

Environmental Site Assessments

A primer for SH&E professionals

By Mark D. Hansen and Gerald W. Gammel

IN THE 1980S, COMPANIES INVOLVED in buying and selling other companies paid little attention to environmental concerns associated with in industrial real estate transactions. Since then, federal and state environmental statutes and regulations have become so significant that most parties involved in property transactions are considering environmental site assessments (ESAs). These assessments are now used by companies buying assets of another company, entering into joint ventures, parties in a merger and insurance companies. This article reviews some best practices for conducting ESAs.

Background

Buying and selling business units often involves a change in property ownership, which raises many questions regarding compliance with environmental regulations, as well as the potential liabilities associated with real estate transfer. Buyers want to know whether they are purchasing a contaminated site, and lenders want to know whether they are lending money with a potential Superfund site as collateral.

The possible presence of air pollution, surface contamination, groundwater contamination, hazardous wastes, underground storage tanks (USTs) or other liabilities negatively impacts property value. As a result, many buyers, lenders and insurers insist on conducting a Phase I ESA at an early stage of these transactions. If the cost to clean up the site exceeds the value of the business transaction, the deal may be canceled. A good ESA can help to bolster the value of a company's assets, and it can help to improve a company's financial situation during negotiations. Conversely, the findings may result in the property being deemed a liability, which can diminish its value and that of other company's assets, which, in turn, degrades a company's financial situation during negotiations. Another concern is the risk of incurring either strict liability or joint and several (individual) liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which is often referred to as Superfund.

Superfund Implications

Superfund is a comprehensive program that authorizes the EPA to clean up hazardous waste sites and undertake emergency response actions with regard to releases or threatened releases of hazardous substances into the environment. The statute provides for two mechanisms for hazardous waste cleanup and reimbursement: 1) EPA can order potentially responsible parties (PRPs) to undertake remedial measures to clean up contaminated properties; or 2) EPA can take remedial actions on its own initiative and sue for recovery of its expenses from PRPs.

"Innocent Landowner" Defense

Superfund's strict and joint and several liabilities are broadly imposed. One can cite three basic exceptions (or defenses) to the liability that can accompany a contaminated site: 1) an act of God; 2) an act of war; and 3) an act or omission of a third party, against which the property owner took all appropriate precautions. This final defense, often called the "innocent landowner" defense, is applicable when the owner has used due diligence to determine whether the site was contaminated prior to acquisition of the property.

To avoid liability, the purchaser or potential lender must, at a minimum:

- 1) inquire about the current and previous ownership and uses of the property;
- 2) inquire about the environmental compliance record of all prior property owners, including review of all available public or government records concerning compliance;
- 3) conduct, either itself or through a representative, an environmental inspection of the property.

A CERCLA case is based on several facts about the site in question. These include:

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A firm should not attempt an ESA without the services of a qualified professional due to the complex issues and requirements involved.

- 1) contamination exists at the site;
- 2) the degree of contamination:
 - type of contamination;
 - amount of the property affected;
 - projected cost to restore the property;
- 3) who is responsible and who will pay (often different entities).

CERCLA is retroactive and encompasses contamination that occurred years before the law was enacted. The actual responsible parties are often deceased, "broke" or untraceable. Therefore, the current owner is liable and pays the bill, regardless of whether it played any role in the contamination. This is true unless the owner can succeed with the innocent landowner defense, which requires proving that the owner "did not know, and had no reason to know, that any hazardous substance . . . was disposed of on, in, or at the facility" (with the facility being the site where the material is located). To prove "had no reason to know," CERCLA requires that, at the time of acquisition, the purchaser exercised "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice." This can only be achieved through properly executed Phase I (and possibly Phase II) ESAs.

Currently, there are no legal requirements for credentials of persons conducting Phase I ESAs. However, it is not recommended that a company attempt an ESA without the services of a qualified environmental professional due to the complex issues and requirements involved. Usually, only those environmental professionals who have successfully demonstrated their ability through experience (e.g., inspector licenses, professional designations, number of investigations conducted), are hired to perform Phase I ESAs. This person must know how to conduct a site inspection; recognize signs of contamination; how to best interview the site owner and assess adjoining property; and how to interpret data collected and write a comprehensive report outlining the findings.

