



Environmental Issues in Business Transactions

Practical Problem Solving, Including the
Maine Voluntary Response Action Program

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MEREDA

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Why Do Environmental Due Diligence?

- ✓ Save money
- ✓ Limit liability and establish Superfund defense (and VRAP typically requires)
- ✓ Lender requires it
- ✓ Avoid operational problems, tenant hassles, and resale difficulties
- ✓ To do the deal!

Problems – Practical Problem Solving

Top 7 Problems

1. What's a "Phase I?"
2. The dead or the undead? Hazardous waste closure issues
3. Why can't we be friends? Lender requirements
4. You want to close when?
5. Who's on first?
6. What "continuing obligations?"
7. VRAP – not a panacea...

Problem: When is an Environmental Site Assessment NOT?

- EPA: 100% of Phase I reports don't meet ASTM Phase I standard or legal minimum.
- Need to specify which standard you are doing! (New standard 2013).
- Bank's or Seller's Phase I is never adequate for Buyer.
- Tenant may or may not rely on landlord's Phase I?!
- Issues: Cost? Scope? Recommendations? Limitation of liability? Address!
- When is a Phase II required? And recommendations?
- New standard: Identifying vapor intrusion possibilities will lead to more investigations.

Outside review of Phase I is strongly recommended!

HAZARDOUS WASTE CLOSURE – The Dead or the Undead?

1. Required by law for *certain* haz waste generators.
2. FOR EXAMPLE: Not completed. What if prior owner didn't conduct and file HW closure? Obligation of new owner? Is it really required?
3. FOR EXAMPLE: Reopened. HW Closure completed, but DEP reopens: *e.g.*, Phase I of buyer raises new issues, or structure gone so subsurface "available."
3. **"New" Issues that aren't "waste generator" issues:** PCBs, possible Vapor Intrusion, Lead Dust, Lead Paint.
4. If RCRA Corrective Action Site, any area of site is fair game as a "solid waste management unit" – including licensed outfalls.

Identify the issue early and resolve!



Lender Requirements: Why Can't We Be Friends?

- Federal bank regulations require bank programs to protect collateral, limit risk
- SBA loans require assessment of environmental issues and resolution of any contamination issues
- Banks sometimes require ASTM Phase I "plus"

Have to work with bank's environmental staff!

You want to close WHEN??

Timing is Everything!

- Multiple Environmental Decisions to address *first*
 - Phase I consultant retention and timing
 - Scope of Phase I/II?
 - What hazardous generator status and permits?
 - What will lender require?
 - Want VRAP?
- Coordination with drafting purchase and sale agreement terms: representations, warranties, indemnification
- “As is” purchase
- Auctions...ugh!

SIMPLE: Start early! But -- Scope of Due Diligence will depend on details of transaction, risks.

IF you want to Make Things More Complicated Than Necessary.....

- ✓ Try to negotiate the whole deal, THEN call MICE, MICE & MICE
- ✓ Assume VRAP program will accept consultant's recommendations, but make no allocation of time to address DEP questions, requests



Who's on First?

- **Seller** – owner/operator/key site manager
 - Provides access to property
 - Provides documents
 - Provides interviews

Lender

ME DEP VRAP

Oh, and the Buyer...

**WHO'S DOING WHAT TO
WHOM AND WHEN??**

- **Lawyer** – usually Buyer's
 - Title search
 - Contract drafting and closing
 - Makes sure Phase I meets ASTM
 - Assists with VRAP
 - Permit transfers
 - Environmental Covenant?
 - Document BFPP status



SCARY "CONTINUING OBLIGATIONS?"

MUA HA HAA HAA!

Its Okay to buy contaminated property, but to assert defenses must also:

- **Make Legally Required notifications**
- **Exercise Due Care by taking "Reasonable Steps" to stop continuing releases, prevent future releases, prevent or limit exposure**
- **Cooperate with government response actions**
- **Stay in compliance with controls and land use restrictions**
- **Comply with information requests**

AND COMPLY WITH VRAP CONDITIONS

VRAP – Not a Panacea

- ◇ Remember: Useful but Limited!
 - *Liability protection to extent information submitted*
 - *State liabilities only*
 - *Compliance with conditions required*
- ◇ For example: Former Dry Cleaner Site
 - TCE in groundwater, possible vapor intrusion
 - VRAP with Condition: monitor groundwater to help address possible vapor intrusion issue (but monitoring didn't continue)
 - DEP requested additional VI investigation
- ◇ Q: Relationship of VRAP to CERCLA and Federal Liabilities? A: None!
 - Consider likelihood of EPA involvement
 - *Develop strategy accordingly, as it may affect decision making*

So – no
problems,
right??

So...

