

Proactive by Design: Strengthening Deals Through Early Environmental Due Diligence

By: Tim Sowecke, Win Colbert, Tim Jones, & Tyler Self

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Environmental issues surface in far too many deals only after the business terms are locked in, diligence windows are closing, lenders start asking hard questions, and after the opportunity to meaningfully and more accurately allocate risk has slipped away. In today's regulatory and litigation environment, where Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") liability attaches broadly to owners and operators of contaminated properties, ubiquitous per- and polyfluoroalkyl substances ("PFAS") have become a routine part of due diligence, and legacy contamination can impair otherwise strong investments — a reactive approach to environmental review is not just inefficient, it is economically harmful.

Accordingly, deal teams should adopt front-loaded, systematized environmental risk management as a formalized component of due diligence. This includes robust ASTM-compliant investigations, strategic use of contractual protections, and targeted risk-transfer mechanisms that inform valuation and negotiations. Consistently, we see that proactive environmental risk assessment leads to stronger deals, clearer liability allocation, and far fewer near- or post-closing surprises.

Step One: Operationalize an Environmental Risk System Before the Deal Starts

Teams regularly engaged in the acquisition and sale of assets should adopt a simple, repeatable internal framework for environmental risk analysis before engaging in any specific transaction. This system should include triggers for when an ASTM-compliant Phase I Environmental Site Assessment should be conducted, what kinds of historical uses may trigger deeper inquiry, how the deal team will weigh investigation and cleanup costs during valuation, and what risk-transfer tools are available.

Importantly, the system should also detail how all environmental diligence will be routed through legal counsel to preserve privilege. While failure to maintain privilege may not have immediate impacts on the deal itself, it can have cascading issues post-deal litigation or later environmental compliance scenarios. Establishing this type of formalized system will allow deal teams to avoid improvising, rushing, or ignoring environmental risk signals during the transaction itself while maintaining client privilege and confidentiality.

Step Two: Execute the System Through ASTM-Compliant Due Diligence

In order to better understand environmental due diligence, two foundational concepts are important: “[All Appropriate Inquiries](#)” (“AAI”) and ASTM International, formerly known as American Society for Testing and Materials. AAI is the standard established under CERCLA that prospective purchasers must satisfy to preserve the ability to assert key defenses, including the bona fide prospective purchaser and innocent landowner liability defenses under CERCLA. ASTM is the technical body that develops the standards, specifically the [Phase I Environmental Site Assessment](#) standard (ASTM E1527-21), that EPA has approved to meet AAI requirements. In sum, ASTM guides the environmental professional by establishing minimum standards for conducting the environmental investigation, and AAI guides the legal assessment of what is required to secure CERCLA protections for liabilities related to the presence of hazardous substances on a property.

Executing environmental due diligence under this framework should not be a ho-hum exercise. A Phase I conducted using ASTM E1527-21 is critical and involves far more than a site walk and file review. It requires a qualified Environmental Professional to analyze more than 50 years of historical use, inspect the property and its surroundings, review regulatory records and environmental liens, investigate potential off-site sources of contamination, and interview past and present operators. Depending on the circumstances, in today’s regulatory landscape, it requires consideration of certain PFAS as a “recognized environmental condition” at some properties due to current or historic operations.

The Phase I is an investigative and due diligence tool. Its purpose is to identify potential hazardous substance releases or data gaps that cannot be resolved through non-intrusive means, e.g., soil/water sampling. When those gaps exist, a Phase II investigation becomes a critical decision point. Although AAI does not expressly require sampling, CERCLA defenses and transaction certainty will usually require further investigation of potential contamination in the form of sampling and analysis. Targeted sampling for appropriate contaminants, e.g., PFAS, chlorinated solvents, petroleum hydrocarbons, can eliminate or greatly reduce uncertainty related to environmental conditions and help to determine whether the deal is viable for the anticipated/expected purposes and cost, as well as where responsibility for further investigation and cleanup should lie.

Where contamination is confirmed, the parties can account for remediation plans, cost estimates, and regulatory pathways to cleanup or otherwise de-risk the property. All of which should *directly* inform negotiations.

Step Three: Allocating and Controlling Risk Through Transaction Documents

Once the facts are established through Phase I and possible further investigation, the transaction documents are critical for allocating pre- and post-closing risk. Representations and warranties addressing environmental compliance, historic releases, PFAS, underground storage tanks, and waste management practices become meaningful only when drafted in light of site-specific findings.

Indemnities, though unable to eliminate statutory CERCLA liability, are powerful tools for determining who should be responsible for cleanup as between the parties. Environmental

escrows and holdbacks tied to investigation and remediation can be good tools for ensuring a buyer is not left holding an unexpected liability. Pollution insurance can also support risk allocation by providing coverage for pre-existing conditions, off-site migration, agency-directed cleanup, and long-tail liabilities. Additionally, the use of representations and warranties insurance can provide deals with an additional layer of security for assets that carry uncertain and risky liabilities.

Each of these tools is most effective when matched directly to the risks identified during diligence, rather than inserted reflexively at the end of negotiations where they can create friction, delay, or death of the deal.

Step Four: De-Risking Properties Post-Closing

For properties with known or suspected contamination, simply closing the deal should not be the end of the environmental story. Long-term de-risking requires a strategy that includes regulatory engagement, cleanup and remediation planning, and maintenance of engineering and institutional controls. State voluntary cleanup programs and brownfield programs can provide covenants-not-to-sue, defined cleanup endpoints, and long-term liability clarity. Ongoing stewardship measures will likely be necessary and budgeted, such as ongoing monitoring, maintaining soil “caps” or vapor mitigation systems, and honoring land-use restrictions. The considerations are especially important under CERCLA’s broad liability scheme, where past owners and operators remain at risk even decades after their involvement.

Conclusion

Environmental due diligence in transactions should be neither peripheral nor surprising. Rather, environmental risks should be a knowable and quantifiable component of value and liability. By operationalizing a consistent internal system, executing ASTM-compliant diligence early, integrating findings into negotiations and allocation of risk, and committing to long-term stewardship where needed, deal teams move from reactive to proactive control, which results in fewer surprises and stronger deals.

For questions on how to set up and operate strategic environmental due diligence systems for acquisition and divestment of assets, please contact GableGotwals’ [Environmental and Natural Resources Law Team](#).



Tim Sowecke

405-568-3308

tsowecke@gablelaw.com



Win Colbert

346-200-6439

wcolbert@gablelaw.com



Timothy T. Jones

918-595-4839

tjones@gablelaw.com



Tyler A. Self

405-235-5589

tself@gablelaw.com

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