ENVIRONMENTAL ISSUES IN REAL ESTATE TRANSACTIONS

Presented by
Polly B. Jessen, Kaplan Kirsch & Rockwell

March 7, 2018
Environmental Issues
Contamination Poses What Risks?

- Regulatory enforcement
- Cost overruns
- Third party claims
- Natural resource damages
- Off-site disposal liability

BUT there are some incentives too.
Contamination

SOURCES OF LIABILITY

SOURCES OF DEVELOPMENT COSTS

SOURCES OF FUNDING AND TAX BENEFITS
Contamination

SOURCES OF LIABILITY

CERCLA or “Superfund” and its defenses
- Innocent purchaser
- BFPP
- Contiguous Property
- Voluntary Cleanup

State common law
- Statutes
- Non-disclosure
- Tort claims
Contamination

SOURCES OF LIABILITY AND DEVELOPMENT COSTS

Other federal statutes
- RCRA
- Clean Water Act
- TSCA

State statutes
- Hazardous Waste
- Solid Waste
Contamination

SOURCES OF FUNDING AND TAX BENEFITS

Other federal statutes
- RCRA
- Clean Water Act

State statutes
- Hazardous Waste
- Solid Waste
Environmental Resource Laws Affect Real Estate Transactions?

- Development costs
- Operational costs
- Regulatory enforcement
Environmental Requirements

- Wetlands
- Endangered Species
- Migratory Birds
- Floodplains
- Environmental Permits
Building Demolition and Renovation

- Hazardous material disposal
- Asbestos abatement
Management Mechanisms

- Contractual
- Regulatory
- Financial
- Due Diligence
- Project Management
# Due Diligence

## Due Diligence Checklist

### Real Estate Transaction

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Due Diligence

Environmental Liability

13. Obtain or perform an ASTM- or regulatory-compliant Phase I report for the property to include:

   a. Review of existing environmental data and reports provided by seller
   b. Review of environmental liens and activity and use restrictions
   c. Status of any ongoing remediation
   d. Identification of any recognized environmental conditions requiring further Phase II investigation (including USTs).

14. Perform any Phase II testing desired.

15. Review regulatory status of site (any permits, orders, cleanup plans, settlement agreements, covenants, etc.)

16. Determine the availability and evaluate the protection afforded under any indemnities or cleanup covenants or agreements from predecessors in title or other responsible parties.
17. Determine the available limits, term, and premium for environmental liability insurance coverage for the property.

18. Determine the regulatory programs available to perform cleanup and/or obtain “no further action” determinations and liability protections.

19. Review of the status of buildings and records regarding the presence of lead-based paint, asbestos, and other hazardous building materials or uses affecting demolition or reuse.
Due Diligence

Environmental Resources

7. Confirm that no wetlands exist on property.

8. Determine existence of wildlife and wildlife habitat on property (i.e., prairie dogs, migratory birds, and other species).

9. Determine existence of historic and cultural resources on property.

10. Determine floodplain status of property.
### Identify the Management Mechanisms

#### Regulatory Enforcement – Federal

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<td>Pollution legal liability insurance</td>
<td>Maintain BFPP Defense</td>
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<td>Reasonable Steps Letter</td>
<td>Title stays with current owner</td>
<td>Professional and/or contractor’s pollution legal liability insurance</td>
<td>ASTM Compliant Phase I ESA</td>
<td>Pollution legal liability coverage</td>
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<td>Prospective Purchaser Agreement</td>
<td>Contractor indemnities</td>
<td>Escrowed funds</td>
<td>Continuing Obligations Plan</td>
<td>Phase I reliance letter</td>
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<td>Implement cleanup/comply with Orders or reasonable steps letter</td>
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- Comfort Letter
- Reasonable Steps Letter
- Prospective Purchaser Agreement
- Administrative Settlement/Order on Consent
- State VCUP or order (EPA defers enforcement to State)

