

# Environmental Due Diligence

From A to Z



# Three-Part Webinar Series

- **Webinar 1: The Basics**
  - 45 minute presentation, 15 minute Q&A
- **Webinar 2: Troubleshooting Issues**
  - March 11 from 12:00 to 12:45 p.m.
  - 30 minute presentation, 15 minute Q&A
- **Webinar 3: Maintaining Compliance**
  - March 18 from 12:00 to 12:45 p.m.
  - 30 minute presentation, 15 minute Q&A

# Webinar Speakers



**SARAH GLATHAR**  
Principal Compliance  
Specialist  
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**HEIDI YANTZ**  
Senior Hydrogeologist  
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**CARSON BOWLER**  
Shareholder  
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**GARRETT STEPHENSON**  
Shareholder  
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**LINDSAY THANE**  
Associate  
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# Webinar 1

Environmental Due Diligence: The Basics

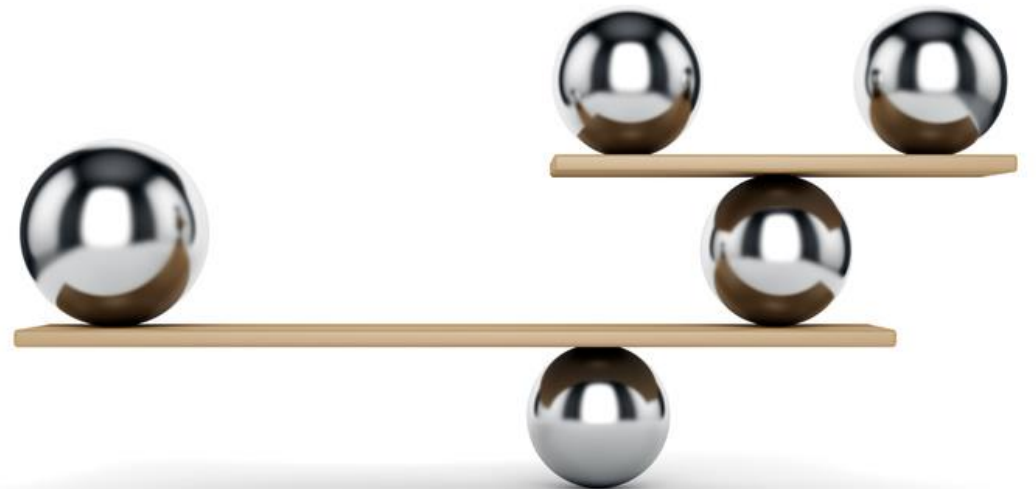
March 4, 2021



# Environmental Due Diligence

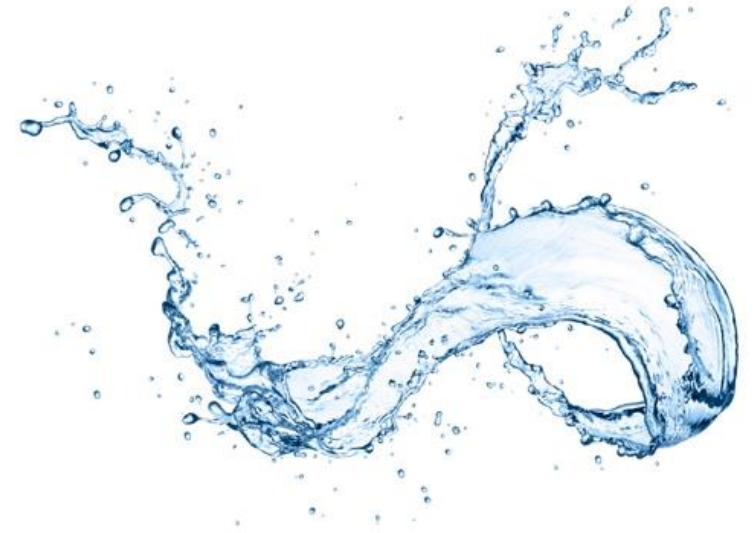
Traditional definition:

- Assessing real estate for potential risk of environmental contamination from historical or current practices.



# What Needs Assessment?

- Environmental liability
- Environmental compliance
- Land use considerations
- Water rights considerations
- Property condition (structural and infrastructure)
- Wetlands and other natural resource issues
- Ongoing (continuing) obligations after purchase
- Title considerations



# Who Is On Your EDD Team?

- Consultants – scientists, engineers, planners
- Attorneys – environmental, land use, water rights
- Others such as property condition assessors



# Engaging Your Team

- Environmental attorney
  - Bring in early!
  - Evaluate risk (short >> long term)
  - Deal strategy
  - They will help build in off-ramps/contingencies
  - Work with brokers
- Environmental consultant
  - Bring in early!
  - Phase I = 3 to 4 weeks
  - Phase II = 6 to 8 weeks
  - For sites with known environmental conditions, consider a 90-day due diligence period





