Environmental Due Diligence:
Answering the Five Main Questions

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and
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A full service environmental consulting firm headquartered in Houston with offices in Austin and Denver.

Mainly provide multimedia permitting and compliance support services.

My focus is on supporting attorneys on projects, including:
- Due diligence
- Audit technical support
- Expert reports and testimony

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• A full service environmental, health and safety legal practice based in Houston, Texas.
• Assist clients with regulatory compliance, EHS litigation, and transactional matters.
• Due diligence experience in numerous states, territories and countries.
• Work with both large and small clients – from individuals buying property to large industrial acquisitions.
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Who is part of the due diligence team?

**Who selects the Consultant?**

- Work with consultants already on the project (Those who performed Phase I and Phase II).
- Client asks for a recommendation.

**Common Questions from Clients**

- Do we need someone with experience in that particular state/country?
- Do we need a consulting firm with experience in a variety of environmental media (air, waste, and water)?
- Do you have any recommendations?
Who is part of the due diligence team?

**What level of experience is needed?**

- Need to be able to dive in and assess the situation.
- Air Quality Expert
- Water/Waste Expert

**Example Situation**

- A buyer is looking at several refineries and ~50 terminals. How can you look at all of that in a short time?
What can we look at as part of the due diligence?

Scope of the due diligence is the most crucial pre-planning step.

- Determines client’s costs for the project.
- It can determine how an attorney negotiates the Purchase and Sale Agreement.
- Determines how much risk a client will be taking with the acquisition.
What does the Agreement Say?

Purchase and Sale Agreement allows us to investigate...

Example:

Except as required by any Environmental Law, as part of corrective action under the current RCRA permit, or as otherwise authorized by this Agreement, neither Party may seek indemnification from the other Party under this Article 9 for any Environmental Liability that is in any way increased or accelerated in time because of any (1) vertical conduits (e.g., pilings) that are installed after Closing (except for groundwater monitor wells that are installed according to generally accepted industry standards) without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed, and which transfer contamination between upper and lower groundwater aquifers or (2) sampling, analysis of groundwater, soil or vapors evolved from the ground or any other action that breaks the plane of Land that occurred without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed...
**What** does the Agreement Say?

Purchase and Sale Agreement allows us to investigate...

Example:
Except as required by any Environmental Law....
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That is in any way increased or accelerated in time because of any....
(2) sampling, analysis of groundwater, soil or vapors evolved from the ground or any other action that breaks the plane of Land that occurred without the prior written consent of the other Party....
**What does the Agreement Say?**

Lease Agreement allows us to...

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**Example:**

**Non-Disclosure.** With the exception of Tenant’s professional advisors in connection with the transaction contemplated herein, Tenant shall not disclose to Lessor, its agents, and its employees, or any other person not affiliated with Tenant, any information, reports, analyses or data of any kind generated, prepared or otherwise obtained as a result of the Work (collectively the “Results”) unless disclosure is indisputably required under applicable laws, and Lessor, its agents, and its employees shall not be imputed with knowledge of the contents of such Results.
What does the Agreement Say?

Lease Agreement allows us to...

Example:

Non-Disclosure.

- With the exception of Tenant’s professional advisors in connection with the transaction...
- Tenant shall not disclose to Lessor, its agents, and its employees, or any other person not affiliated with Tenant...
- Any information, reports, analyses or data of any kind generated, prepared or otherwise obtained as a result of the Work (the “Results”)...
- Unless disclosure is **indisputably** required under applicable laws, and
- Lessor [i.e., the Owner of the Property]...shall not be imputed with knowledge of the contents of such Results.
What can we look at as part of the due diligence?

Is there a federal nexus?

- Federal funding
- Federal/publicly-owned lands
- Federal permit is required

Yes!

- NEPA process was/will be triggered
  - Clean Water Act
  - Clean Air Act
  - Endangered Species Act
  - National Historic Preservation Act
  - Native American Graves Protection & Repatriation Act

No!