Standard practice requires that the inspector exercise due diligence—and it is the only way to succeed with an innocent landowner defense. Suppose that 100 years ago, someone buried mercury (now an RCRA hazardous waste) in the middle of a farm field. The person died without revealing the mercury disposal. The farm was subsequently subdivided and is now an industrial park. A development owner, who had a properly executed Phase I ESA performed before buying the property, uncovers the waste while excavating for a building addition. Is this owner liable for cleanup costs when faced with a CERCLA case? Only the courts can ultimately decide. However, in this case, the owner has built an excellent defense.

The most recent Superfund amendment, often referred to as the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, clarifies the scope of lender liability for environmental cleanups. More specifically, this statute identifies the appropriate level of inquiry required of lenders on a foreclosed property with potential envi-

ronmental cleanup liability. It basically spells out how a lender can foreclose on a piece of property used as collateral and not incur the liability to perform an environmental cleanup.

In general, lending institutions have responded to this new statute by incorporating ASTM International's set of voluntary consensus standards into their customized Phase I ESA reports.

ASTM Standards

In 1996, ASTM published Standard E1528-96, Transaction Screening Process, and in 1997, Standard E1527-97, Phase I Environmental Property Assessment Process. These standards attempted to synthesize customary practice for ESAs of industrial real estate. These standards also attempt to:

- 1) facilitate high-quality, standardized environmental site assessments;
- 2) ensure that the standard of appropriate inquiry is practical and reasonable;
- 3) clarify an industry standard for appropriate inquiry in an effort to guide legal interpretation of CERCLA's innocent landowner defense.

Transaction Screening Process

The transaction screening process is a preliminary inspection of an industrial or residential property. It entails completing a questionnaire and conducting limited research. Performing a transaction screening does not require the judgment of an environmental professional and may be conducted by the owner of the property or an agent. Depending on the information obtained, it may be used by itself or as a precursor to a full Phase I ESA. For less-valuable properties, this screening may be all that those involved need to assess environmental concerns.

This process includes observations during a site visit as well as interviews with the property owner(s) and current occupant(s), if applicable. The site visit and interview process involves questions concerning current and past uses of the property and adjoining property, if known; these questions are designed to determine whether chemicals such as those used in chemical processing, laboratories, waste treatment facilities and recycling centers have ever been used or stored on the property. In addition, other issues must be assessed.

- Is the property serviced by a private well or nonpublic water system? Does any evidence suggest that it was ever contaminated or emitted foul odors?
- Have any environmental violations been reported with respect to the property or any facility on it?
- Have previous ESAs revealed the presence of hazardous substances or petroleum products? Has further assessment been recommended?
- Has any lawsuit or administrative proceeding—past or pending—raised concerns regarding the release of any hazardous substances or petroleum products?

The transactional screening is also used to examine government records and historical data to determine whether the property is listed in any federal records systems such as the National Priorities List

(NPL); CERCLA Information System (CERCLIS) and the Resource Conservation Recovery Act-Temporary Storage and Disposal Facility (RCRA-TSDF) list.

The ESA Decision Process

The ESA process is used to document investigation results and to provide evidence that due diligence has been exercised; it can also provide a basis on which to evaluate potential and actual environmental liabilities in order to aid in property transaction decisions. Professional judgment decisions are an integral part of this process—from deciding whether a full or partial Phase I liability assessment should be conducted to determine whether to proceed with the transaction. The focus is to manage liability, which is particularly important when acquiring new property. Figure 1 provides a decision-making flowchart for property acquisition.

To illustrate the decision-making process, consider that the ESA Phase I is conducted for most property transactions; it allows a company to avoid “acquiring the liability” and to structure a “managed approach” to insulate intended operations from known or suspected contamination.

During a Phase II ESA, if contamination is not confirmed, the transaction can proceed without adding undue risk for environmental liability. However, if contamination is confirmed, it must be determined whether the importance of the site outweighs the potential liability that would accompany its acquisition. At this point, the company may negotiate with the owner regarding the contamination or may pursue further information through a Phase III ESA.

