The Right-of-Way Professionals Guide To Avoiding Environmental Hazards

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Previously, Miller practiced environmental and real estate law in Detroit, Michigan. He has consulted with real estate trade groups, lenders and the U.S. Department of Justice in the development of environmental due diligence policies, and speaks regularly for groups of attorneys, environmental consultants and lenders. He is also an instructor for environmental courses at the University of California, the National Water Well Association, the American Bankers Association, and currently chairs two committees for the ASTM Site Assessment standardization process. He has served as a legislative intern to the United States Senate and the British House of Commons.

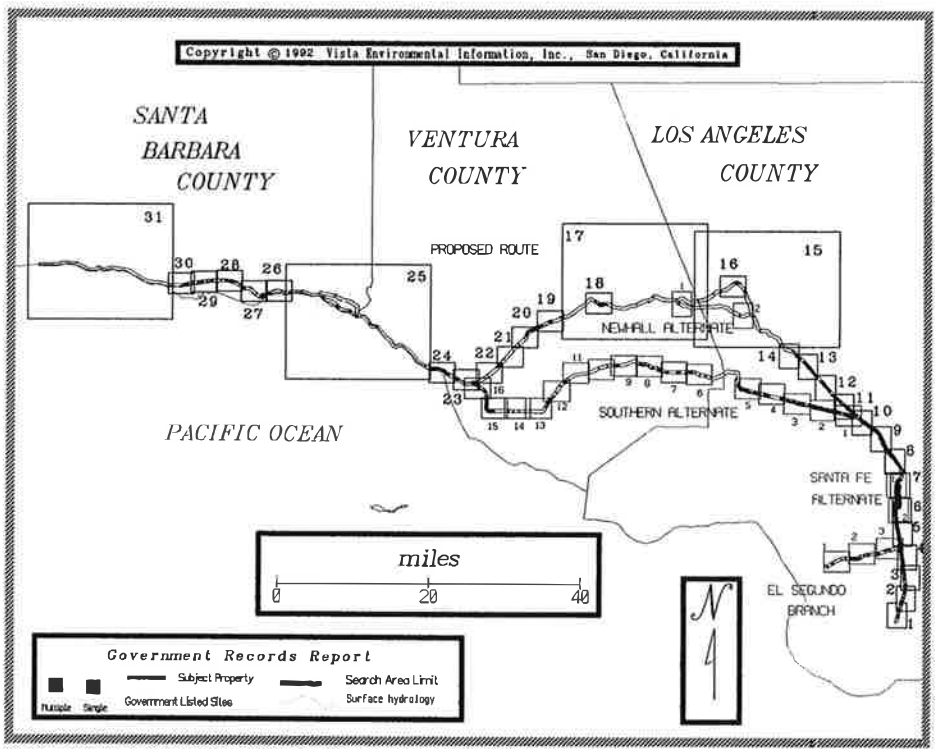
Increasing public concern over the effects of environmental contamination and proliferation of environmental laws have created new risks for all real estate purchasers including right-of-way professionals. Driven by recognition of health risks associated with exposure to toxic substances, the public and their political representatives are demanding protection. Recent estimates indicate that tens of thousands of properties are impaired by environmental contamination, and that the list is growing at a record pace. Since tragedies such as Love Canal and Times Beach, demand for environmental responsibility has developed into a double-edged sword for right-of-way professionals: risk of legal liability as well as risk to the value of the properties they acquire.

Common Environmental Hazards Encountered In Right-of-Way Acquisitions

In the process of acquiring real estate for right-of-way purposes, the following environmental hazards have been encountered:

- *Old Landfills/Community Dumps*–In the past, it was legally and socially acceptable for each community to dispose of its household, commercial and industrial waste in what was known as the community landfill or "town dump." In the past, the process was relatively simple, whereby a developer acquired a piece of property, dug a hole, accepted waste from the local town and simply buried it in an unlined pit. Then, after the pit became full, the common process was to simply cover it over with fill dirt and allow vegetation to once again take over the top soil. The types of material placed in these landfills often included hazardous waste from commercial operations, local industrial operations, as well as household trash.