- Indemnity/release from current owner
- Title stays with current owner
- Contractor indemnities
- Pollution legal liability insurance
- Professional and/or contractor’s pollution legal liability insurance
- Escrowed funds
- ASTM Compliant Phase I ESA
- Continuing Obligations Plan
- Materials Management Plan
- Implement cleanup/comply with Orders or reasonable steps letter
- Indemnity
- Pollution legal liability coverage
- Phase I reliance letter
- Additional collateral
- Phased funding
# Regulatory Enforcement – State

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<td>• Other State letters</td>
<td>• Contractor indemnities</td>
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<td>• Consent Order</td>
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**Regulatory Agreements**
- State VCUP or order (EPA refers enforcement to State)
- Consent Order
- No Further Action/No Action Determination

**Contractual Terms**
- Indemnity/release from current owner
- Title stays with current owner
- Contractor indemnities

**Financial Assurances**
- Pollution legal liability insurance
- Professional and/or contractor’s pollution legal liability insurance
- Escrowed funds

**Project Management**
- Implement cleanup/comply with orders or reasonable steps letter

**Loan Terms**
- Indemnity
- Pollution legal liability coverage
- Phase I reliance letter
- Reps and warranties
- Project management covenants/default
- Additional collateral
- Phased funding
## Cleanup Cost Overruns – Delay

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- **Approved cleanup plan (State VCUP, Order, Work Plan)**
- **Brownfields funding/tax credits (i.e., more money in budget)**
- **Seller cost share/ Seller owner pays overruns**
- **Fixed price remediation**
- **Cost cap/stop loss insurance**
- **Escrowed funds**
- **Letter of credit**
- **Parent and/or personal guarantees**

Careful cost estimates/contingency

- **Indemnity**
- **Pollution legal liability coverage**
- **Phase I reliance letter**
- **Reps and warranties**
- **Project management covenants/default**
- **Additional collateral**
- **Phased funding**
## Third Party Claims

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| Third party claims  | EPA Settlement Agreement/ Administrative Order (contribution protection) | • Indemnity/release from current owner  
• Contractor indemnity  
• Environmental covenants | • Pollution legal liability insurance  
• Professional and/or contractor’s pollution legal liability insurance  
• Escrowed funds | • Implement cleanup  
• Materials management plan/best practices to avoid further exposure, ongoing releases  
• Engineering controls | • Indemnity  
• Pollution legal liability coverage  
• Project management covenants/default  
• Additional collateral |

- EPA Settlement Agreement/ Administrative Order (contribution protection)
- Environmental covenants

- Indemnity/release from current owner
- Contractor indemnity
- Environmental covenants

- Pollution legal liability insurance
- Professional and/or contractor’s pollution legal liability insurance
- Escrowed funds

- Implement cleanup
- Materials management plan/best practices to avoid further exposure, ongoing releases
- Engineering controls

- Indemnity
- Pollution legal liability coverage
- Project management covenants/default
- Additional collateral
## Natural Resource Damages

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| Natural Resource Damages | EPA/State Settlement Agreement/ Administrative Order (contribution protection) | Indemnity/release from current owner | Pollution legal liability insurance | Maintain BFPP defense | - Indemnity  
- Pollution legal liability coverage  
- Phase I reliance letter  
- Reps and warranties  
- Project management covenants/default  
- Additional collateral |
| Third party claims | EPA Settlement Agreement/ Administrative Order (contribution protection) | Indemnity/release from current owner | Pollution legal liability insurance | Implement cleanup, manage clean-up, and avoid further exposure, ongoing releases | Indemnity  
- Pollution legal liability coverage  
- EPA/State Settlement Agreement/ Administrative Order (contribution protection)  
- Reps and warranties  
- Additional collateral  
- Project management covenants/default  
- Engineering controls |
| Natural Resource Damages | EPA/State Settlement Agreement/ Administrative Order (contribution protection) | Indemnity/release from current owner | Pollution legal liability insurance | Maintain BFPP defense | - Indemnity  
- Pollution legal liability coverage  
- Phase I reliance letter  
- Reps and warranties  
- Project management covenants/default  
- Additional collateral |
| Disposal Liability at Off-Site locations | EPA/State Settlement Agreement/ Administrative Order (contribution protection) | Pollution legal liability insurance | Licensed disposal sites | Indemnity  
- Pollution legal liability coverage  
- EPA/State Settlement Agreement/ Administrative Order (contribution protection)  
- Reps and warranties  
- Additional collateral  
- Project management covenants/default  
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# Disposal at Off-Site Locations