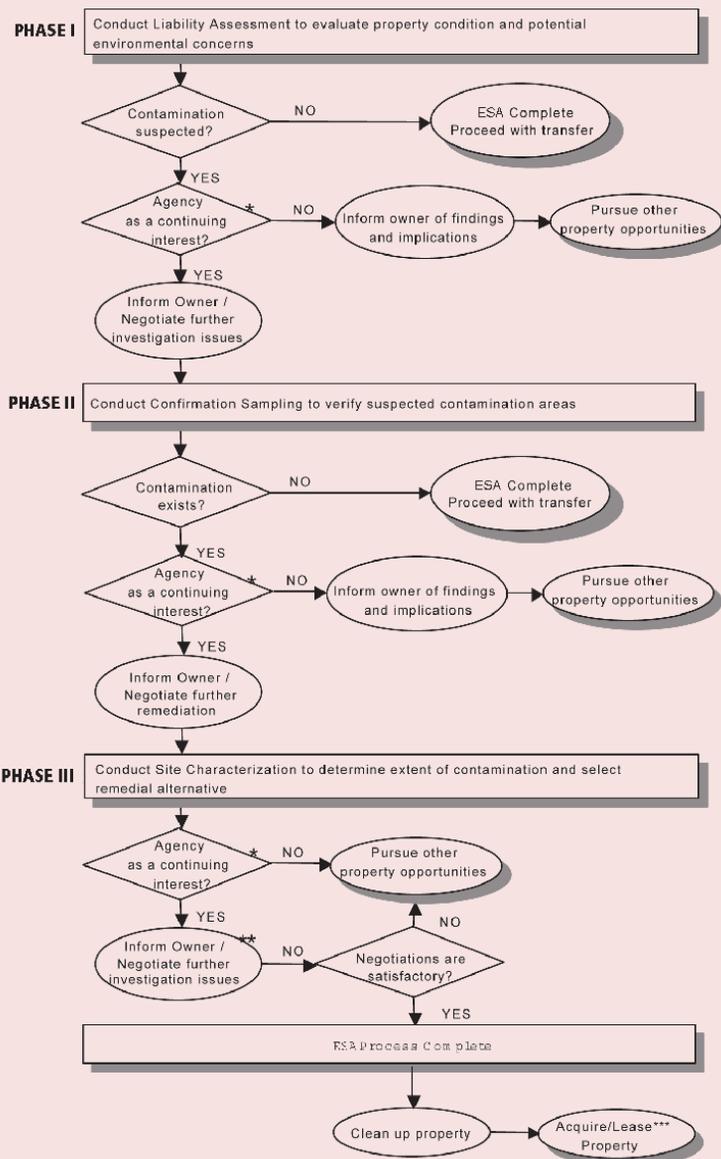
Information obtained from a Phase III ESA allows a company to better weigh the potential liability costs against the property’s value. A company may decide to assume these costs, possibly even using the information to lower the property’s purchase price. If the ESA findings appear significantly adverse, then other acquisition opportunities may become more acceptable. There is no requirement to continue to a Phase II or Phase III for acquisitions. However, if the Phase I ESA indicates a potential for contamination, a company must confirm and, as necessary, characterize and cleanup contaminated property.

Phase I Environmental Site Assessment

As noted, existing information that reveals a property’s environmental status is assessed during this phase. To ensure the performance of appropriate inquiry, this review must be conducted by an environmental professional. It should be noted that all property is not created equal; there are inherent risks depending on the type of property being addressed. Figure 2 illustrates the risk framework for various types of properties and transfers; clearly, acquisition and leased property have the highest degree of risk. The Phase I ESA has three components: 1) pre-site evaluation through historical review and owner/operator questionnaires; 2) site inspection through visual observation of the property; and 3) submission of a written report. It takes two to three weeks to complete, with cost depending on property type and size.

Figure 1

Decision Process for ESA Phase I, II & III



* Value of property to the agency outweighs the scope of potential liability or is of strategic interest.

** Property owners or agency may complete ESA at their cost, provide for cost offsets against property value, or agree on other cost allocation position as part of negotiated settlement.

