



Environmental Site Assessments: A Wise Investment

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If you're interested in purchasing a farm, home, or a commercial or industrial property, you may wish to consider having an environmental site assessment (ESA) performed before purchase. These assessments uncover environmental problems that may be associated with the property. This fact sheet is intended to provide a better understanding of the environmental site assessment process and its role in reducing your liabilities. It is also intended to encourage property owners to dispose of wastes in a proper manner in order to avoid legal problems associated with environmental regulations and property transfer. For simplicity, words in **bold type** are defined in the Definitions section of this fact sheet.

The Superfund Law

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) legislation of 1980, also known as "Superfund," has made buyers of real estate, financial lenders, and property owners wary of *environmental liabilities*.

Superfund legislation aims to clean up contaminated property by expanding liability to cover *potentially responsible parties*, including current owners, who may not have known that the property was contaminated at the time of purchase. Superfund liability targets:

- * current owners and operators
- * any former owners and operators of the site who were present at the time of contamination and afterward
- * waste generators who arranged for waste disposal
- * waste transporters
- * other parties connected to the property.

Hazardous Substances on the Farm

Superfund lists over 800 *hazardous substances* that require cleanup. These hazardous substances are defined and identified by five other laws: The Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Solid Waste Management Act, and the Toxic Substances Control Act. The EPA has compiled these hazardous substances in its *List of Hazardous Substances and Reportable Quantities*, which can be found in Title 40 Part 302 of the Code of Federal Regulations.

Some of these substances can be found in farm sheds, storage areas, or in the farm dump. Hazardous substances include leaded paints, pesticides, fertilizers, railroad ties, automotive batteries and household cleaning products. Although oil and gasoline can be harmful to the environment, they are not classified as hazardous wastes under the Superfund. Contamination caused by petroleum products is subject to other environmental laws, such as the Clean Water Act and the Resource Conservation and Recovery Act.

The Innocent Landowners Defense

In 1986, the innocent landowners defense was added to Superfund in order to prevent property owners from being held liable for contamination that they did not know existed before purchase. It also includes contamination that was caused by an *unrelated third party*. The innocent landowners defense allows a person to establish a *defense* against charges of environmental liability under the Superfund. To successfully use the defense, a person must prove, in a court of law, that at least one of the following circumstances has occurred:

- *At the time of purchase, the defendant did not know and had no reason to know that any hazardous

substance was disposed of on the property, or the contamination was caused by an unrelated third party.

In each of these circumstances, the current owner must prove that he or she used the *appropriate inquiry* for purchasing real estate, or that they conducted the appropriate procedures for preventing someone else from releasing contamination on the property.

Carrying out appropriate prevention procedures is referred to as *due diligence*. For purchasing real estate, this includes researching the past uses and ownership of the property, as well as having a Phase I or Phase II ESA performed before purchase. A person that uses due diligence when purchasing property will not be held liable if contamination from past activities is found in the future.

Proving due diligence is sometimes difficult because the law does not give clear instructions on procedures to investigate each and every type of property. Some types of property are more likely to be contaminated than others and require a more thorough investigation. Therefore, due diligence is usually defined by the type of property involved in the transaction.

Environmental Site Assessments

An ESA is an essential part of due diligence, namely to prove that the purchaser conducted an appropriate inquiry into the past uses and ownership of the property. While ESAs are not conducted for all property transactions, farms, businesses, and industrial sites that may contain contaminants should undergo the scrutiny of an ESA. Many lending institutions require these before a commercial or industrial property transaction can take place.

ESAs are performed by people from many backgrounds, including soil scientists, engineers, geologists, and others. These people are referred to as *environmental professionals*. (See Agricultural and Biological Engineering fact sheet C 30 for more details.)

The American Society for Testing and Materials (ASTM) has created standard procedures for environmental site assessments (See Further Reading section). ASTM has divided these assessments into three phases based upon the procedures performed during each phase.

Phase I: Environmental Site Inspection

A Phase I assessment is the most common environmental site assessment performed for commercial

and industrial real estate transactions. Its intent is to identify *recognized environmental conditions* on the property. The information obtained by conducting a Phase I assessment forms the foundation for the Phase II and Phase III assessments, which may be performed later if needed.

The Phase I assessment has four components:

- * a historical records check,
- * a thorough site investigation,
- * interviews, often with current owners, occupants, neighbors or local government officials, and
- * a final evaluation and report.

This assessment identifies recognized environmental conditions, however, no sampling or analysis of the soil or groundwater is conducted. It may indicate that a site is contaminated or that a site is considered contaminant-free. If the assessment indicates that the presence of any contaminants is unlikely, the buyer can purchase the property with the assurance that the innocent landowners defense is available should contamination resulting from past activities be found in the future. If the results of the Phase I assessment indicate that the property may be contaminated, then soil and water testing are performed later in a Phase II assessment to identify the pollutants.

Transaction Screen Process

A Transaction Screen Process enables a person to perform his or her own assessment of a property — or hire someone other than an environmental professional — to assess the property prior to purchase. The transaction screen process is less expensive than hiring an environmental professional to conduct a Phase I assessment. Current costs for a transaction screening are \$700-\$1000 and for a Phase I assessment costs range \$1300-\$2000.

The Transaction Screen Process consists of completing the *Transaction Screen Process Questionnaire*. Details on the questionnaire and ASTM guidelines for the Transaction Screen Process can be found in document ASTM E 1528-00, cited at the end of this fact sheet. Steps involved in completing the questionnaire include:

- * questioning owners and occupants of the property,
- * observing site conditions on the property, and
- * conducting limited research regarding certain government records and historical documents.

