



The Global Legal Network
Celebrating 40 Years

MITIGATING ENVIRONMENTAL PITFALLS IN CONSTRUCTION & DEVELOPMENT

JUNE 30, 2020

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WHAT ARE THE CONCERNS?

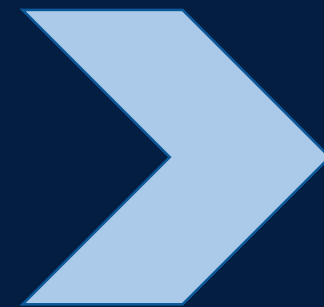
- Storm Water Permits
- Dredge and Fill Wetlands
- Oil Spill Prevention Requirements
- Hazardous and Non-Hazardous Solid Waste
- Hazardous Substances
- Polychlorinated Biphenyl (PCB) Waste
- Air Quality
- Asbestos and Lead Paint
- Endangered Species Act

THE POTENTIAL REALITY

- What lurks beneath the surface of real property that may not have been used recently in a manner that suggests contamination is likely?
 - Retail or educational facility built on former landfill
 - Multi-family residential project built on or next to former drycleaner site
 - Restaurant constructed on or next to former gas station site



LIABILITY



ENVIRONMENTAL LIABILITY

- Civil Liability
 - Compensation
 - Punitive
- Regulatory/Statutory Violations
 - Compliance
 - Remediation
 - Fines and Penalties
 - Compensation
 - Punitive



WHO IS RESPONSIBLE?

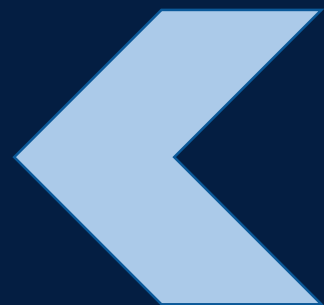
- Owners (Past, Present, Future)
- Property Managers and Developers
- Landlords/Tenants
- General Contractors/Project Managers
- Subcontractors
- Third-Parties



MANAGING CONTINGENT LIABILITIES

- Do you want to be in the chain of title?
- Will seller retain any liabilities?
- Do you need escrows?
- Will public perception slow approvals?
- What is your exit strategy?





DEFENSES



HOW DO YOU PROTECT YOURSELF?

- Best Defenses:
 - Due Diligence
 - Contract
 - Insurance
 - Site Security



DUE DILIGENCE

- Schedule
 - Timing considerations
 - Regulatory document reviews
 - Phase II investigation required?
 - Delays due to regulatory involvement
 - Choosing an environmental consultant
- Remediation – how do you price what you don't know?
- Transaction structure?
 - Fee title or ground lease

DUE DILIGENCE

- Focus diligence on true risk - land use?
- Were historical buildings demolished onsite?
- Any development constraints?
 - Shallow groundwater
 - Storm water
 - Geotechnical
 - Neighbors
 - Time

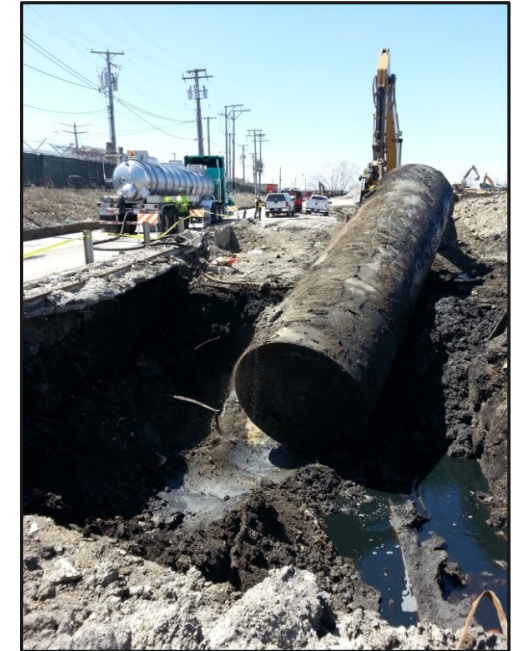


DUE DILIGENCE

- Additional considerations:
 - Title Insurance
 - Policy / Endorsements
 - Regulatory Requirements
 - CCRs / City / County / State
 - Environmental Violations
 - Of Record? On File?
 - Legal Counsel

WHEN ISSUES ARISE

- Stop work and notify owner immediately
- Call environmental consultant
- Who needs to be notified?
 - Insurance
 - Lender
 - Legal Counsel
- Know what regulations apply and your obligations to ensure compliance, i.e., notice provisions
- Follow the Soil Management Plan



MINIMIZING LIABILITY FOR RELEASES

- Fast response and documentation are key
- Follow the Soil Management Plan
- Preserve rights
- Preserve evidence
- Control communication

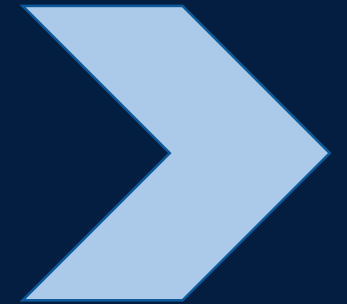


POP UP QUESTION

- What is the biggest challenge during due diligence?
 - A. Soil Management Plan
 - B. Shallow Groundwater
 - C. Time
 - D. Fee Title



MINIMIZING RISK



MINIMIZING RISK THROUGH CONTRACT

- Clear Scope of Work
 - The scope of work or services must clearly stipulate if the contractor is to perform environmental services
- Owner Disclosures
 - EG: underground tanks information and environmental assessments.
 - Information relative to permits issued to the site (if working at an active facility), such as notices of violations or fines for releases or discharges and various hazardous substances used or in use at the site
- Indemnification Clauses
 - Indemnifies the contractor in the event environmental liability attaches merely because of the existence of contamination.
 - Usually will not indemnify for exacerbation of conditions or for other contamination releases that the contractor causes by its own actions or omissions

MINIMIZING RISK THROUGH CONTRACT

- Limitations of Liability
 - Contractual
 - Disclosure of Documents
 - Retention of Consultant
 - Soil Management Plan (“SMP”)
- Carve outs to limitation of liability
 - RCRA/CERCLA
- Assignment of liability for existing materials vs. materials brought onto site during project.

MINIMIZING RISK THROUGH CONTRACT

- Change in Conditions Provision
 - Sets forth parties respective obligations if Haz Mats discovered on site
- Responsibility for Ownership, Transport, Arranging, and Disposing of Waste
 - Contractor is not and never intends to become an "arranger," "operator," "generator," or "transporter" of hazardous substances as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA, also known as "Superfund").
 - Contractors must be careful not to sign waste profiles and manifests as owners or generators of hazardous wastes.

MINIMIZING RISK THROUGH INSURANCE

- Contractual obligation to maintain insurance
 - Additional insured status
- Commercial General Liability (CGL) policies
 - Have significant gaps and limitations for pollution
 - Most exclude mold or asbestos
 - Sudden and Accidental contamination only
- Contractor and Owner Pollution Liability policies
 - CPL is placed by contractor and PLL by owner
 - Pre-existing contamination covered by PLL
 - Exacerbation and new releases by CPL
- Ensure GC and grading subcontractor carry CPL

SITE SECURITY

- Ongoing obligations under CERCLA
- Illicit abandonment - dumping
- Bodily injury
- Stop work orders
- Reputational risk



THANK YOU! IF YOU HAVE ANY QUESTIONS,
PLEASE CONTACT ONE OF THE PRESENTERS



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