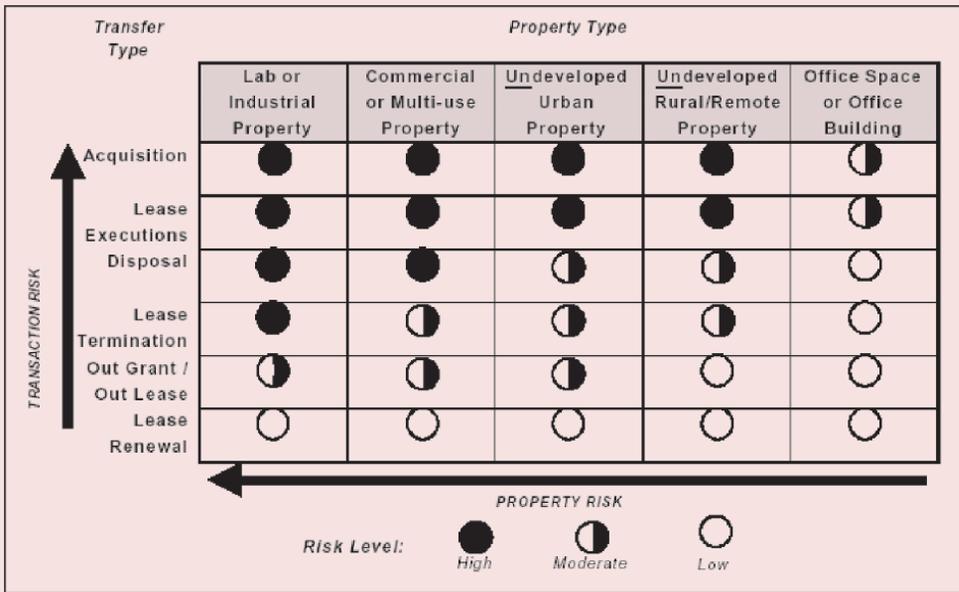
*** Acquisition / lease may proceed before cleanup activities are completed.

History of Actual Site Usage

This task may be completed through a review of deed records pertaining to the property; interviews with past and present owners; and a review of available aerial photographs and fire maps, if available. Other appropriate materials include records, permits and licenses that detail what has been built or installed on the property; this includes building, zoning planning, sewer, water, fire, and federal and state environmental regulatory databases. In addition,

Figure 2

General Risk Framework



Phase I: Preliminary Site Assessment

- Property appears free of contamination. Evaluate need for further investigation. Proceed with Phase II or acquisition as appropriate.
- Potential for contamination is identified. Proceed to Phase II site sampling investigation.
- Known or confirmed contamination on site. Re-evaluate benefits of acquisition. Terminate acquisition if risks outweigh advantages.

tion, records of both public agencies and any accessible privately held records should be reviewed for the following information: site history and use; hazardous materials and hazardous waste storage and disposal permits; UST records; discharge or emissions permits; business hazardous materials plans; reported releases of hazardous materials or known site contamination problems.

For commercial/industrial sites, a questionnaire can be presented to the current owner that requests details on current and past operations. Commercial record search services are available that cover state and federal

site lists. Local records must also be searched. No regulatory agency listing is all-inclusive and the absence of a site does not mean no problems exist.

Historical Research

The investigator must learn as much as possible regarding previous site ownership and uses in order to assess the potential for contamination due to past activities. Several resources facilitate this process.

- Title history report.** This type of report can be prepared by a title company at a slightly higher cost than an ordinary title report. The title search should go back to the time the property was first developed. The report will indicate whether the property was owned by government agencies or companies that likely handled hazardous materials and will also

reveal recorded leases by such entities. State and federal environmental liens may also be included in these records.

- Aerial photos.** Historical aerial photos can provide invaluable documentation of site use and activity for both the subject site and surrounding properties. Many commercial aerial photography companies can provide coverage of urban areas dating back 50 years.

- Maps.** Historical maps, especially Sanborn fire insurance maps, are often available for urban areas through local libraries or historical societies. Old business directories and other similar historical records may also be available.

- Interviews.** Talking with people knowledgeable about the property can provide valuable insight into its history and activities for which no written records exist. Neighbors, former employees and long-time public officials can often provide this information.

Site Inspection

Inspection of the property and properties within a ½-mile radius of a property should assess the presence of sources of onsite and nearby off-site contamination that may impact the site. The inspection should characterize the property and identify potential areas of concern (e.g., hazardous waste storage and disposal, leaking storage tanks, asbestos, lead-based paint, pesticides and herbicides, radon). The investigator will look for characteristics such as discolored soil, abnormal odors, vegetative stress, and signs of extensive filling or regrading. Authorization for access to the site (preferably written) must be obtained from the owner before visiting the property. If permitted, existing conditions should be documented using photos or videotape. In addition, knowledgeable onsite personnel should be interviewed to gather further details. Contamination "red flags" include:

- USTs. In California, nearly all USTs that contain hazardous substances or petroleum products must have permits, and leaking tanks must be reported to regulatory agencies. However, some USTs may not have permits and/or may be abandoned, especially on agricultural and residential properties. The investigator should look for vent pipes, fill connections, and metal caps or plates.