The Transaction Screen Process may allow a person to conclude that no further inquiry is necessary or that a Phase I assessment should be performed by an environmental professional.

The completed Transaction Screen Process Questionnaire should be notarized so that the date is recorded and verified. It is also recommended that photographs be taken of the property to document site conditions at the time of site inspection. The questionnaire and the photographs should be stored in a safe place. If contamination is found in the future, the questionnaire and photographs can be used to prove that the current owner used due diligence when purchasing the property.

A Transaction Screen Process can be used to discover contaminants found on property, and it should only be used as a precautionary measure on property that is generally considered contaminant-free. Residential property is a good example of this. Using a Transaction Screen Process on real estate that is generally perceived as being contaminated, such as a gas station, may not be considered due diligence on the part of a buyer because a Phase I or Phase II assessment is customarily used for these types of properties.

Phase II: Environmental Site Investigation

A Phase II ESA is conducted when the Phase I assessment indicates possible contamination on the property. Sampling and analysis of the soil and groundwater are conducted in order to test for the presence of hazardous substances or petroleum products. A summary of the results is generated and confidentially submitted to the client. Findings may indicate that either contamination is present and that a phase III assessment should be performed, or the site is considered contaminant-free.

It is recommended that commercial and industrial real estate receive a Phase II assessment, even though the Phase I assessment may not show any signs of contamination. Performing the Phase II assessment is considered to be using due diligence on the part of the buyer because commercial and industrial sites are more likely to be contaminated than farmland or residential areas. A Phase II assessment allows the property owner to use the innocent landowner defense if contamination from past activities is found on the property in the future.

Based upon the information obtained in the Phase I assessment, an owner may choose to skip the Phase II assessment and request a Phase II / III assessment. This process combines the site characterization procedures with *remediation* activities.

The Phase II / III assessment can reduce time required and overall cost of the project.

Phase III: Environmental Site Remediation

A Phase III assessment is intended to evaluate the data compiled during the Phase II assessment, and remediate the contamination. Based upon the Phase III evaluation, a cost estimate and detailed sampling strategy are developed for one or more remedial techniques. At this point, the contamination is removed and disposed of in a prescribed manner, or remediated in place. Remediation activities include removing hazardous substances, removing or isolating contaminated soil, or pumping and treating contaminated groundwater.

Misconceptions

ESAs do not prove that a site is completely contaminant-free. It is nearly impossible to determine if every aspect of the site is contaminant-free and in compliance with applicable laws. Subsurface conditions may exist that were not discovered through ordinary diligence, historical investigation, or observation during site inspection and investigation. However, if contaminants are found in the future, having an ESA performed and on file prior to purchase can limit your liability through the innocent landowners defense.

What do ESAs Mean to You?

Currently, ESAs are not required for most property transactions. A lending institution may perform an environmental survey of the property before purchase in order to identify any potential problems regarding the property. However, failing to assess potential environmental problems can cost a great deal of money and time remediating the problems in the future. When viewing a property, the following items may indicate reason to conduct an ESA:

- underground and aboveground storage tanks (fuel oil, gasoline, oil, waste oil, or hazardous substances),
- electrical transformers or any other potential PCB-containing device,
- barrels or drums containing chemicals, fertilizers, or pesticides,
- farm dumps,
- sinkholes,

- oils or antifreeze that may be stored or dumped on-site,
- water wells and abandoned water wells, and
- floor drains in garages, barns or other structures.

Preventing Environmental Liability

Farmers and property owners can prevent environmental liability by following good solid waste management practices. Landowners are encouraged to discard hazardous materials such as pesticides, fertilizers, automotive batteries, railroad ties, and household chemicals in a proper manner. Check with the local solid waste management authority for correct disposal procedures for these items. Farmers are encouraged to clean up farm dumps. Although it may be expensive to dispose of these wastes in a proper manner, it will be even more costly to pay for the removal of contaminated soil later.

Conclusion

An ESA can be a wise investment for individuals interested in purchasing property. Although ESAs are not required for all real estate transactions, an individual should carefully consider whether the property they are about to purchase could have been contaminated from past activities. A Phase I assessment or a Transaction Screen Process can indicate potential for property contamination, or can allow a property owner to qualify for the innocent landowners defense if contaminants from past activities are found in the future. It is recommended, however, that industrial and commercial transactions receive a Phase II property assessment because the likelihood of contamination here is greater than for other types of real estate.

Further Reading

ASTM Standards E-1527-00 and E 1528-00
 [Contact www.astm.org]
 Title 40 Part 302 of the Code of Federal Regulations
 [Contact www.access.gpo.gov]

Definitions

Appropriate inquiry: an investigation into the previous ownership and uses of property consistent with good commercial and customary practice.

Defense: an excuse or justification used in a court of law to prevent liability.

Due diligence: the process of inquiring into the environmental characteristics of a parcel of commercial real estate.

Environmental liabilities: environmental problems for which a person could be held legally responsible.

Environmental professionals: persons from a variety of backgrounds who perform ESAs and other environmental services.

Hazardous substances: any element, compound, mixture, solution or substance which, when released into the environment, may present a danger to public health and welfare.

List of Hazardous Substances and Reportable Quantities: a list of hazardous substances substances compiled by the USEPA.

Potentially responsible parties: a business or individual who can be held legally responsible for cleaning up contaminants.

Recognized environmental condition: some type of characteristic that indicates the presence of contamination.

Remediation: those activities intended to restore environmental quality.

Unrelated third party: a person who is not a party to (not involved in) a lawsuit. Unrelated refers to the fact that the third party is not an employee or agent of the defendant.

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