# Assessments: The 10,000-foot View

- Phase I ESAs
- Environmental compliance
- Land use
- Water rights



# Phase I

Environmental Site Assessment



# Phase I: Environmental Site Assessment

- What is it?
  - Primarily looks *back*
  - Well-defined process to educate you on the history of the property
  - Identifies potential or known environmental concerns at the site (“Recognized Environmental Conditions” or RECs)
  - Sets the stage for price reduction discussions due to RECs
- What is it *not*?
  - Not a warranty of a “clean property”
  - Not valid after 6 months without a new site visit

# Phase I: Environmental Site Assessment

- So why bother?
  - Allows you to make an informed business decision
  - Offers landowner liability protection from regulatory actions
  - It is a really good idea even with cash/self-financing
- The math can be easy:
  - A \$4,000 investment on a \$2M deal (0.2%)
  - Could save you \$25,000 for a tank decommissioning post-purchase
  - Or \$250,000 to clean up a groundwater plume from a leaking tank

# Phase I: Environmental Site Assessment

- Why do lenders require Phase I ESAs?
  - They have concerns about the value of the asset
  - Contaminant assessment and cleanup can impact your cash flow
- How do you address findings?
  - Find out in Webinar 2: Troubleshooting Issues on March 11!



# “Out of Scope” Issues

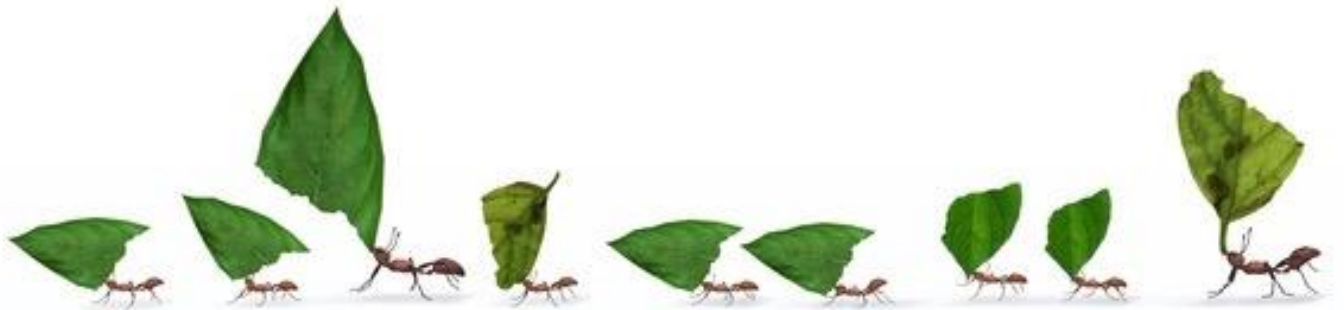
- Asbestos survey
- Lead-containing paint survey
- Mold survey
- Radon survey
- Wetlands or other natural resource issues



# Other Assessment Options

- Desktop historical review
  - Good option if you are researching and positioning to make an offer
    - No liability protection
    - Feeds into a future Phase I ESA
- Transactional screen
  - Used by lenders
    - No liability protection
    - Not recommended for a prospective purchaser
- Baseline assessment
  - An option for lessees

# Environmental Compliance





# Compliance and Permits

Review at this stage would include questions such as:

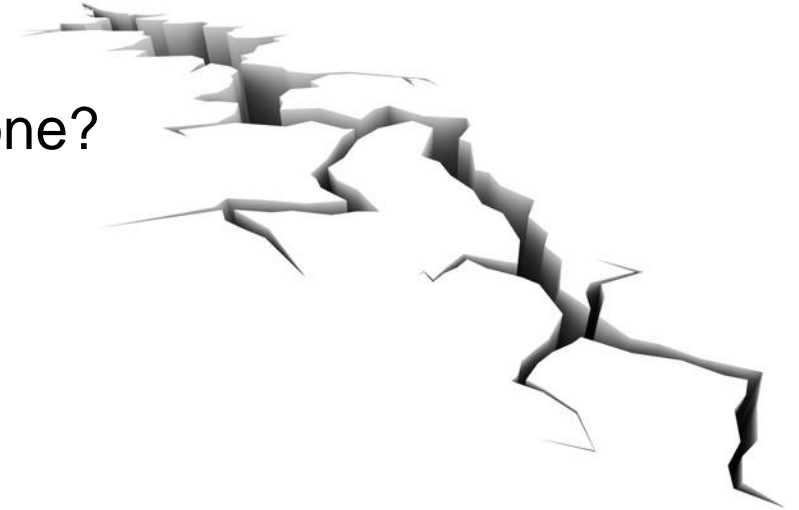
- What is the current status?
- Can future operations run the way you want?
- Do current issues matter for your future at the site?