- Wastewater systems, which include septic tanks; leaching fields; sumps; dry wells; or any other subsurface systems not connected to a sewer system.

- Drums or any other chemical storage or handling areas on the site.

- Discoloration of pavement or soils, especially near storm drains throughout the property.

- Dead, dying or unhealthy vegetation.
- Piles of waste or trash or unidentified mounds.
- Surface impoundments (such as pits, ponds, lagoons or unidentified depressions).
 - Obvious signs of spillage or residues on property or in buildings.
 - Odors (e.g., solvents).
 - Wells (may be capped or covered).
 - Maintenance, repair or shop areas.
 - Building components that may contain asbestos (generally prior to 1980) such as sprayed-on fireproofing and plaster; thermal insulation on pipes and ducts; electrical insulation; floor and ceiling tiles and transite panels; and roofing materials.
 - Electrical equipment such as transformers and capacitors (older than 1979) that may contain polychlorinated biphenyls (PCBs).

The final report should follow this format: summary; introduction; site description, records review; site inspection information; findings and conclusions; and related appendixes. It should also include:

- 1) documentation to support the analysis, opinions and conclusions found in the report;
- 2) a description of all evidence of recognized environmental conditions on the property;
- 3) site photographs;
- 4) in-depth statement of the findings and conclusions; it should also be noted that any conclusions generated from a Phase I ESA cannot reasonably confirm the presence or absence of potential environmental liabilities at the site because discrete environmental media samples (surface soils, subsurface soils and groundwater) are not collected or analyzed;
- 5) signature of the person who conducted the assessment.

Limitations of a Phase I ESA

The scope of a Phase I ESA includes research and reporting requirements that support the user's ability to qualify for the innocent landowner defense. As such, sufficient documentation of all sources, records and resources utilized in conducting the inquiry must be provided in the written report. The degree to which an ESA is conducted will vary according to the environmental concerns identified for each business transaction and the laws of the state in which the site is located. However, all ESAs must be comprehensive enough so that environmental risks are properly considered in any business decision involving the real estate transaction.

Requirements Other Than Appropriate Inquiry

This practice does not address whether requirements in addition to appropriate inquiry have been met in order to qualify for CERCLA's innocent landowner defense [for example, the duties specified in 42 USC [section]9607(b)(3)(a) and (b)]. Phase I report users must recognize that federal, state and local laws may impose their own environmental assessment obligations. Users must also realize that other legal obligations may exist with regard to hazardous substances or petroleum products discovered on property that are not addressed in this

practice and that may pose risks of civil and/or criminal sanctions for noncompliance.

Factors That Affect the Extent of an ESA

As noted, in some cases, completion of Phase I may result in an ESA that is comprehensive enough to adequately assess environmental risks. For example, Phases II and III may not be necessary if available site information is adequate or if environmental risks are satisfactorily addressed by an indemnification. If more than one phase is conducted, they would logically occur in sequential fashion, with information obtained from each phase used to better define the scope of work in the next phase. However, the schedule for completing the real estate transaction may require that several phases be conducted simultaneously.

Confidentiality

The Phase I report is confidential and remains the client's property. An ESA is confidential and privileged if developed in anticipation of possible litigation. Accordingly, all parties involved in the performance and review of an ESA must take appropriate steps to prevent its unauthorized disclosure.

Phase II ESA

A Phase II environmental test is conducted when a hazard is suspected or when the environmental professional suggests further testing after conducting a Phase I assessment. The information gathered during Phase II should identify, with some assurance, the presence or absence of a potential environmental hazard, or the approximate magnitude of an observed or suspected environmental hazard.

Phase II consists of the following components: physical sampling of the site using recommendations from the Phase I report as a minimum guideline; and a comprehensive written report. This report should detail the rationale for the sampling, sampling protocols and procedures, explanation of results, and, if necessary, a description of the recommended remedial action.