- Phase I = bare minimum
  - ASTM E1527-13 & EPA’s AAI
    - Not a clean bill of health
  - Consider a constraints analysis
    - Desktop review only (translation: low cost)
    - High reward
**Where** do we focus the due diligence work?

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**Scope of the Due Diligence**

- What are the biggest environmental hurdles for what the client wants to do?
  - For example, client wants to start construction tomorrow (not far-fetched sometimes...)

- Common client complaint:
  - Attorneys/consultants getting bogged down in minor/fixable issues.
  - For example, spent tens of thousands of dollars on issues that were $1000-2000 in liability.
**Where do we focus the due diligence work?**

**Potential Air Issues**
- Missed federal permitting issues (netting, site aggregation)
- Insufficient control technologies/equipment
- Missed federal standards for sources/pollutants
- **Not** a full compliance review

**Potential Water Issues**
- Historic spills and long-term effects/continuing obligations
- Discharges and monitoring vs. standards

**Potential Waste Issues**
- Historic spills and long-term effects/continuing obligations
- Major changes in surface features
Where is the subject site(s)?

Anytime, Anywhere

- In the United States,
  - Regulatory programs are structured similarly
  - Know the local standards
- Outside the United States,
  - Determine if local regulations exist
  - If none, common practice to use U.S. standards as default
When should you conduct the due diligence?

Timing for the Due Diligence Review

• Again, look at the deal documents. When are you allowed to start?

• My opinion, the earlier the better.
  • Allows an attorney to amend the deal docs.
  • Findings can give an attorney leverage (e.g., Escrow money holdbacks, amended schedules to the deal documents, etc.).

• A lot of times, I get 1-2 weeks before closing…
  • Short time frames don’t provide enough time for creative solutions.
Why conduct due diligence?

Purpose of Due Diligence

• **Avoid significant environmental issues.**
  • Example – Superfund sites – Owner liability under CERCLA.
  • Example – Long remediation efforts – 20+ years of groundwater remediation

• **Avoid issues that prevent a client from doing what they want to do.**
  • Example – Sensitive receptors next to where you want to build your facility.

• **Avoid expensive fixes to get back into compliance.**
  • Example – Flares not working on 1300 oil and gas wells.
Why conduct due diligence?

Avoid significant environmental issues.

- **Superfund Sites**
- **Long Remediation Efforts**

**Company A**

**Company B**
**Why** conduct due diligence?

Avoid issues that prevent a client from doing what they want to do.

Developing near sensitive receptors

Next door to...

_Southern Crushed Concrete v. City of Houston, 398 S.W.3d 676 (Tex. 2013)_
**Why** conduct due diligence?

Avoid issues that prevent a client from doing what they want to do.

Client cannot permit the site the way they want.

- Client’s proposed property is located in Texas.
- Client wanted to build storage tanks on the property.
- Property is located in an industrial area.
- Client plans to register its authorization under a Permit by Rule (30 Tex. Admin. Code 106.478).

**30 Tex. Admin. Code 106.478**

“Any fixed or floating roof storage tank, or change of service in any tank, used to store chemicals or mixtures of chemicals shown in Table 478 in paragraph (8) of this section is permitted by rule, provided that all of the following conditions of this section are met:

1. The tank shall be located at least **500 feet** away from any recreational area or residence or other structure not occupied or used solely by the owner of the facility or the owner of the property upon which the facility is located...”
**Why conduct due diligence?**

Avoid expensive fixes to get back into compliance.

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**Client was purchasing approximately 1500 oil and gas wells**

**Company Due Diligence Policy**
Called for desktop review of 10% of the wells.

**Findings**
Indications that there were minor recordkeeping issues

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**Texas Environmental Audit**
Conducted a full review of the acquisition to clean up recordkeeping errors.

