be dependent upon the transaction type and the environmental risk of the property.

# Why Bother?

- Why bother with environmental concerns if there are protections?
  - Even though they exist, they are not absolute
  - Require action to protect the assets
  - Both state and federal laws provide some protections, but parties need to remain vigilant about changes and environmental risks

***\*Environmental risks are not always obvious***

# Why Bother?: Risk Management

- A buyer of contaminated property or a facility can become responsible for cleaning up the contamination just by becoming the owner of the property
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the some state laws (i.e. Indiana Hazardous Substance Statute) state that potentially responsible parties include current owners
  - State environmental statutes (mini-CERCLAs)
  - Strict, joint, and several liability
- Underground Storage Tanks (USTs): responsible parties include the owner of the UST
- Petroleum Statutes: Responsible parties include facility owners
- Various other environmental regulations and statutes

# Asset Purchasers are not Immune from Environmental Liabilities

- While the general common law rule is that asset purchasers are not liable for debts and obligations of the seller corporation, there are four exceptions:
  1. The purchaser expressly or impliedly agrees to assume seller's liabilities;
  2. The transaction is a de facto merger;
  3. The purchaser is a "mere continuation" of the seller; or
  4. The transaction is a fraudulent effort to escape liability.

# Asset Purchaser Liabilities (cont.)

- The purchase includes all or substantially all of the seller's assets.
- Shareholders of the seller become shareholders of the buyer as a result of the transaction.
- Officers/directors of the seller continue to serve in the same capacity for the buyer.
- The seller ceases all operations and rapidly dissolves after the sale
- The buyer produces the same product and continues the same operations/processes as the seller
- The buyer uses the same name, same locations and same employees of the seller
- The buyer's customers are the same as the seller's
- The buyer uses the same trade names, trademarks, technology and intellectual property of the seller
- The buyer uses the same management and supervisory personnel
- The buyer assumes all contractual obligations of the seller ordinarily necessary for uninterrupted continuation of normal business operations
- Company press releases characterize the transaction as an acquisition of the seller
- The buyer holds itself out to the public as being the same company as before the transaction

# Diligence Uses and Benefits

- Identify current and historical sources of contamination (actual and potential)
- Identify legacy environmental liabilities associated with former properties, operations and businesses of the company.
- Identify tort liability
- Cleanup of contamination on:
  - owned or leased property;
  - nearby property owned by others, where contamination has migrated from a company property;
  - property where the company's waste has been sent for treatment or disposal;

# Diligence Uses and Benefits

- Prioritize (re)development site selection and acquisition decision-making
- Identify capital expenditures necessary to achieve or maintain compliance with environmental laws and permits applicable to company operations;
  - Identify fines/penalties for violations of environmental laws and permits
- Satisfy liability risk management requirements; and
- **Assert liability protection under Federal All Appropriate Inquiry (AAI) standard and other state laws**

# Environmental Due Diligence Options

- None
- Environmental Questionnaires
- Site inspection
- Desktop + site inspection or Desktop Review
- Transaction Screen Assessment (TSA)
- Phase I
- Phase II
- Other



# Transaction Screen Process

- **ASTM E1528 - 14e1**
  - Not a short-cut or substitute for a Phase I Environmental Site Assessment
  - Does Not Provide Environmental Liability Protection

## APPENDIX A TRANSACTION SCREEN QUESTIONNAIRE

**Instructions:** Interview the owner of the property (or a knowledgeable representative). If the owner is the only major occupant of the property, skip over the next instruction.

Interview any major occupants (any anchor tenants, or occupants of more than 40% of the leasable space), or, if there is no major occupant, at least 10% of the occupants. Residential occupants needn't be interviewed.

Interview any other occupants likely to handle chemicals, gasoline, hazardous substances, etc.

Visit the site yourself to inspect the property and all structures. Take photos, and document any limitations.

**Notes:** If you are not familiar with the attached Guide, you must refer to it while filling in this questionnaire. Make a good faith effort to determine answers to these questions. Try to interview those people with the best knowledge of the property.

