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Consultants Corner

Engineering for the future

It Could Have Been Worse...

That's not a very comforting thought when you are dealing with an unexpected problem on a property you own. The more likely thought is, "Why me?" Simple mathematics dictate that the more properties you have in your portfolio, the higher the risk that you'll encounter a problem. So, the better thought might be ,"Why not me?" or more specifically, "How not me?" (pardon the grammar). While it's impossible to totally avoid risk, it is possible to minimize your exposure to environmental risk before you acquire a property.

Over the last 20 years, the environmental consulting industry has developed a widely recognized process for evaluating properties for the possible presence of environmental impairments. That process starts with an aptly named "Phase I Environmental Site Assessment," also known as an ESA. The ESA involves a visit to the site to observe existing conditions, a review of the historical uses of the site, and a review of known releases in the site vicinity to check for off-site sources of contamination.

The ESA process has evolved over the last two decades to include more and more sources of information. In 2005, the U.S. EPA issued a rule defining what Congress meant when it used the term "all appropriate inquiry" as it relates to qualifying for the "innocent land owner" defense in the Superfund Amendments and Reauthorization Act (SARA). The American Society for Testing and Materials (ASTM) updated its ESA protocols to match the EPA rule, resulting in ASTM Standard E-1527-05, Standard Practice for Environmental Site Assessments. ASTM Standard E-1527-05 has become the industry benchmark for performing ESAs. If you want to avoid buying somebody else's mess, the place to start is having a qualified consultant perform an ESA compliant with ASTM Standard E-1527-05.

If a potential for contamination is identified in the ESA, the next step is to conduct a "Phase II" investigation. Phase II investigations are much more variable than ESAs. While standard procedures have been developed for performing specific Phase II tasks, the selection of what tasks to perform is based on the types of contamination thought to be present. This is where the environmental consultant earns his pay.

Buried debris and drums found in illegal pit behind a foreclosed manufacturing facility. Fortunately for the bank, hazardous materials were not present.

To properly evaluate a site, the consultant needs to select investigative methods that are right for both the type of contaminant being evaluated and the geologic conditions at the site. Selecting the right consultant is probably the most important step in the Phase II process, and can be the difference between an efficient investigation that provides the information you need to manage your risk and wasting a bunch of money on useless data.

Timing is an important consideration in performing environmental investigations. Escrows often have 30- to 60-day windows for performing "due diligence" activities, which includes the ESA and Phase II activities. The ESA can usually be performed in two to four weeks, but Phase II activities can take four to six weeks (the standard laboratory turnaround time is typically two weeks). That does not leave much time for considering your options should your consultant find something significant. However, postponing the Phase II until after escrow closes puts you at significant risk if adverse conditions are found.

An adverse finding in an ESA and/or

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Could Have Been Worse... *(continued from page 1)*

Phase II does not necessarily mean the end of the line for a proposed acquisition. Options exist for addressing the cost of contamination that are both flexible and fair. Common options include:

1) Setting up an escrow account to hold money from the sale of the property to pay for the cost of the cleanup, while maintaining the sale price at the uncontaminated value;

2) Reducing the sale price of the property by the projected cost of the cleanup, and having the buyer be responsible for the cost of the cleanup; and

3) postponing the close of escrow until all environmental issues have been adequately addressed.

Of these options, the first seems to be the most fair to all parties involved, and provides a means of financing the cleanup using the value of the property. Other options also exist.

A wide range of cleanup strategies is also available. The right cleanup option for a particular site is based on the type of contaminant, the proposed end-use of the property, the geologic conditions at the site and the time available for treatment. Administrative issues can also be significant; while encapsulating contamination on a site may be permissible from a regulatory perspective, obtaining financing to develop such a site can be difficult.

Getting the right consultant involved early in the process can save time and money in the long run. The consultant should have a wide range of investigative experience; be knowledgeable about cleanup processes and their consequences; work well with other members of the development team (owner, engineer, attorney and financier); have a good relationship with the regulatory agencies; and be able to communicate effectively in writing. A well-written report that adequately documents the investigation and cleanup activities will reduce the hassle involved in future deals involving the property.

A stockpile of DDT-contaminated soil created by removing the top six inches from a two-acre area. Disposal cost: $600,000.

Earth Systems has been involved on the tail-end of several projects where nasty surprises were encountered. These include an agricultural property where cleaning up a DDT spill involving three acres of farm buildings cost more than $1 million. In this instance, the buyer performed an ESA but postponed the Phase II for several years while working out the development plans and permits. By the time the Phase II results were known, the seller had vanished. Another recent nightmare involved a bank that repossessed a manufacturing facility only to discover that the former tenant had left behind 700 drums of assorted product and waste that cost almost $200,000 to remove.

As awful as these two examples sound, they could have been worse. At the farm, only 5% of the total site was affected, and the contamination only extended to a depth of about six inches. For the bank, illegal disposal pits in the rear of the property turned out not to contain hazardous wastes (just empty drums and plastic). While the farm owner and the bank probably consider themselves to have been unlucky, minimizing risk to environmental contamination is more than just luck. The right approach, the right consultant and a willingness to complete the investigation in a timely fashion can reduce your chances of buying somebody else's problem.

—Scot Stormo, PG, CHG, REA II