

### 7.1 INTRODUCTION (2023)

In the railroad industry, environmental due diligence is typically associated with property transactions including property transfers and leases. Railroads may implement some form of environmental due diligence when they buy or sell property and when they are negotiating new leases, during renewal of leases, and prior to termination of leases.

A company's legal, real estate, and/or environmental department will typically decide the degree and form of assessment warranted, which may differ depending on the proposed transaction. It is also important to note that depending on the purpose of the assessment, the assessment may be guided by railroad-specific procedures or U.S. Environmental Protection Agency (EPA) requirements.

Environmental due diligence is also included as one of the areas of interest in merger and acquisition due diligence. This section will focus on environmental due diligence with merger and acquisition due diligence discussed briefly at the end.

### 7.2 ENVIRONMENTAL DUE DILIGENCE (2023)

Environmental due diligence is a formal, defined process conducted to evaluate the environmental condition of a property and in some cases to meet the requirements for All Appropriate Inquiries (AAI) as defined in Section 101(35)(B) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, otherwise known as the federal Superfund law). As previously indicated in the Introduction, a company's legal, real estate, and/or environmental department will typically decide the degree and form of assessment warranted, which may differ depending on the proposed transaction.

Environmental due diligence can take many forms and will be dependent upon the transaction type and perceived environmental risk of the transaction. Types of environmental due diligence can include environmental checklists and/or environmental questionnaires developed by the buyer, Transaction Screen Assessments (TSA), Records Search with Risk Assessments (RSRA), Phase I Environmental Site Assessments (ESA), and Phase II ESAs. Environmental baseline assessments may be conducted associated with property lease agreements.

#### 7.2.1 Comprehensive Environmental Response, Compensation and Liability Act

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) establishes a process to determine who is liable for hazardous substances. The act authorizes regulators to fine property owners and require the removal of hazardous materials at the owner's

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expense, even if the owner is not responsible for the contamination. This means that the owner may be held liable by simply owning the property.

If a purchaser chooses to pursue liability protection, proper assessments made through environmental due diligence can protect the buyer from environmental liabilities under CERCLA, even if contamination is found after the purchase is made. Protection under the CERCLA is for owners, innocent landowners, and bona fide prospective purchasers. To demonstrate qualification for one of these parties, the AAI process must be conducted prior to acquiring the property. This means conducting environmental due diligence typically starting with a Phase I ESA.

### **7.2.2 Potential Environmental Liabilities**

Potential environmental liabilities include but are not limited to:

- Contamination on subject property from activities on the subject property or from adjacent property
- Contamination migrated from subject property onto adjacent property
- Contamination on property where waste has been sent for treatment or disposal
- Fines/penalties for violations of environmental laws and permits associated with operations
- Maintaining compliance with environmental laws and permits applicable to operations
- Increased costs of demolition or site redevelopment associated with contamination of the property, the presence of asbestos or other hazardous materials in site structures, or the presence of wetlands or other sensitive environmental conditions on the property
- Legacy environmental liabilities

### **7.2.3 Environmental Due Diligence Processes and Reports**

#### **7.2.3.1 All Appropriate Inquiry (AAI)**

All Appropriate Inquiry (AAI) is the formal process of assessing properties for the presence or potential presence of environmental contamination. It involves evaluating the current and historical uses of the subject property in an effort to identify conditions indicative of releases or threatened releases of hazardous substances on a property.

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AAI is obtained by completing a Phase I Environmental Site Assessment in accordance with the ASTM Standard E1527-21, Standard Practice for Environmental Site Assessments: Phase I Site Assessment Process and/or the Small Business Liability and Brownfield Revitalization Act (Brownfield Amendments) of 2002 (the Federal rule which describes what constitutes AAI).

### **7.2.3.2 Environmental Checklists and Environmental Questionnaires**

Environmental checklists and questionnaires are typically prepared by the buyer to acquire information about the historical uses and current use of a property that may indicate the potential for environmental concerns. If used by a company, the checklist or questionnaire is typically a standard form prepared by the company's legal, real estate, and/or environmental department.

### **7.2.3.3 Transaction Screen Assessment (ASTM E1528-14)**

A Transaction Screen Assessment (TSA) is a scaled-down ESA; it is quicker to perform and is more cost-effective. It is the only environmental due diligence process besides the Phase I ESA governed by ASTM Standard Practices. Unlike an ESA, a Transaction Screen Assessment does not fully meet the EPA requirements for environmental due diligence and does not offer the protection of CERCLA.

