Railroad Real Estate Acquisitions: Due Diligence and Liability Mitigation

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Background/Objectives. In the last several decades, environmental due diligence investigations for industrial and commercial real property transactions have become commonplace. It has become obvious that the risk of not performing due diligence is, in most cases, unacceptable. The task now is to invest time and money conducting due diligence so that appropriate strategies to mitigate due diligence findings can be identified ever more wisely. A party performing due diligence must be aware of updated due diligence standards and give adequate attention to both post-acquisition obligations and development-related considerations.

Results/Lessons Learned. This presentation will outline the various risk mitigation options available to industrial property purchasers (such as the Railroad), including:

CERCLA liability protections, such as the innocent purchaser, bona fide prospective purchaser, and contiguous property owner defenses
Contractual indemnification;
Liability insurance;
State brownfield or voluntary cleanup programs;
Limiting acquisition boundaries;
An escrowed remediation fund; and
Transaction termination.

With respect to CERCLA liability protections, the new property owner is sometimes surprised to learn—often after it is too late—that in addition to compliance with institutional or engineering controls, due care responsibilities can include remedial or response actions to historic pollution.

Finally, the presentation will explore separate and often overlooked liabilities that are project, rather than regulatory, specific. These liabilities are often referred to as business concerns such as constructability, permitting, and political barriers that should also be vetted during pre-acquisition due diligence. While these types of liabilities do not represent legal obligations attached to property ownership, they can threaten the viability of the project for which the property is to be purchased in the first place.