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CONTROLLING ENVIRONMENTAL LIABILITY IN PROPERTY TRANSACTIONS THROUGH THE USE OF ENVIRONMENTAL ASSESSMENTS IN THE STATE OF CALIFORNIA

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Summary

It has been demonstrated that well prepared Environmental Assessments can be effective tools to estimate the environmental liabilities associated with real estate transactions. All assessments should identify and review existing information on the project site, including pertinent governmental or private data files concerning on-site operations and/or the site's previous use, and historical aerial photographs. In addition, a thorough inspection of the property should be performed by an experienced assessor. Based on the findings, a decision is then made as to whether or not an environmental sampling program is warranted.

A well prepared assessment will include an evaluation of the information generated during the above listed activities and the development of an opinion regarding the potential for environmental contamination on-site. The paper presents some examples of the wording of such opinions.

The value of such assessments varies considerably depending on the adequacy of the document. Three factors which strongly influence the quality of environmental assessments are: 1) the time schedule allowed for its completion; 2) the financial resources a client is willing to devote to the task; and 3) the expertise and experience of the person(s) preparing the assessment. The paper discusses the time and cost involved with typical environmental assessments and the importance of selecting an experienced assessor to prepare an assessment.

The author believes that a recent California law which creates a voluntary registration program for Environmental Assessors will have a positive effect on the quality of property transaction environmental assessments prepared in California. With the first publishing of the directory of registered environmental assessors in early 1988, the registration program will make available a list of registered persons who meet the published qualification requirements for environmental assessors.

Introduction

With the recent passage of the Federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Superfund Amend-

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ment and Reauthorization Act (SARA), state analogs to these laws and toxic tort laws, current and former owners or operators of contaminated property now can be held liable for the costs of evaluating and remediating on-site contamination. The cost of such programs typically run from the tens of thousands to the tens of millions of dollars.

These changes in environmental liability rules impose potential exposures to buyers. In addition, the current regulatory climate tends to support an interpretation where almost any chemical detected in the environment above background levels is evidence of significant contamination. These factors have caused a profound effect on property transactions in the United States of America. Buyers, sellers and lending institutions in California, and most other areas of the country, generally will not finalize a property transaction without an Environmental Assessment being prepared for the property by a qualified professional in the field.

Although current federal and California laws do not explicitly require that Environmental Assessments be prepared prior to property transactions, the SARA does provide an incentive to have an assessment prepared. SARA provides potential relief from Superfund liability for a buyer who has had an Evironmental Assessment prepared which concluded that the property was not contaminated at the time of purchase. Under the "Innocent Party" clause, if contamination from previous owners or operators is later discovered, the buyer may be exempt from superfund liability.

Another incentive to have an Environmental Assessment prepared exists in California law. Senator Art Torres (Democrat, 24th District) authored Senate Bill 245, Chapter 1302, which was passed and signed by the Governor on September 28, 1987. This bill requires an owner who knows or has reasonable cause to believe that a hazardous substance is located on, or within 2,000 feet of the subject property, to notify prospective buyers. An Environmental Assessment provides a written record which can allow the owner to comply with this law. Failure to notify makes the transaction voidable at the discretion of the buyer and can result in financial penalties for the seller. The real estate industry in California generally supports this relatively informal notification process as opposed to the much more formal and time consuming New Jersey program. In New Jersey, the State Department of Environmental Protection administers the Environmental Cleanup Responsibility Act (ECRA) program which requires affected establishments to initiate site audits six to nine months prior to closing an operation or transferring a property. The ECRA process includes heavy penalties for failure to comply.

Contents of an environmental assessment

Phase I research

The basic purpose of an Environmental Assessment is to establish an estimate of the chemical contamination and related environmental liability asso-

ciated with a site. At the present time there are no California standards itemizing the required elements of an Environmental Assessment or addressing how an Environmental Assessment should be conducted. Most of the reputable firms which prepare Environmental Assessments have developed outlines which identify what they interpret to be the minimum elements of an assessment. Although some variation exists in these outlines, most agree that the first phase of a thorough assessment should include identification and review of existing information.

Considerable information on a project site can frequently be obtained prior to collecting environmental samples. The following items should be included in the research phase of an assessment.