This phase involves actual sampling and analysis of soils, groundwater and building components suspected of contamination. It may also entail testing of USTs. Sampling will reveal whether the property is "contaminated" or whether hazardous substances are truly present. At this level, the current property owner must provide written authorization for the investigation because significant consequences may arise if contamination is found. Both federal and state hazardous waste laws require that the owner promptly report such contamination to the proper regulatory authorities. This subjects the current owner to regulatory scrutiny and the burden of further site investigations and remediation (cleanup). Phase II investigations may

Phase II: Site Characterization

- Property appears free of contamination. Proceed with acquisition.
- Contamination confirmed. Proceed with additional site sampling to determine full nature and extent of problem. Negotiate terms for remediation.
- Nature and extent of contamination poses significant liabilities. Terminate acquisition.

Liability Concerns & Malpractice

Substantial damage awards against environmental consultants have raised the question of what consultants can do to avoid malpractice claims. Juries have delivered a \$2,716,000 damage award for negligent misrepresentation; a \$250,000 damage award for breach of contract; and a \$234,000 damage award for unjust enrichment and negligence. [*Titanium Indus. v. S.E.A. Inc.*, 691 N.E.2d 1087 (Ohio Ct. App. 1997) (reversing \$2,716,000 award for negligent misrepresentation and \$250,000 for breach of contract); *Delta Ervt'l Consultants of North Carolina Inc. v. Wysong & Miles Co.*, 510 S.E.2d 690 (N.C. Ct. App. 1999) (reversing \$234,000 award for unjust enrichment)]. In addition, spiraling environmental professional litigation influenced changes to ASTM E1527 and E1528.

Although malpractice claims cannot be avoided under all circumstances, consultants can take several steps to help avoid such claims:

- Carefully negotiate a scope of work with clients.
- Stay within the scope of work while maintaining dialogue with clients and clients' environmental legal counsel throughout projects. Report findings verbally to clients, followed by draft reports before finalizing any reports.
- Expressly disclaim and limit the amount of liability and explicitly restrict reliance on the work performed under the agreement.
- Thoroughly understand the nature and breadth of and properly apply relevant standards, policies or regulations.
- Carefully craft, in conjunction with clients' legal counsel, all written conclusions to avoid giving a legal conclusion or opinion.
- Consult with clients' legal counsel before reporting to governmental authorities any environmental condition discovered during the course of their work.

also result in diminution of the property's value and will likely delay the property transaction.

A technical Phase II report should be prepared following the investigation. It should detail the nature and probable source(s) of the contamination; discuss the likely extent of contamination in soils and groundwater; detail the need for any further characterization (sampling and analyses); list any relevant regulatory and legal standards pertaining to cleanup levels and remedial technology options; and provide a preliminary estimate of the costs and timing of additional sampling and remediation.

It typically takes four to 10 weeks to design and implement a comprehensive Phase II investigation. The actual costs and turnaround time depend on the property's size and the types of contaminants and sampling required. For example, soil borings typically cost \$1,500 each, whereas groundwater monitoring wells cost \$3,000 to \$6,000 each, depending on their location and the site's conditions. Laboratory costs vary according to specific analyses needed.

Once contamination is confirmed by a quantitative technical investigation, the acquisition as negotiated will likely be restructured. The company must perform a written analysis of risks, costs and programmatic benefits of continuing toward acquisition. A health risk assessment study may be performed at this time to determine the effects of contaminants on persons using the property and the effect on the property

itself. Such evaluations are also essential in determining acceptable contaminant cleanup levels.

Phase III ESA

A Phase III environmental remediation is required when current site conditions, past usage of the property or neighboring environmental hazards identified

during Phase II indicate a strong potential for on-site subsurface contamination of soils or groundwater. Remedial actions may include complete or partial removal of all contaminated media; such activities may also include managing and maintaining the successful and continued cleanup of the property.

A Phase III cleanup can cost \$20,000 or more depending on the level of contamination. Factors that affect all phases of the environmental assessment include property size; the number of analytical samples required; past property uses; timeframe required for completion; and the number of permits and reports required to perform the cleanup according to regulatory standards.

Outsourcing the ESA: The Role of the Environmental Consultant

When conducting an ESA, it is important to ask the right questions and obtain complete answers. The consultant must judge the significance of environmental impacts as well as the effort in time and money needed to remedy or limit such impacts. In developing the scope of an ESA, the consultant must combine knowledge of the site with knowledge of the transaction's framework and the effect of potential concerns on the deal's outcome. In addition, ESA findings and how they are presented may affect negotiating position and how risks are ultimately allocated between the parties to the transaction.