### **7.2.3.4 Records Search with Risk Assessments**

Like a TSA, Records Search with Risk Assessments (RSRA) do not provide the liability protection of CERCLA. RSRA's are a minimum requirement for commercial properties designated as low risk that may not need a full ESA. These assessments search government databases and historical records to classify the property as high or low risk for environmental contamination. RSRAs are typically limited to use for Small Business Association (SBA) commercial property loans.

### **7.2.3.5 Phase I Environmental Site Assessment (ASTM E1527-21)**

The Phase I Environmental Site Assessment (ESA) is the standard used to evaluate environmental liability associated with the transaction of real estate. By having an ESA performed, the purchaser may qualify as an innocent landowner or contiguous owner according to CERCLA regulations; this potentially helps the purchaser reduce the potential of being liable for environmental contaminations on the property. When a Phase I ESA is conducted it is important for all parties involved to understand key definitions included in the ASTM Standard including Recognized Environmental Condition (REC), Controlled Recognized Environmental Condition (CREC), Historical Recognized Environmental Condition (HREC), Environmental Professional (EP), De minimis Condition, Data Gap, and Significant Data Gap.

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The Phase I ESA involves a visual inspection of the property, review of historical information, interviews with individuals familiar with the property, and review of regulatory files. The purpose of the Phase I ESA is to identify conditions indicative of releases or threatened releases of hazardous substances on a property. The purpose is not to determine whether contamination is present on a property. If a Phase I ESA is being conducted to meet the requirements of all appropriate inquiries, it must be overseen or supervised by an EP as defined in Section 312.10 of 40 CFR Part 312.

When conducting a Phase I ESA (or all appropriate inquiries), the buyer may also decide to collect information outside the scope of the ASTM Standard to identify regulated materials (e.g., asbestos, lead), characterize public health issues (e.g., trash, rodents), and/or safety issues (e.g., broken windows, damaged fencing) that may require action.

### **7.2.3.6 Phase II Environmental Site Assessment (ASTM E1903-19)**

If the results of a Phase I ESA identify conditions indicative of releases or threatened releases of hazardous substances on a property a Phase II ESA may be conducted by the prospective buyer. The Phase II ESA is intended to determine if a release of a hazardous substance or petroleum product is present in an area where an environmental condition was identified. The focus of the Phase II ESA is to investigate recognized environmental conditions to determine the type of release to environmental media that has occurred. The ASTM E1903-19 Standard Practice for Environmental Site Assessments: Phase II Environmental Site Assessment Process provides guidelines for conducting a Phase II ESA. The scope of a Phase II ESA will be specific to the property and to the environmental conditions identified in a Phase I ESA.

### **7.2.3.7 Evaluation of Other Potential Environmental Issues**

Environmental due diligence may also include at the purchaser's discretion, visual inspections or records reviews for other potential environmental issues that may go beyond the general scope of the ASTM Phase I ESA standards. The presence of any of the conditions listed below may be important to the future use, disposition, or redevelopment of a property:

- Vapor intrusion (i.e., volatile contaminants entering the air space of a building from underlying soils or groundwater)
- Asbestos-containing building materials
- Polychlorinated biphenyl (PCB)-containing transformers or ballasts
- Lead-based paint
- Private potable water systems

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- Mold
- Radon
- Wetlands
- Threatened and endangered species

### **7.3 MERGER AND ACQUISITION DUE DILIGENCE (2023)**

During the merger and acquisition process, due diligence is a comprehensive appraisal of a business that a potential buyer or investor generally undertakes before buying a company or agreeing to make an investment. As a buyer or investor, during due diligence process, the buyer's legal department or an attorney acting on buyer's behalf will typically coordinate the review of the target company's assets and liabilities, structure, operations, facilities, and key business relationships.

Every merger and acquisition deal is unique, and the depth of due diligence needed on a specific topic will vary depending on the company and the dynamics of the deal. Corporate leadership along with their legal counsel will determine the complexity of the due diligence process.

Certain areas of interest are generally included in the process. These areas of interest typically include the following:

- Human Resources
- Real and Personal Property
- Information Technology and Data
- Intellectual Property
- Operations
- Sales and Marketing
- Finance, Accounting, Insurance, and Tax
- Legal and Regulatory
- Environmental, Health, and Safety and Sustainability