1. Identification of current and prior uses of the project site and all property within 2,000 feet.
2. A thorough review of information available on current and prior processes to identify areas of potential environmental exposure or risk.
3. Identification and review of relevant public agency permits and files on the project site and surrounding land users.
4. Review of agency lists and records of all identified contaminated sites located within two miles of the project site.
5. Inspection and interpretation of current and historical aerial photographs of the project site and surrounding land users.
6. Review of geotechnical reports, hydrogeologic reports, well logs, and other information on the hydrogeology of the area.
7. Review of water quality information from wells identified within one mile of the site.
8. Interviews with current and prior employees of the companies present on and near the project site.
9. On-site inspection by one or more qualified environmental assessors.

This first phase of an Environmental Assessment is extremely important in that this information will be used to determine whether environmental sampling is necessary. If sampling is required, the type of sampling and the analytical protocols will also be based on the findings from the first phase.

Phase II sampling and analysis

The environmental sampling phase of an Environmental Assessment is generally the most time consuming and expensive part of the assessment. Environmental sampling can involve:

1. Conducting surface vapor scans and/or geophysical scans of the property;
2. Sampling on-site construction materials to check for the presence of asbestos, heavy metals or other compounds;
3. Collecting and analyzing samples of process and waste streams if the subject property contains an active plant to establish the constituents of potential releases to the environment;

4. Sampling oil-filled electrical equipment for the presence of polychlorinated biphenyls.
5. Collecting and analyzing samples of surface and subsurface soils for suspected environmental contaminants. This may include investigating any underground storage tanks;
6. Collecting and analyzing samples of surface water or groundwater for evidence of contaminants related to on-site activities. An alternative purpose can be to establish background water quality data at the time of the property transaction;
7. Collecting and analyzing samples of subsurface gases;
8. Collecting and analyzing samples of ambient air to determine the presence of any gases, vapors or particulates.

Due to the time consuming and expensive nature of environmental sampling, it is important that the Environmental Assessment firm properly collect, document, transport, and analyze the samples. Correct interpretation can be accomplished only if the data are meaningful and valid. The author advocates that a written Work Plan be prepared to describe the details of where and how the samples are to be collected and analyzed. This plan should be approved by all parties involved prior to the beginning of any field work.

It is worth noting that environmental investigations are frequently iterative since the results of one round of sampling and analysis may only identify the presence of a contaminant. It may be necessary to conduct one or more additional investigations to establish the extent and significance of the identified contaminants.

Phase III interpretation

The last phase of an assessment is to develop an estimate of the legal and financial liabilities associated with identified contamination, based on an evaluation of the information from previous phases.

The estimate of environmental liability typically includes an itemization of the cost of further investigations (if required) as well as the cost of implementing various remedial alternatives. Generally, these estimates should also include projected time schedules for implementation which account for agency participation if regulatory agencies are involved.

The bottom line

Many persons unfamiliar with the nature of Environmental Assessments expect the bottom line of an assessment to be a certification by the assessment firm or a governmental agency that the site is "clean, with no environmental liabilities". Environmental Assessment firms and governmental agencies in general cannot reasonably make such statements due to the fact that most assessments involve chemical analysis of only selected areas of the site. It is financially impractical to analyze samples from every cubic inch of the site,

which would be necessary to certify that the entire site is clean and free of environmental liabilities. It is reasonable, however, to expect the Environmental Assessment firm to issue an opinion regarding the significance of the findings. Such opinions are generally worded to reflect that a reasonable investigation was performed and that based on that investigation the Environmental Assessor is not aware of the existence of potentially significant environmental contamination associated with the site. The wording must be tailored to reflect the work performed. Four examples of wording which could apply to an investigated site are provided below. Case 1 relates to a site inspection with no historical research or sampling. Case 2 relates to an Environmental Assessment which includes research and a site inspection, but no sampling. Case 3 applies to an assessment which includes all of the work done in Case 2 plus sampling. While Case 4 reflects an environmental assessment which includes all of the work performed in Case 3 plus remediation of the identified environmental liabilities. Cases 1 through 3 apply to sites where no evidence of chemical contamination was encountered. If evidence of potential contamination were encountered during the assessment, the professional opinion section would identify and describe the significance of such material. Recommendations for further investigations or remediation should also be provided as appropriate.

