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Environmental Real Estate Newsletter

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Introduction

ERAS Environmental, Inc. (ERAS) publishes this Newsletter from time to time to discuss developing environmental issues. It is distributed for the benefit of the clients of and other interested persons. Its' focus is on environmental issues pertaining to due diligence for environmental assessment of commercial real estate. Many of these issues come up regularly during our business interactions.

- ETS, ESA and Innocent Landowner Defense
- Evaluation of ESA and ETS reports
- ESA Projects and Relation to Phase 2 Projects
- Site Case Closures and Closure Letters

ETS, ESA and Innocent Landowner Defense

KEY CONCLUSION: While an ETS does not provide protection under the innocent landowner defense it may still be appropriate for certain types of properties.

In practice, banks and other financiers of property should realize the innocent landowner defense is designed to protect a landowner from catastrophic financial loss. Because an important goal would be to avoid even having to defend, the ESA project can be considered insurance against this loss. The decision to perform an ETS must be considered an initial process to decide whether to buy the comprehensive policy. The lending institution must be able to depend on a good environmental consultant to help evaluate a specific property for environmental risk whether an ETS or complete ESA.

The Environmental Transaction Screen (ETS), referred to by SBA as a Transaction Screening Analysis (TSA) should be performed under the new standard ASTM 1528-06. The standard specifically states that this project does not provide protection under the CERCLA "innocent landowner defense". That is because qualifying for the innocent landowner defense requires All Appropriate Inquiry (AAI). This condition is met by performing the scope of work outlined in the new standard for Environmental Site Assessment (ESA) projects (ASTM 1527-05). The use of the ETS will be guided by 1) the type of Property; 2) the expertise and risk tolerance of the user and perhaps most importantly, 3) the information developed in the course of the inquiry.

The innocent landowner defense appears to be subject to interpretation on a case-by-case-basis in the judicial system. The courts have generally ruled that an owner of a contaminated site becomes a potentially responsible party (PRP) simply because they are the owner. Generally the courts have upheld the innocent landowner defense if 1) a prior party was the sole cause of the contamination; 2) the previous owner is a liable party; 3) the new owner did not know about the contamination and undertook appropriate inquiry at the time of purchase and 4) the owner took due care once the contamination was discovered.

Evaluations of ETS and ESA Reports

KEY CONCLUSION: Specific Sections of ETS and ESA reports should be reviewed for key information pertaining to environmental conditions at the subject site.

The ETS report is a shorter more concise report than the ESA report. However, the main elements related to potential risk of ownership should still be contained in the report. These include an evaluation of the current and historical uses of the Property and adjacent sites and possible impact of contamination from nearby leak sites. The banker or other user should be able to quickly determine the risk and whether more property research should be performed. A good consultant will provide timely and advance recommendations if this is necessary.

Both the ETS and ESA report should include 1) the **type** of development on the Property and current **use**, 2) the **historical uses** 3) the **type** of nearby development and 4) the **proximity** and **number** of nearby sites of risk. All of this should be prominently contained in the Introduction and/or the Conclusions and Recommendations.

For the ESA report the important sections include 1) the **Current Uses**, near the beginning of the ESA report. The **historical uses** of the Property are summarized, along with the very important historical gap analysis in the **Conclusions and Recommendations**. The potential impact of **off-site contamination** is summarized in the **Off-site Sources** section.

By review of these limited portions of the ESA report, the reviewer can evaluate the consistency of the data and the ensuing conclusions. For example, are there current or past uses or large gaps in use that could indicate a risk to value?

Is there sufficient technical evaluation of off-site sources to make definitive conclusions of the current or future risk? If there are issues that pose a risk are they clearly defined with the proper recommendations to resolve them expediently?

ESA Projects and Relation to Phase 2 Projects

Key Conclusion: The main goal and purpose of a Phase 1 assessment is to determine the need for a Phase 2 subsurface investigation.

A Phase 1 ESA is an evaluation of environmental conditions based on available agency and other printed and published documents. There are some situations, based on current, previous or nearby uses that the conclusions of an ESA may recommend a Phase 2 project. In Phase 1 ASTM standard terminology these are referred to as *recognized environmental conditions (REC)*.

REC may include 1) a current condition such as the presence of an underground storage tank (UST) or sump used for chemicals, 2) the current or historical documented spillage, leakage or dumping of hazardous substances, 3) a former UST or other underground oil or chemical storage device that was removed but there is not sufficient subsurface sampling data, 4) an adjacent or up-gradient site is already a known leak case.

An adequate Phase 1 MUST identify **specific** problems in **specific** locations involving **specific** chemicals (i.e. why, where and what?). It is not possible to abolish all risk regarding subsurface environmental conditions. It is never possible to test all areas on a Property for all chemicals. The best a Phase 2 can accomplish is to minimize the risk of a specifically identified problem. It is not acceptable to recommend Phase 2 sampling and then miss the target area. Yet this is an example of a recommendation that is presented in poorly prepared ESA reports.

Imprecise statements in an ESA report such as “based on historical uses of the Property, there may have been releases of petroleum products and solvents to the subsurface” are essentially meaningless. That is because it does not identify why, where and what implies that any chemical contaminant could be present in any location on the Property. If a Phase 2 investigation is performed based on that recommendation, there will be questions about why, where and what?

Case Closure Letters

Key Conclusion: Case closure letters for former leak sites should be carefully examined and may not be sufficient to eliminate risk regarding a Property.

Case closure letters are a requirement for clearance for former leak sites (note that UST closures and facility closures are closures that do not refer to leak cases). These letters do not always indicate that no further action is necessary.

Leak case closure letters should be carefully evaluated to determine that the closure refers to the contamination issue of concern, that it was prepared by the agency that has that jurisdiction, that all of the agencies that must concur have done so and that all the documents that are a part of the case closure documentation are included. For example, closure letters also include a Case Closure Summary and may also include specific maps, tables and other legal documents.

Therefore a closure cover letter is **never sufficient** to document case closure. The reasons a case closure letter may not be sufficient for a no further action recommendation are the following.

- The case closure may close only part of the issue (a UST leak but not the presence of solvents or metals, leaks covered by another agency.
- The agency may have closed the case to their satisfaction but it was not agreed to by the agency of jurisdiction. For example, the city or county may have recommended the closure but it was not agreed to by the Regional Water Board.
- The local agency may have closed the case but the regulatory standards have changed. Case closures are based on current information and may be re-opened based on new information such as additional subsurface sample analysis. ERAS must evaluate the closure based on current standards.
- The agency may have simply made a mistake in their case closure.

ERAS welcomes the opportunity to provide a short visual presentation on these issues. We would welcome the opportunity to meet you and your staff. Please call for an appointment.

Note that the information presented herein should not be construed as legal advice.

ERAS employs Registered Environmental Assessors (REA) both Class 1 and 2, a Professional Geologist and a Certified Asbestos Consultant (CAC).

If you have any questions regarding the information in this newsletter, ERAS services, or if you have a subject you would like to read about in a future newsletter, please call David Siegel at 510.247.9885 (ex. 304) or email us at info@eras.biz

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