  Today, these landfills typically pose hazards due to their potential to contaminate right-of-way properties, neighboring properties, and soil instability. Migrating methane from the decomposition process has also been known to create explosions. The right-of-way professional should be aware that because of the increasing growth of our suburban communities, many of these old town dumps which were once on the outskirts of town, are now in the middle of suburbia where the greatest development is taking place.
- *Leaking Underground Storage Tanks (LUST)*–Underground storage tanks have been commonly used for the past 70 years for a variety of purposes. While most are underground storage tanks associated with petroleum service stations, underground storage tanks have also been used for heating oil, chemical production material, chemical waste from production processes, and heating oil for both commercial and residential buildings.
- *Buried Drums/Railcars*–Over the years, some companies have indiscriminately buried their industrial waste in steel 55-gallon drums. Because many landfills do not except hazardous waste, and those landfills that do accept hazardous waste charge high rates for disposal, many companies have found it more convenient to simply bury their waste on-site in 55-gallon drums. Other companies, thinking that they have hired a responsible disposal company, have later come to learn that they have been disposed of through a process that has become known as "midnight dumping."
- *Agricultural Concerns*–In agricultural areas, soil has become contaminated through extensive use of pesticides related to agricultural applications. The improper use of pesticides can also create extremely high levels of various types of contamination which are "actionable" under environmental cleanup laws. In addition, because farmers are often "self sufficient," they sometimes use such things as underground storage tanks, waste disposal sites, maintenance facilities, and other activities which create contamination on or nearby their properties.



- *Industrial Waste Disposal Pit and/or Lagoons*–In the earlier part of this century, it was perfectly legal and accepted business practice to dispose of solid and liquid industrial waste by burying it somewhere on the property. Typically, this procedure occurred by placing waste "out the back door" in unlined pits or lagoons. The residual contamination remains there today; it may not be discovered or reported until development or construction takes place on the property.
- *Leakage From Utility Lines and Transformers*–Many right-of-ways and easements incorporate utility lines used for conveyance of fuels. Leakage from these lines can cause contamination within the right-of-way property itself. In addition, transformers and pump stations may also contain substances which contaminate soil and/or groundwater near the site.
- *Spills*–In many cases, transportation right-of-ways and corridors have been subject to hazardous materials spills. These spills commonly occur as a result of improper maintenance, accidents, or other collisions. After the incident is attended to, in many cases, the contamination has not yet been cleaned up to levels acceptable by federal, state or local environmental agencies.
- *Asbestos*–Because right-of-way acquisitions may involve the acquisition of buildings, the right-of-way professional should also look out for asbestos insulation or asbestos containing materials (ACM). Asbestos is typically used as an insulating material and can be found in building insulation, piping insulation, floor tiles, ceiling tiles, and even in some cases, as a part of exterior shingles. Ordinarily, asbestos in place does not require removal, unless it is "friable" (crumbling, releasing particles into the air). However, if a building is going to be demolished as part of the right-of-way development, special considerations and costs will be necessary to properly dispose of the asbestos in a hazardous materials landfill.

While the list above represents common environmental hazards, additional and unique factors may also come into place when acquiring specific properties. Therefore, because these environmental hazards are common, they create significant problems and challenges for the right-of-way professionals.

The Impact Of Environmental Hazards On Right-of-Way Acquisitions

Environmental hazards, such as those described above, create problems and challenges for right-of-way professionals in the following ways:

- Impairment of real estate values
- Delays and interruptions to project development
- Clean up liability and/or compliance liability
- Toxic tort liability

The implications from any of the above problems create impact of significant proportions on the overall project.

Environmental Hazards Impair Real Property Values

The presence of environmental hazards are likely to significantly impair property values. First, at a minimum, if a cleanup is required, the market value of a property is often offset by the cost to clean up or remediate the property. Additionally, factors such as limitations on the highest and best use, legal and administrative cost, consulting fees, and fines also create cause for decrease in the value of a property. While there is no formula for determining exactly what the impact on value is, Mr. Albert R. Wilson, of Environmental Analysis and Valuation, Inc. in Denver, Colorado, recently presented a proposed formula to the Appraisal Institute at its national convention. His suggested formula is the following:

- Impaired value = Unimpaired value,
  less the cost to implement (NCP-defined) remediation plan,
  less the cost of restrictions on use and/or environmental liability prevention,
  less the impaired financing cost, and

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less the stigma, or negative intangible costs.