Examples of conclusions for Environmental Assessments

Case 1 — Inspection only

The firm performed an inspection of the project site in accordance with generally accepted practices to identify areas of potential environmental contamination. It is our opinion that observations made during this inspection and cited in this report do not indicate a significant potential for chemical contamination above generally accepted levels to be associated with the site.

Case 2 — Inspection and research

The firm has used generally accepted practices to identify information available on the project site relating to environmental contamination. It is our opinion that the inspection performed and the information reviewed and cited in this report (i.e., agency records, company records, interviews, aerial photographs and site inspection checklists) do not indicate a significant potential for chemical contaminants above generally accepted levels to be associated with the site.

Case 3 — Inspection, research and sampling

The firm has performed an environmental assessment of the project site in accordance with generally accepted practices. Based on research of available information on the project site and a site inspection, areas of potential environmental contamination were identified. Samples were collected from the

identified areas of concern and analyzed for suspected potential contaminants. It is our opinion that the concentrations of chemicals detected in these samples are below levels normally considered significant. The firm is not aware of the existence of any potential contamination which could significantly affect the value of the property.

Case 4 — Inspection, research, sampling and remediation

The firm has performed an environmental assessment of the project site in accordance with generally accepted practices. Based on research of available information on the project site and a site inspection, areas of potential environmental contamination were identified. Samples were collected from these areas and analyzed for suspected contaminants. Based on this information, the following areas were identified as requiring remediation (identify areas). Remedial action was conducted at these locations in accordance with generally accepted practices. Following completion of the remedial action, verification samples were collected and analyzed to document that significant contaminants in the identified areas were successfully remediated. It is our opinion that the concentration of chemicals detected in these samples are below levels normally considered significant. The firm is not aware of the existence of potential environmental contamination which would significantly affect the value of the property.

If the investigation and/or remediation was conducted based on Work Plans approved by government agencies or the involved parties, the wording of opinions should be altered to reflect this fact. In such cases, the opinion could state that: "It is our opinion that the concentration of chemicals in these samples are below the negotiated clean-up goals. The firm is not aware of the existance of any areas on-site which exceed the clean-up goals."

Although government agencies are reluctant to issue certifications for sites, the author has had success with obtaining written statements from agencies acknowledging that specific areas of a site were remediated to acceptable standards. The key to obtaining such statements generally lies in the upfront involvement of agency personnel. Agency involvement in the assessment process can be valuable and at times is required. It must be understood, however, that involving agencies or other third party reviewers can significantly increase the time and cost required to complete the assessment process. Well written summaries, neatly tabulated results and effective use of diagrams can facilitate timely review and approval of environmental assessment and remediation reports by agency and other third party personnel.

Variation in the quality of Environmental Assessments

There are three key factors which affect the thoroughness of an environmental assessment: budget, time and talent. The first two are governed to a

large extent by the client. The third factor, talent, relates to the training and experience of the environmental assessor(s) responsible for completing the project.

Budgets required for environmental assessments range from as low as US$1,000 for a simple site inspection to around US$5,000 for a thorough review of agency files, aerial photographs and plant records as well as a site inspection. Projects involving environmental sampling and chemical analysis start at US$1,000 and can run into several hundred thousand dollars.

Time schedules for assessments vary depending on the work to be performed. A site inspection can generally be completed in less than a week. A thorough program to locate, acquire, and review all available information on a site can take two to six weeks or more. Accessing agency records and historical aerial photographs can be particularly time consuming. Cutting this task short can result in the unexpected discovery of additional areas requiring investigation and possibly remediation later in the assessment process or even after the property is sold. The environmental sampling phase can require from one week to one year, depending on the scope of work. Four to eight weeks is the average time required to complete one round of an environmental sampling program.

The talent of the environmental assessor plays a key role in the assessment process. Reviewing existing information on a site and interviewing key personnel requires persistance, patience, personality and perception. The task is similar to detective work in that seemingly irrelevant clues can be used to reconstruct past activities which resulted in hidden on-site chemical contamination.

Experience and talent are also important in the field investigation phase. A cost and time effective field investigation requires the optimum placement of sample collection points and the correct selection of analytical parameters and methods.