Site Name: \_\_\_\_\_

Address: \_\_\_\_\_

Owner: \_\_\_\_\_ Date Interviewed: \_\_\_\_\_

Occupant: \_\_\_\_\_ Date Interviewed: \_\_\_\_\_

<b>1</b>				
Are you aware of any industrial use on the property, now or in the past?	<b>Owner</b>	Yes	No	?
_____	<b>Occup</b>	Yes	No	?
_____	<b>Occup</b>	Yes	No	?
_____	<b>Inspec</b>	Yes	No	?
<b>2</b>				
Are you aware of any gas station, motor repair shop, commercial printing facility, dry cleaner, photo lab, junkyard, landfill, or waste handling facility on the property now or in the past?	<b>Owner</b>	Yes	No	?
_____	<b>Occup</b>	Yes	No	?
_____	<b>Occup</b>	Yes	No	?
_____	<b>Inspec</b>	Yes	No	?
<b>3</b>				
On adjoining properties, are you aware of any industrial use, now or in the past? (Note: Adjoining properties either share a common property line, or would share one if it weren't for an intervening street or thoroughfare.)	<b>Occup</b>	Yes	No	?
_____	<b>Occup</b>	Yes	No	?
_____	<b>Inspec</b>	Yes	No	?
<b>4</b>				
Also on adjoining properties, are you aware of any gas station, motor repair shop, commercial printing facility, dry cleaner, photo lab, junkyard, landfill, or waste handling facility now, or in the past?	<b>Occup</b>	Yes	No	?
_____	<b>Occup</b>	Yes	No	?
_____	<b>Inspec</b>	Yes	No	?

**STOP! IF THERE'S A "YES" ALREADY, CALL AN ENVIRONMENTAL CONSULTANT FOR HELP.**

# All Appropriate Inquiries (AAI)



- AAI is the formal process of assessing properties for the presence or potential presence of environmental contamination.
  - Governed by EPA Regulations: 40 CFR Part 312
- Goal is to protect a party from environmental liability associated with an environmental condition on a property

# Phase I: Environmental Site Assessment

- EPA recognizes two ASTM standards as being compliant with AAI
  - **ASTM E 1527-13**: Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process
  - **ASTM E2247**: Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process *for Forestland or Rural Property may be used*

# Phase I Assessment (cont.)

- Non-intrusive Investigation
- Generally consists of the following activities by an environmental professional:
  - a review of publicly available records;
  - a site visit/inspection;
  - interviews of owners, occupants, neighbors, and government officials; and
  - a report describing the results of the investigation and the environmental professional's opinion as to whether there is specific evidence of, or reason to believe, that the property is contaminated.

# Phase I Assessment

- It involves evaluating the current and historical uses of the subject property in an effort to identify recognized environmental conditions (RECs) and historical recognized environmental conditions (HRECs) in connection with the subject property.

# Recognized Environmental Conditions

- The presence or likely presence of:
  - Any hazardous substances or petroleum products, in, on, or at a property:
    1. Due to release to the environment
    2. Under conditions indicative of a release to the environment; or
    3. Under conditions that pose a material threat of a future release to the environment
  - Does not include *de minimis* conditions

# Historical Recognized Environmental Conditions (HREC)

- A REC from a past release of hazardous substance or petroleum products that
  - Has been addressed to the satisfaction of the applicable regulatory authority, or
  - Meets unrestricted use criteria AND is not subject to implementation of land use or other controls

# Controlled REC

- A REC from a past release that:
  - Has been addressed to the satisfaction of the applicable regulatory authority; and
  - Is allowed to remain in place subject to the implementation of required controls
- Examples:
  - Institutional Controls
  - Engineering Controls

## SAMPLE

(modify as needed and please include all required exhibits)

### DECLARATION OF DEED RESTRICTION AND MAINTENANCE

DECLARATION made this \_\_\_\_ day of \_\_\_\_\_, 2015 by \_\_\_\_\_, having its principal office at \_\_\_\_\_, New York (hereinafter referred to as "Declarant").