It is a myth that the ASTM guidelines for ESAs are an inviolate standard of the industry. These are consensus standards, not compliance specifications and, as a result, many gray areas exist in their application. The ASTM guidance is a good starting point in developing a scope of work, but the consultant must be prepared to modify the scope to serve situational objectives. It is also important to note that the ASTM documents were originally developed as an innocent landowner defense to the liability imposed under CERCLA. As such, they may not account for all business concerns in today's climate.

Another critical issue is the intended use of the property after acquisition. For example, an environmental condition may be a concern if the site is to be developed with single family homes, but not if the site is to be developed as industrial property. Another example is the effect of site grading required by the desired use. Whether the site development will involve excavation and off-site disposal of contaminated soils has substantially different ramifications than if the development will require fill (clean, uncontaminated soil) and, thus, no disposal offsite. Unregulated groundwater contamination may also be a significant environmental concern if it impacts the construction process (such as increasing the cost of dewatering activities). However, if no construction activities are intended, that same condition may be of no concern. In short, if a property is to be redeveloped, the environmental consultant must recognize the interrelationship between site development activities and the cost of addressing environmental issues.

The timing of regulatory closure and the effect of that process on development plans is another consideration. Developments that allow several years for final regulatory closure to occur involve a different analysis of risk and costs than those which require expedited (and, thus, more expensive and challenging) regulatory closure. So, a developer who is not seeking to sell a property immediately after redevelopment may have different issues than one who will sell a property immediately.

The consultant plays a critical role in explaining regulatory closure and methods to achieve it. The timetable for such closure is often based on the current regulatory climate. The consultant should know how to accelerate the schedule and reduce related costs. This includes having a good relationship with the regulator, which promotes a positive working environment.

The consultant should also be able to offer counsel on future site uses that would limit disruption to existing environmental conditions or that would adapt well to the regulatory framework, as well as those that may be difficult or impractical. For example, if the property can be restored to a pristine environment, it could be used for unrestricted residential housing; otherwise, it could be used for industrial purposes.

In the authors' experience, many consultants mistakenly assume that environmental liability issues are solely the purview of legal counsel. In fact, the environmental consultant can play a critical role in this area. Therefore, s/he must understand state-specific laws and regulations that impact environmental liability.

For example, consider the regulatory liability associated with USTs. In most states, the owner/operator of a UST system is liable for releases from that system. As such, removal of the tank before closing a transaction can dramatically reduce a purchaser's liability by preventing that purchaser from ever being an owner/operator.

The consultant must also understand the ramifications of third-party liability. For example, liability for a groundwater contaminant plume migrating offsite into a landfill or a cemetery is substantially different than that for a plume that migrates into a neighborhood. S/he must also recognize when to advise a company to seek legal counsel.

Company Impact

The consultant's recommendations may dramatically affect business decisions, since a company's assumption or reallocation of risk will be based on the advice received. Therefore, the consultant must be aware that conclusions related to environmental issues can affect the financial viability of the project or transaction. As such, solid practical advice must not be skewed toward protecting the consultant's liability to the company's detriment.

For example, language used in an environmental report can impact strategy. Exaggeration of risk can alter negotiating position; overly conservative statements can eliminate the opportunity to obtain

financing or complete a transaction. Similarly, such statements can harm the owner's ability to sell the property at a later date. Therefore, a consultant must understand how subtle changes in language can impact the reader's perception of risk.

The best consultant will have a combination of good judgment, experience and appreciation of business issues. The real value of a consultant's service is understanding the client's objectives when assimilating, analyzing and presenting data gathered.

Scope of Work

Environmental consultants must carefully negotiate and draft a scope of work. A written scope of work is essential to protect against claims by the client and prevents "he said/she said" disputes. Therefore, the consultant should do what was agreed to in writing—no more, no less; a fully executed scope of work does little good if it is not adhered to. The consultant should also state in writing what s/he is not doing for the client, to the extent possible. If the client requests any change from what was originally agreed upon, the scope of work document should be amended in writing before any additional work is performed.