Important: Define an endpoint (time, dollar amount, or level of comfort)

# Land Use Considerations

# Land Use Considerations

- Analytical tracks: new land use/development or existing use/development?
- Existing use/development:
  - Is the use permitted in the zone(s)?
  - Does it require a use permit, and if so, does it have one?
  - Look for potential physical development issues:
    - Building setbacks
    - Driveways and access points
    - Paving and landscaping
    - Building condition
  - Get a land use due diligence analysis



# Land Use Considerations (Cont.)

- What is a nonconforming use?
- Definition: A use that was lawful when established but because of changes in zoning ordinance regulations, no longer complies with zoning ordinance requirements. Examples include:
  - Changes in allowed uses
  - Permitted use becomes a conditional use
  - Change in dimensional requirements for buildings and parking, such as setbacks, building height, and lot coverage
  - Changes in property lines
  - Changes in other requirements, such as landscaping
- Nonconforming uses are amortized out of existence. How long has the use been dormant?

# Land Use Considerations (Cont.)

- Proposed use/development
  - Is the use permitted in the zone(s)?
  - If so, how?
    - Permitted outright?
    - Permitted conditionally?
    - Special use considerations?
- Legal lot considerations
- Legal lot = “lawfully established unit of land.”
- Look at the title report!
  - Created by deed or by metes/bounds description?
  - If metes/bounds description, when created?



# Case Study: Permissible Land Use

## *Loosli v. City of Salem*, 345 Or. 303 (2008)

- Plaintiffs apply for a DMV Motor Vehicle Certificate.
- City planning department to sign a land use compatibility statement.
- Plaintiffs put time and money into starting dealership.
- City finds that an overlay zone applies to the property and informs plaintiffs that they cannot sell cars.
- Or. Sup. Ct. held: no duty on the part of the planning department to the Looslis to be correct in its zoning determination.

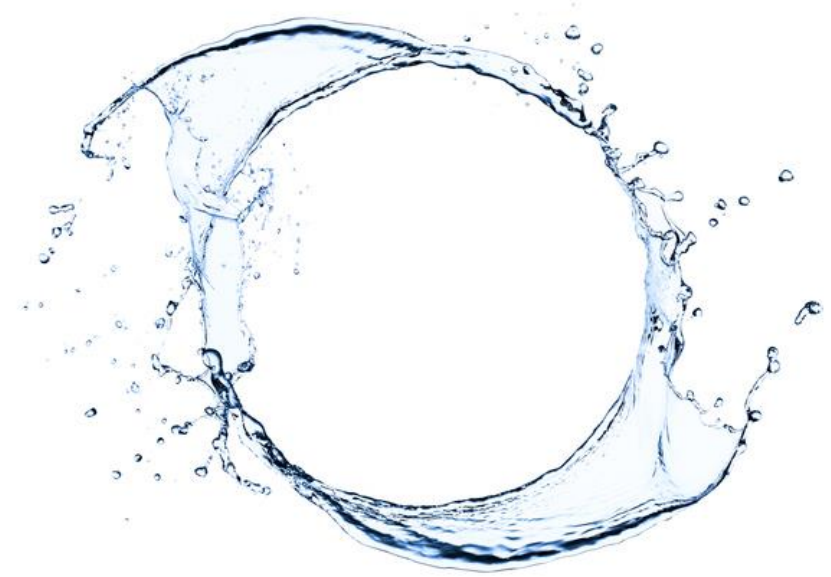


# Water Rights Considerations

# Why Water Rights Matter

Is water needed for the proposed use of the property?

- Consider the proposed plans for the property. Will water be needed for irrigation, industrial use, or another type of use?





# Water Rights Research

- Paper review of water rights
  - What is the authorized use?
  - What is the place of use?
  - What is the point of diversion (surface water) or point of appropriation (well)?
  - Is the point of diversion or the well on a neighbor's property?
  - What is the rate/duty?
- On the ground research
  - Can someone confirm that the correct POU and POD/POA are being used?
  - Has water been used at least once in the last five years?
  - Are all conditions of the water right being met?
  - Is the water reliable?

# What If There Are No Water Rights?

- Consider water availability
  - How much water do you need?
  - Surface water: Is there water available for appropriation in a nearby stream/river or is it over appropriated?
  - Groundwater: Is groundwater viable?
  - Storage
- Exempt water uses not requiring a water right
  - Groundwater
    - Irrigation of ½ lawn
    - 5,000 gpd for a single industrial or commercial use of water (i.e., processing or manufacturing a product)
    - 15,000 gpd for single or group domestic purposes (i.e., household use, human consumption)
  - Surface water
    - Emergency firefighting

# Timing Considerations

1. There are water rights, but they don't work for the new use of the property
  - Transfer application: Transfers take up to 120 days if you pay to use the Reimbursement Authority program, longer if not.
2. There are no water rights
  - The time from filing a water right application with the Oregon Water Resources Department to receiving a water right permit may take 12+ months, but it varies.
3. The POD or POA is on or across a neighboring property
  - Build time into the transaction to negotiate a written agreement with the neighboring landowner for access.

# Q&A