WHEREAS, the DECLARANT is the owner of certain real property situated in the Borough of, County of and State of New York, known and designated as Block lots \_\_, \_\_ and \_\_ (the "Premises"), as shown on the tax map of the City of New York for the County of \_\_\_\_\_ and more particularly described in Schedule A and as shown on Schedule B; and

WHEREAS, the DECLARANT proposes to construct \_\_\_\_\_ commercial buildings (completed buildings available for rental only) (the "Buildings") in accordance with private plans filed with the New York City Department of Buildings ("DOB") and the New York City Department of Environmental Protection ("DEP") under permit NB numbers \_\_\_\_\_; and

WHEREAS, the Buildings are to be served by a common area (the "Common Area") common storm and sanitary drain disposal systems including internal drains and storm water detention/retention facilities, common water mains and other public or private utility lines serving more than one of the buildings' ("Common Facilities"); and

WHEREAS, the DECLARANT proposes to construct the private internal sanitary and storm drains, storm water detention/retention facilities and connections within the Common Area in accordance with a plan on file with the DOB under NB Nos 10 \_\_\_\_/15, 10 \_\_\_\_/15 and 10 \_\_\_\_/04; and DEP under site connection proposal application number, attached as Exhibit A; and

# Phase I Assessment

3.2.49 *Landowner Liability Protections (LLPs)*—*landowner liability protections* under CERCLA; these protections include the *bona fide prospective purchaser liability protection*, *contiguous property owner liability protection*, and *innocent landowner defense* from CERCLA liability. See 42 U.S.C. §§9601(35)(A), 9601(40), 9607(b), 9607(q), 9607(r).

❖ *BFPP defense may also be available to tenants*

# Phase I Limitations

- A Phase I does not specifically address:
  - whether the operations comply with environmental laws and permits or other regulatory compliance
  - whether there are site conditions that could affect the buyer's development plans.
  - company's potential liability for off-site waste disposal
  - legacy environmental liabilities
  - Health & Safety
  - Asbestos, Wetlands, Lead based paint
  - Mold

# Top Ten Phase I Issues

- Not following the correct standard
- Not following the recommended format
- Failing to include Exact Certification Language
- Not properly utilizing the defined terms
- Not stating the purpose and user of the Phase I
- Including recommendations for site sampling
- Not conducting proper file review
- Reusing Phase 1 text from the last Phase 1 completed
- Inadequate documentation in Appendices
- Issuing the Phase 1 as final without counsel review of the draft

# Phase I Shelf Life

- Shelf Life is 1 year
- Must also complete/update less than **180 days** prior to the date of acquisition, purchase, or transaction:
  - (i) *interviews with owners, operators, and occupants;*
  - (ii) searches for recorded environmental cleanup liens;
  - (iii) reviews of federal, tribal, state, and local government records;
  - (iv) visual inspections of the *property* and of *adjoining properties*; and
  - (v) the declaration by the *environmental professional* responsible for the assessment or update.

# Phase II Assessment

- **ASTM E1903-11**
- Identifies potential contamination of the site. Includes sampling and laboratory analysis to confirm the presence of hazardous materials.
- Usually done when a Phase I identifies RECs
- Can include:
  - surficial soil and water samples
  - subsurface soil borings
  - groundwater monitoring well installation, sampling, and analysis (may be appropriate on neighboring properties as well to determine the presence of contamination)
  - drum sampling (if any were left on the property)
  - sampling of dry wells, floor drains and catch basins
  - transformer/capacitor sampling for Polychlorinated Biphenyls (PCBs)
  - geophysical testing for buried tanks and drums
  - Testing of underground storage tanks



