



# Transactional Due Diligence: Using a Phase I Environmental Site Assessment to Assess Compliance

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## Principal, Manager of Tellevate's Compliance Services

- Professional Engineer
- Certified environmental and management systems auditor
- Previous Experience as Regulatory Environmental Engineer
- Environmental compliance program support
- Air quality compliance
- Multi-media compliance auditing
- Management systems
- Agency consultation and litigation support



# Michael J. Linder



## Koley Jessen P.C., L.L.O.

### Bio:

- Environmental Attorney
- Former Director - Nebraska Department of Environmental Quality

- Air quality, water quality and other environmental permit consultations and interaction with permitting authority
- Livestock operation regulation and permitting
- Remediation requirements and process for cleanup of sites
- Public records consultation
- Support Koley Jessen's Merger and Acquisition and Real Estate Practice Groups on environmental due diligence matters in transactions across the United States including understanding environmental requirements
- Consultation and strategic advice relating to regulatory uncertainty and understanding the regulatory process and trends



# Transactional Due Diligence



## Why do environmental due diligence in property transactions?

- Determine condition of the target property
- Determine the operational/regulatory status of target property

## Driven by Audience Requirements

- Who is the audience?
- Who determines the meaning and use of information gathered during diligence activity?



# Transactional Due Diligence



## Representations and Warranties Insurance (RWI)

- Increasingly used in merger and acquisition industry by Sellers wanting to reduce post-closing risk
- What is it and how does it work?
  - Transfers risk from Sellers to insurers who indemnify Buyers for breaches of representations and warranties
  - Insurer has an interest in understanding the level of risk for all contractual representations – including environmental



# Representations and Warranties Insurance (RWI)



## Impact on due diligence process

- RWI obtained by Buyer and impacts the work level leading up to closing
- Due diligence reports by Buyer provided to underwriter shortly before closing leading to underwriter call
- Goal is to avoid RWI policy exclusions due to unknown or unacceptable risk
- Not only does Buyer need to be comfortable with risk but insurer does as well



# Taking Due Diligence Further



## Apply the benefits of environmental compliance audit type analysis to transactional due diligence

- Phase I Environmental Site Assessments (ESA's) document historical environmental contamination liabilities
- ESA's do not inform buyers of an acquisition's current operational environmental compliance and management performance
- Environmental Compliance Management System (ECMS) Assessments fill this gap



# Environmental Compliance Audits



## What are the Benefits?

- Improve Environmental Compliance
- Limit Liability
- Minimize Future Environmental Damage, Cleanup Costs
- Improve Environmental Management
- Sustain the Organization
- Training and Technical Support





# ECMS Assessment



## Complement a Phase 1 ESA by:

- Reviewing operational practices and determining environmental compliance status
- Determining the effectiveness of internal controls for environmental performance
- Identifying environmental management process breakdowns
- Offering recommendations for operational and management performance improvements



# Take-Aways



## Environmental Compliance Management Systems (ECMS) Assessments

- Consider ECMS Assessment analysis to more fully understand potential risk and liabilities
- Recommended as a best practice in any transaction involving real estate with business operations impacted by environmental or safety regulation
- Increasing use of products such as RWI provide additional incentive to invest in a process that gives the parties a complete understanding of the target property



# QUESTIONS?



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