Reports

Throughout the project, the consultant should maintain an open dialogue with the client and, if possible, the client's environmental attorney. To avoid surprises and to allow flexibility for the client to make business decisions, a consultant should first report findings verbally, then prepare a draft report for review. The client may then suggest changes and raise questions before the report is finalized. It may be best to consult with a client's legal counsel before discussing findings with the client, and to allow legal counsel to review both draft and final reports before sharing them with the client.

Disclaimers

Carefully crafted written disclaimers and limitations of liability are now critical because of court rulings that purport to shift the standard of liability for consultants closer to strict liability and away from a negligence standard.

For example, a consultant may be deemed a responsible party as an operator under federal environmental law by exacerbating environmental contamination during pre-acquisition environmental investigation activities [*K.C. 1986 Ltd. Partnership v. Reade Mfg.*, 33 F.Supp.2d 1143 (W.D. Mo. 1998)]. This could render the consultant strictly liable for response costs. While disclaimers and liability limitation provisions may not completely protect the consultant from liability under this scenario, it can shield the consultant by contract from liability to the client and third parties. Furthermore, a consultant must understand that client indemnities are only as good as the financial wherewithal of that client.

Third-Party Reliance

A consultant must be careful to prevent any third party from relying on his/her work without express

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consent. The agreement and written reports should state that the work is intended for exclusive use by and benefit of the client alone. If a consultant knows or should have known, based on particular circumstances, that third parties may rely on the work, then s/he must take affirmative steps to limit such use [*Grand Street Artists v. General Elec. Co.*, 19 F.Supp.2d 24 2 (D.N.J. 1998)].

Standards

Environmental standards and regulations can be technical, complicated and ambiguous. Therefore, a consultant must not only understand the nature and breadth of applicable standards, regulations, guidance documents and policies, s/he must also adhere to them closely. Here, the insight of the client's legal counsel can be useful in interpreting standards, resolving ambiguities, and developing a plan that satisfies relevant requirements.

It is also important to understand the revisions made to ASTM E1527 and E1528 in 2000. Spiraling environmental professional litigation influenced these changes, which introduce new "business environmental risk" and "historical recognized environmental condition" concepts; resolve problems arising from the definition of "recognized environmental condition"; elaborate on what constitutes proper documentation in a Phase I ESA report; revise Phase I report format and table of contents to be consistent with writings prepared in practice; and provide guidance on the selection of a Phase I environmental professional.

In some cases, a client may ask the consultant to draw legal conclusions as to whether an environmental condition may be a statutory or regulatory violation, or may result in the assessment of penalties. The revised ASTM standards raise additional concerns in exercising consultant judgment as to not only recognized environmental conditions (e.g., potential for Superfund designation) but also historical recognized environmental conditions and business environmental risks.

Needless to say, a consultant should take extreme care when drafting conclusions and recommendations in any ESA report. Where feasible, the consultant should consider having legal counsel review all draft conclusions to ensure that they do not cross into the realm of a legal opinion. Should this occur and the opinion be wrong and the client relies on the statement to its detriment, the consultant should anticipate a negligent misrepresentation claim for damages.

Reporting Violations

Many federal and state pollution laws, regulations and local ordinances require people who own, operate or control a pollution activity to report spills or releases. Heavy fines and jail time may result if such incidents go unreported. Many of these reporting requirements do not apply to environmental consultants who merely observe environmental conditions because they do not own, operate or control the activities observed.

On rare occasions, a consultant may need to report an environmental condition. For example, an environmental consultant failed to report to the New York State Dept. of Environmental Conservation within two hours after observing petroleum-contaminated dirt in the excavation pit of a removed UST. An administrative review board concluded that the consultant was subject to a state regulation that requires any person with knowledge of a spill, leak or discharge of petroleum to report the same within two hours.

Therefore, the consultant should carefully analyze any spill-reporting obligation and should always consult with legal counsel before making any such report. Nothing would cause conflict between client and consultant more than the consultant needlessly reporting a pollution incident. Such an action is likely to trigger a malpractice claim by the client.

Conclusion

Federal and state environmental statutes and regulations have become so significant that most parties involved in property transactions are conducting ESAs before completing their deals. Properly conducted ESAs can help prevent potential problems that accompany lawsuits and associated interaction with government authorities. The goal is to determine the risk of acquiring a property that has apparent strategic benefit to a company's portfolio, while avoiding any adverse cost and legal liability. ■

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