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- Pollution legal liability insurance  
- Professional and/or contractor’s pollution legal liability insurance  
- Licensed disposal sites | **Loan Terms**:  
- Indemnity  
- Pollution legal liability coverage  
- Project management covenants/default  
- Additional collateral |

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- Escrowed funds | Implement cleanup  
- Materials management plan/best practices to avoid further exposure, ongoing releases  
- Engineering controls | Indemnity  
- Pollution legal liability coverage  
- Project management covenants/default  
- Additional collateral |
| Natural Resource Damages | EPA/State Settlement Agreement/Administrative Order (contribution protection) | Indemnity/releases from current owner | Pollution legal liability insurance | Maintain IPPP defense | Indemnity  
- Pollution legal liability coverage  
- Phase 1 notice letter  
- Rails and warranties  
- Project management covenants/default  
- Additional collateral |
| Disposal Liability at Off-Site locations | | | | | Indemnity  
- Pollution legal liability coverage  
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| Wetlands              | • Corps of Engineers Letter  
• Jurisdictional Determination  
• 404 Permits | Purchase Price | Permit compliance | • Indemnity  
• Compliance with laws |

### Regulatory Agreements

- Comfort Letter  
- Reasonable Steps Letter  
- Prospective Purchase Agreement  
- Administrative Settlement Order on Consent  
- State VCUP or order (EPA defers enforcement to States)

### Contractual Terms

- Indemnify/release from current owner  
- Title stays with current owner  
- Contractor indemnities

### Financial Assurances

- Pollution legal liability insurance  
- Professional and/or contractor's pollution legal liability insurance  
- Escrow funds  
- Maintain BPR Defense  
- ASTM Compliant Phase I ESA  
- Continuing Obligations Plan  
- Materials Management Plan  
- Implement_cleanup comply with Orders or reasonable steps letter

### Project Management

- Indemnity  
- Pollution legal liability coverage  
- Phase I reliance letter  
- Reps and warranties  
- Project management covenants/default  
- Additional collateral  
- Phased funding

### Loan Terms

- Indemnity  
- Pollution legal liability coverage

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**Wetlands**
# Endangered Species

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<td>• Safe Harbor Agreement</td>
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### Loan Terms
- Compliance with Laws
- Indemnity

## Contractual Terms

- Purchase Price
- Clearing funds
- Implement cleanup/comply with orders or reasonable steps later
- Additional collateral
- Phased funding

## Financial Assurances

- Indemnity
- Pollution legal liability coverage
- Phase I reliance letter
- Reps and warranties
- Project management covenant/default
- Additional collateral
- Phased funding

## Project Management

- Compliance with Laws
- Indemnity

## Regulatory Agreements

- Consent
- State VCP or order (EPA refers enforcement to States)
- Indemnify/release from current owner
- Title stays with current owner
- Contractor indemnities
- Pollution legal liability insurance
- Professional and/or contractor’s pollution legal liability insurance
- Escrow funds
- Implement cleanup/comply with orders or reasonable steps letter
- Additional collateral
- Phased funding
- Indemnity
# Migratory Birds

