

Building the Right Team

Concepts for Success

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Outline of Presentation

- **Understanding the goals and risk tolerance of the stakeholders**
- **Focus on seller/buyer/private sector issues impacting the team**
- **Picking tools to match the risk – and team members who know those tools**
- **The Top Ten**

Identify Key Stakeholders & Risk Tolerance

- **Current owner**
- **Developer/redeveloper**
- **Lender/investor**
- **Regulator**
- **Local government planning & redevelopment agencies**
- **Public/affected community**

Primary Sources of Risk

- **Regulatory liability**
- **Third party liability**
- **Impact on current & future property value**
- **Impact on financing, schedule & operations**
- **Perception**
- **Economic downturns**

Why Liability (Still) Matters

- **Uncertainty in nature and extent of investigation and cleanup**
- **Potentially high costs and delay to investigate and clean a site**
- **Public/worker/tenant exposure**
- **Roadblock to project financing, permitting, construction, property transfer**
- **Impact to value of land, corporation**

Common Mistakes re: Liability

- **The state can indemnify me.**
- **The seller/buyer/developer indemnified me, so I am not liable.**
 - *For a discussion of indemnity, see Hoyt Street Properties, LLC v. Burlington Northern & Santa Fe Railway Company, 38 FSupp2d 1185 (D Or 1999)*
- **Somebody has to indemnify me!**
- **I am ok; they did a Phase 1/Level 1 site assessment and didn't find anything.**
- **I sold it "AS-IS" so I have no liability.**
- **I can't get financing, this site is contaminated!**

So What if I am Liable? Sue Me!

- **State entitled to recover remedial action costs for failure to conduct cleanup without sufficient cause**
- **Punitive damages (3X state's remedial action costs) and attorney fees**
- **Civil penalties**
- **Criminal penalties**
- **Lien on personal and real property**

Develop a Common Sense Strategy

- **Basic understanding of cleanup liability, sources of risk, and risk tolerance of each participant**
- **Range of tools which address liability and risk issues**
- **Match the tools to the risk**

Bottom line: to make any brownfield project work, all parties need to accept risk

The Strategy

- **Understand and control risks *early in the process***
 - **Not just contamination; local political and regulatory landscape**
 - **Cost effective investigation and remediation targeted at specific risks and coordinated with development goals**
- **Reasonable liability protection**
- **Preserve cost recovery options**

Understanding the Seller's Strategies

- **Goal 1: “As-is-where-is” sale to maximum extent possible**
 - **Buyer takes subject to all known and unknown environmental liabilities**
 - **Buyer may walk away or view as to risky unless buyer obtains detailed environmental investigation**

Understanding the Seller's Strategies

- **Goal 2: Seller retains only as much liability as can be directly attributed to seller's activities**
 - Possible through carefully structured representations, warranties and indemnities in which seller specifies its responsibilities for site conditions during its tenure
 - Creates potential for future disputes, i.e., which party caused the problem. May be resolved by decreasing seller liability over time (after closing)

Understanding the Seller's Strategies

- **Goal 3: Limit buyer's ability to walk away from the deal**
 - Allocate costs and risks revealed and incurred during an environmental site assessment
 - Can be done through an option contract followed by a purchase agreement that includes a detailed environmental due diligence effort and allocates risks of results

Goal 3, cont.

- **Another approach is to phase acquisition under an option agreement where “clean” portions of site are sold first, leaving contaminated portions for future investigation and cleanup as development proceeds**
 - **This appeals to buyers who eventually needs the entire property and is willing to undertake some level of cleanup obligations, but needs the unimpaired site development to proceed**

Understanding Buyer’s Strategies

- **Goal 1: Buyer pays full fair market value after taking contamination into consideration**
 - **Requires detailed ESA information**
 - **Buyer usually wants seller to pay cost of site assessment and compliance audit (if applicable). Seller may object to cost and potential exposure to liability, causing buyer to walk away.**
 - **Before assessment or audit, buyer & seller should allocate costs and determine who will deal with information disclosed**

Understanding Buyer's Strategies

- **Goal 2: Buyer wants to avoid purchasing environmental liability**
 - **Place all risk on seller except risks related to operations after financial closing**
 - **All historic liabilities go to seller**
 - **Works only if seller continues to exist as a financially viable entity**
 - **If buyer's end use is the same as seller's, this approach is probably not equitable or enforceable without significant investigation and documentation**

Understanding Buyer's Strategies

- **Goal 3: Buyer limits liability through representations and warranties in purchase and sale contract**
- **Seller has no knowledge of any existing conditions or environmental impairment not disclosed or revealed by assessment/audit**
- **At closing, facility/property in compliance with all permits, laws and regulations**

Summary of Key Risk Allocation Tools

- **Indemnification**
- **Promises to take or not take specific action**
- **Specific assumptions of suspected, potential or unknown risks**
- **Allocation deductibles**
- **Thresholds**
- **Liability caps**
- **Time and geographical limits**
- **Environmental insurance**

Goal: Find the Right Tool for the Job



Practical Suggestions: The Pre-Cleanup Process

- **1. Develop owner/operator and prospective purchaser/developer relationship**
 - ID scope of environmental issues
 - Agreement on basic cost/info sharing & off ramps
 - Begin contact with regulators but be mindful of confidentiality, timing issues
 - Environmental attorney and consultant collaborate at this stage to manage confidentiality, documentation, costs and liability

Pre-Cleanup Process, Continued

- **2. Preliminary investigation and development planning**
 - Owner/operator's historic information
 - Phase I/II Environmental Site Assessment
 - Integration of professional disciplines to enhance development and cleanup options
 - Preliminary consultations with local government land use/economic development agencies
 - Identify community reps

The Homestretch



The Top Ten of Brownfields Team Building

- ***#1: A strong brownfields team with leadership from the top***
 - Key government officials essential to providing vision, building community support, developing partnerships and obtaining resources
 - Each stakeholder will, in essence, be its own team (assessment, cleanup, legal, permitting, planning, funding, political, community)

The Top Ten

- **#2: Connect the site with community priorities and find a community champion**
 - Environmental, economic and community goals
- **#3: Keep the team focus on the end**
 - The end use is not just cleanup
 - Connect with local plans for growth
- **#4: Structure the team at the beginning**
 - Don't wait to assemble the right players

The Top Ten

- **#5: Team members must understand and reduce all stakeholder's risks**
 - Private sector risk drives the deal
 - Remember why liability still matters
- **#6: Use cleanup strategies that focus on risk reduction and end use**
 - Know the rules, match the program to the realities of the site
 - Be flexible

The Top Ten

- **#7: Every team member has a role in leveraging funding**
 - Usually a variety of funding sources needed from public and private sectors
- **#8: Join forces with the State**
 - Integrate environmental and economic agency efforts
- **#9: Nurture the team**
 - Don't keep team members in silos
 - Keep the team close to the site

The Top Ten

- **#10: Reward success at every step**
 - Every success matters



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