The historical research, field work and laboratory analysis performed on a site will result in large volumes of data to be reviewed, tabulated and interpreted. Considerable training and experience is required to be able to use this data to create a clear picture of the extent and significance of the environmental contamination. The task is particularly challenging since, for the most part, there are few environmental standards for soil or groundwater. Dealing with governmental agencies which have overlapping areas of jurisdiction and different perspectives is difficult and requires an in-depth knowledge of agency regulations and policies.

Selection of an environmental assessment firm

It is clear that a person contemplating a property transaction would be wise to consider having an Environmental Assessment prepared early in the nego-

tiation process. The persons involved in the negotiation should allow at least four to six weeks for a normal Phase I type audit to be prepared. Additional time may be necessary if environmental sampling is required. It is our opinion that one of the most important steps in having an environmental assessment prepared is selecting the right firm to prepare the assessment. This is particularly important considering the lack of guidelines or standards regarding how the assessment is to be prepared.

The field of environmental assessment is different from most other fields in that it encompasses many disciplines. The optimum firm to prepare property transaction environmental assessments has experienced professionals with training in the many fields involved with environmental assessment. Experience is particularly important considering the diverse types of industrial, manufacturing and commercial processes an assessor is expected to evaluate.

A program to help persons requiring assessment services to identify qualified assessors was created by recent California legislation. On September 30, 1986, the Governor of California signed into law SB-1875 the Environmental Quality Assessment Act of 1986. This law was codified in Division 20, Chapter 6.98 of the California Health and Safety Code commencing with Section 25570. Title 14, Chapter 3, Sections 19030–19032 of the California Administrative Code provide further clarification of the law.

The law and regulations created a voluntary registration program for environmental assessors which is administered by the California Secretary of Environmental Affairs.

The California Administrative Code states that an applicant for registration as an environmental assessor shall:

"a. Demonstrate a minimum of five (5) years full time experience in the applicant's general field of expertise, acquired within the last eight (8) years.

b. Demonstrate a minimum of two (2) years substantial experience in performing environmental assessments acquired within the last four (4) years.

c. Possess a bachelor's or higher degree from an accredited college or university in a physical or biological science, engineering or law. State certification, licensing or registration or certification by a nationally recognized professional association in a physical or biological science, engineering or law shall be considered equivalent to such training. Five (5) years substantial experience performing environmental assessments acquired within the last eight (8) years shall also be considered equivalent to such training.

d. Provide the name, addresses, telephone numbers and professional affiliations of three or more references who as employers or clients can attest to the accuracy of the evidence provided by the applicant, to the applicant's professional competence and character, or both".

The Secretary of Environmental Affairs is required to compile, publish and update a directory of registered environmental assessors. The directory is to include a list of the areas of expertise and experience for each assessor. The

assessor's application is available to persons wishing to evaluate the qualifications of a registered assessor.

It is the author's opinion that this voluntary registration program, although new and unproven, is an asset to the community of persons requiring property transaction audits. The directory will allow a person seeking such services to identify listed, registered environmental assessors, with expertise in the geographic area of the project site. A copy of the assessor's signed application form can be obtained from the Secretary of Environmental Affairs to assist in determining their qualifications for the job. Finally, the person seeking the services of an assessor now has a means of lodging complaints against the record of a registered assessor who performs unsatisfactory services. Experience with this program during the next few years will allow the less formal California program for identifying potential environmental liabilities associated with land transactions to be compared to the more formalized New Jersey ECRA program.

Recaption

Changes in the regulatory climate have resulted in a situation where the purchaser of property inherits environmental problems and may incur significant liability. An effective way of identifying potential environmental liabilities associated with a property, before completing the sale, is to have a property transaction environmental assessment prepared. There are no standards in California for how property transaction environmental assessments are to be prepared.

A typical environmental assessment includes research into current and prior uses of the project site as well as nearby parcels. An inspection of the area is a necessary part of the program. Depending on what is encountered during the research and site inspection phase, environmental sampling may be indicated. The firm preparing the environmental assessment will scrutinize the results of the research, inspections and analytical results and issue an opinion regarding potential chemical contamination which may be associated with the site.

It is clear that one of the most important steps in having an environmental assessment prepared is selecting a qualified assessor.

It is the author's opinion that the new voluntary registration program for environmental assessors currently being administered by the California Secretary of Environmental Affairs will assist the land transaction community with selecting qualified environmental assessors.

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