<table>
<thead>
<tr>
<th>Environmental Risks</th>
<th>Project Risk Management Tools</th>
<th>Loan Terms</th>
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</thead>
<tbody>
<tr>
<td><strong>Migratory Birds</strong>&lt;br&gt;Bald and Golden Eagles</td>
<td><strong>Regulatory Agreements</strong>&lt;br&gt;<strong>Contractual Terms</strong>&lt;br&gt;<strong>Financial Assurances</strong>&lt;br&gt;<strong>Project Management</strong></td>
<td><strong>Loan Terms</strong>&lt;br&gt;• Compliance with Laws&lt;br&gt;• Indemnity</td>
</tr>
<tr>
<td>MBTA • Permit for “take”&lt;br&gt;BGEPA • Permit for “take”&lt;br&gt;<strong>Purchase Price</strong>&lt;br&gt;<strong>U.S. FWS Nationwide Conservation Measures</strong>&lt;br&gt;<strong>U.S. FWS BMPs for specific industries (wind, utility lines, oil &amp; gas, towers)</strong>&lt;br&gt;<strong>Colorado Parks and Wildlife Best Management Practices</strong>&lt;br&gt;<strong>Recommended Buffer Zones and Seasonal Restrictions for Colorado Raptors</strong></td>
<td><strong>Action Determination</strong>&lt;br&gt;• Approved cleanup plan (State VCUP, Order, Work Plan)&lt;br&gt;• Brownfield funding/credits (i.e. more money in budget)&lt;br&gt;• Seller cost share/Seller owner pays overruns&lt;br&gt;•Seller's interest/property tax remediation&lt;br&gt;• Cost caps/stop loss insurance&lt;br&gt;• Escrowed funds&lt;br&gt;• Letter of credit&lt;br&gt;• Parent and/or personal guarantees&lt;br&gt;• Contingency cost estimate/exercise/coningency</td>
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</table>
# Floodplains

## Environmental Risks

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<thead>
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<tbody>
<tr>
<td>Third party claims</td>
<td>EPA Settlement Agreement/Administrative Order (contribution protection)</td>
<td>Indemnity/release from current owner</td>
<td>Pollution legal liability insurance</td>
<td>Implement cleanup</td>
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<tr>
<td>Natural Resource Damages</td>
<td>EPA/State Settlement Agreement/Administrative Order (contribution protection)</td>
<td>Indemnity/release from current owner</td>
<td>Pollution legal liability insurance</td>
<td>Maintain BPFF defense</td>
<td>Indemnity</td>
</tr>
</tbody>
</table>

## Project Risk Management Tools

### Regulatory Agreements
- CLOMR / LOMR
- Local permit

### Contractual Terms
- Purchase Price

### Financial Assurances
- Pollution legal liability insurance
- Escrow funds

### Project Management
- Implement cleanup
- Materials management plan/best practices to avoid further exposure, ongoing releases
- Engineering controls

### Loan Terms
- Indemnity
- Pollution legal liability coverage
- Project management covenants/debt
- Additional collateral
- Compliance with Laws
## Permitting

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<td></td>
<td>Regulatory Agreements</td>
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<tr>
<td>Permitting</td>
<td>Application and transfer approval effective on closing</td>
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<td></td>
<td>• Representations and warranties regarding all necessary permits for ongoing operations</td>
<td>Indemnity</td>
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<td>• Cooperation and transition requirements</td>
<td>Compliance with Laws</td>
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<td>Close communication with regulators</td>
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<td>Maintenance BFPP defense</td>
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<td>• Project finance letter</td>
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## Asbestos Abatement and Hazardous Materials Removal

### Environmental Risks
- Asbestos abatement and hazardous materials removal

### Project Risk Management Tools
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<tr>
<td>Asbestos abatement and hazardous materials removal</td>
<td>Reg. 8 Permit</td>
<td>Close regulatory coordination</td>
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<td>Qualified/insured contractors</td>
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<td>Compliance with Law</td>
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### Regulatory Agreements
- Reg. 8 Permit

### Contractual Terms
- Current owner

### Financial Assurances
- Pollution legal liability insurance
- Project management covenants/default
- Additional collateral

### Project Management
- Close regulatory coordination
- Qualified/insured contractors
- Indemnity
- Pollution legal liability insurance
- Project management covenants/default
- Additional collateral

### Loan Terms
- Indemnity
- Compliance with Law
Success

Environmental Considerations

Real Estate Transaction
Questions

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303.825.7000
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