**Findings**
90% of the well sites did not have working flares.

**New Company Policy**
Conduct 100% Desktop Review of all well sites

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Months later...

**Did the company miss the point?...**
Why conduct due diligence?

To Understand the Past
- Determine existing environmental conditions
- Determine effect on purchase price and on land use
- Discuss appropriate remedies with client and with counsel
  - May be technical
  - May be legal

To Understand the Future
- Planning to operate the site “as-is” or your own way?
- What will your future compliance obligations be?
- What will your future permitting look like?
- Can educate stakeholders early
- Can staff accordingly

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Why conduct due diligence?
How can attorneys/consultants conduct a more streamlined approach to due diligence?

Stage 1 - Initial Discussion

• **First Meeting** – meet after client decides to proceed with an acquisition but before the Letter of Intent (“LOI”) or definitive documents are drafted.

• **Legal Review** – Client and environmental counsel review pertinent framework documents prior to initial discussion. (e.g., investment broker documents, draft LOI or Purchase/Sale Agreement, etc.)

• **Purpose of First Meeting:**
  • Frame the deal – Timing, assets to be purchased, strategic issues, etc.
  • Discuss:
    • the Seller’s tolerance for accepting environmental liability;
    • the Seller’s amenability to altering the transactional documents; and
    • coordinated approach to negotiations.
How can attorneys/consultants conduct a more streamlined approach to due diligence?

**Stage 1 - Initial Discussion (cont.)**

- **Identify** – Significant EHS risks. Place EHS risks into the following categories:
  - Major risks;
  - Medium risks; and
  - Minor risks.

- **Available Documents** – Discuss available documents and identify known data gaps (even though preliminary).

- **Discuss:**
  - the potential expertise required for the transaction (e.g., Does the consultant need to be local? What type of expertise is needed—air, waste, and/or water?); and
  - scope of consultant review to ensure they efficiently review environmental risks by priority (consultant should spend majority of time on the Major risks and a decreasing amount of time on Medium and Minor risks).

- **Budget** – Develop an initial budget for the due diligence, including both legal and technical budgets, and discuss timing and scope of due diligence required for the acquisition.
How can attorneys/consultants conduct a more streamlined approach to due diligence?

Stage 2 – Implement and Monitor Due Diligence

- It’s an interactive and iterative process with periodic discussions/meetings with the client (as often as the needs of the project dictate).

- Review of data room documents.

- Client and Counsel determine scope of:
  - Consultant review of data room and
  - Counsel review of data room (if needed).
How can attorneys/consultants conduct a more streamlined approach to due diligence?

Stage 3 – LOI/Definitive Document Stage

• **Draft the Deal Points** – Environmental counsel involved in ensuring all EHS deal points are included in the LOI.

• **Allocate Liability** – Client and counsel develop a comprehensive approach for the transactional documents, including proper allocation of liability, escrow of funds to address environmental risks, and/or other environmental contractual provisions.

• **Review Deal Points** – Client, counsel, and consultant review EHS terms based on due diligence findings, risk tolerance, and LOI.

• **Presentation** – Counsel and consultant assist client with presenting comprehensive approach to Seller to ensure effective and efficient negotiations.
How can attorneys/consultants conduct a more streamlined approach to due diligence?

Due Diligence Legal Protections

Texas Environmental, Health & Safety Audit Act

• Can conduct a pre-acquisition audits

• No requirement to notify TCEQ before initiating a pre-acquisition audit (notify TCEQ within 45 days after closing).

• Communications are audit privileged whether or not you formally begin the audit.

• Get immunity for disclosed violations.
How can attorneys/consultants conduct a more streamlined approach to due diligence?

Communicate!!!

• An ounce of prevention > a pound of cure
• Telephone > email
  • More fluid & collaborative
  • No paper trail/security risk
• Maintain confidentiality
• Centralized checklist/progress report
• Collaborative effort, so work together!
Contact Information

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