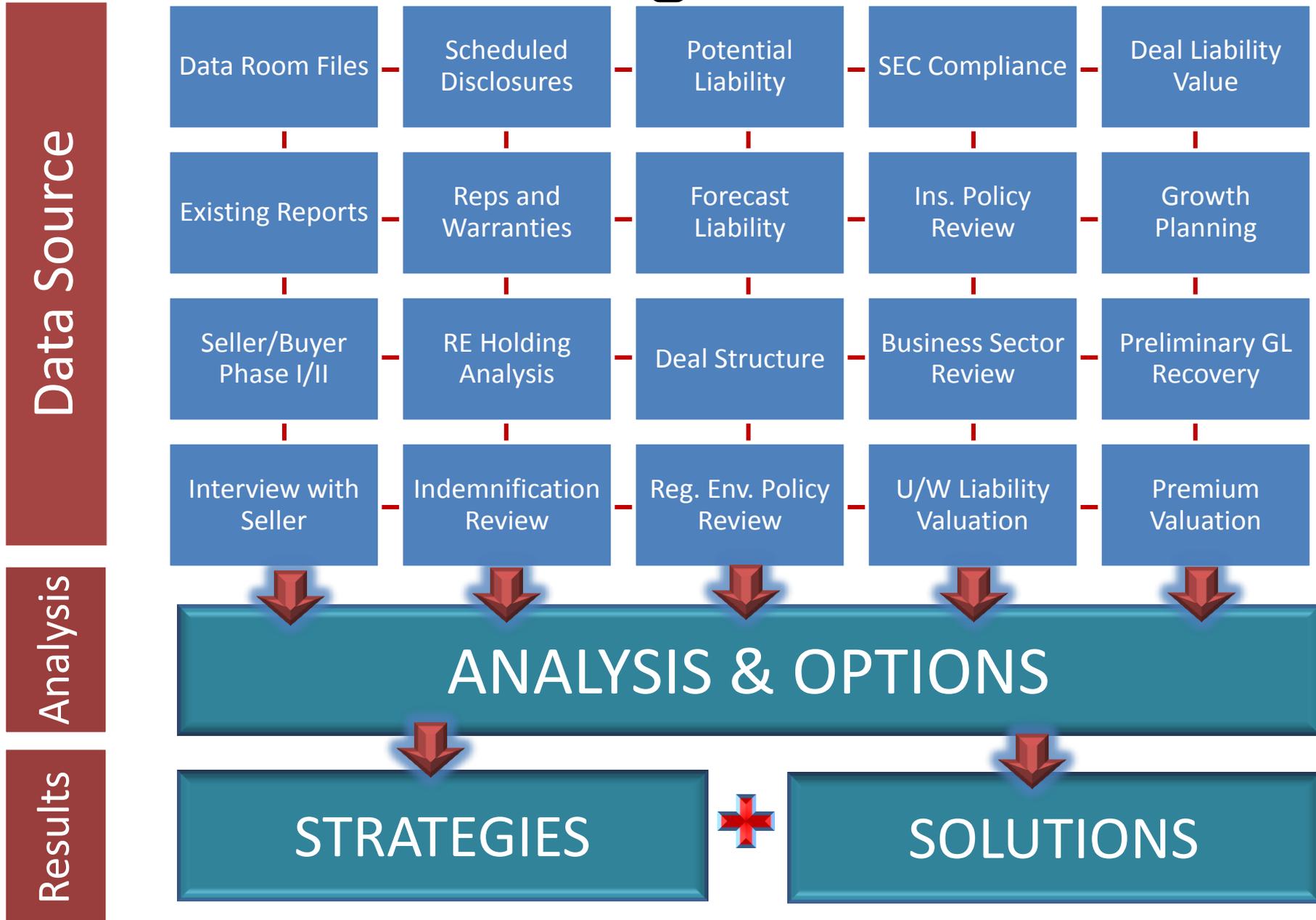
# Additional Due Diligence

- **Asbestos surveys** – identification and testing of building materials suspected to contain asbestos (Building materials that contain asbestos must be removed by a licensed asbestos contractor prior to any renovation or demolition activity.)
- **Wetland surveys** – identification of [wetlands subject to federal or state regulation](#) in connection with construction and development activities
- **Endangered or Threatened Species**
- **Capacity Issues**
- **Property Transfer Requirements**

# Additional Due Diligence (cont.)

- **Computer database searches** – third-party database search services may be used to research the company's former properties and businesses as well as determine whether it has been named a potentially responsible party (PRP) at Superfund sites
- **Environmental compliance audits** – evaluation of the facility operations to determine whether all required permits have been obtained and the operations comply with the permits and environmental regulations.

# The Due Diligence Process



# Management of Liability

- Comfort Letters
  - Directed at entity qualified for an exemption of liability (Bona Fide Prospective Purchaser, Lender, or “contaminated aquifer” or “contiguous property”)
- Site Status Letter – directed to entity that did not cause site contamination and demonstrates current level of impact meets current cleanup criteria ( . . . No threat and no response actions)
- Site Closure Letters – no further action (NFA), Covenant Not to Sue, etc.

# Talk to your Environmental Attorney Early

- Be sure to provide the attorney with all available details about the proposed structure of the transaction and the plans for the property and operations after the closing.
- The attorney can assist in developing a strategy and timetable for completing the appropriate environmental due diligence.
- Often, an attorney can also advise on steps that can be taken before and after the transaction to minimize or manage environmental risk.



# Questions & Answers

# *Thank You*

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