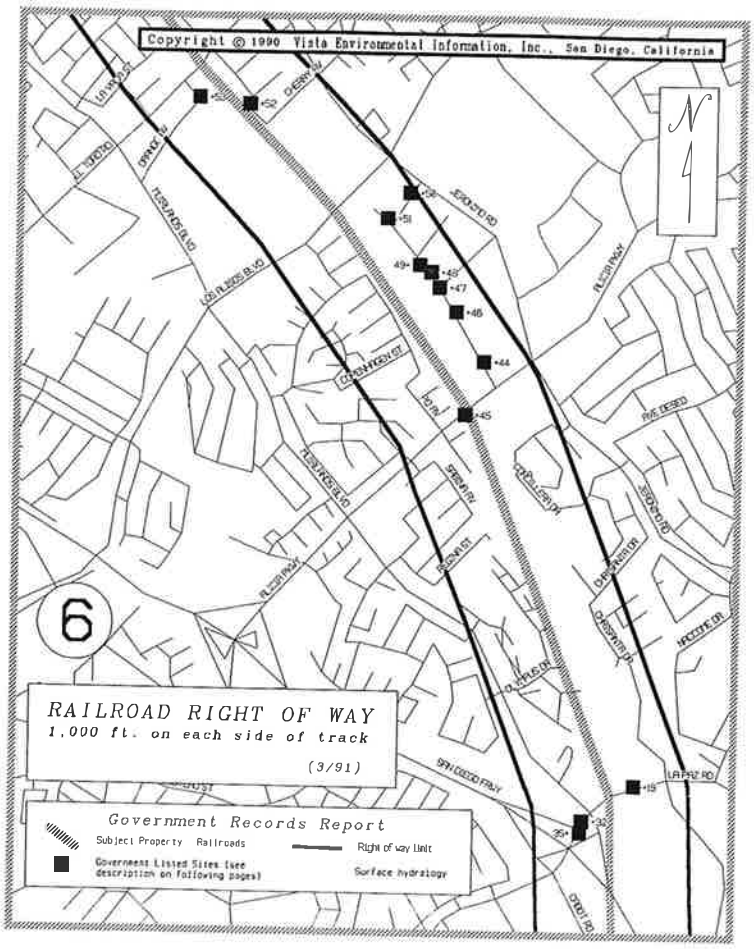
Additionally, some definitions are useful for describing the way that environmental hazards impact property values:

- *Directly Affected Properties*–Properties with environmental hazards within their boundaries.
- *Indirectly Affected Properties*–Properties that have contamination in close proximity to the subject site, but not necessarily on the subject property.
- *Permanently Affected Properties*–Properties which are perceived by the public as having such a significant level, or type of contamination that would permanently devalue the property.
- *Temporarily Affected Properties*–Those which typically have contamination within the structure, such as radon or asbestos, and are perceived by the public as something easy to remediate.

Of perhaps the greatest significance to the right-of-way professional is the potential for impact to the real estate value due to contamination on the subject property. However, the value of a right-of-way property can be dramatically affected by environmental hazards in close proximity to the subject site. As people have a choice between two equally desirable properties, they will choose the one further away from the source of contamination. Therefore, environmental hazards in close proximity to a particular property may cause devaluation even though there is no contamination on the subject site.

Delays And Interruption To Development

Typically, once environmental hazards are encountered on a particular property, federal, state or local environmental agencies must be notified. Once notified, an assessment must be conducted to determine the type of contaminate, extent of vertical and lateral migration, and actual or potential impact on groundwater. After the extent of contamination has been determined, the next step is to identify a plan for remediation which will be acceptable to the environmental agency. Once negotiated, and even perhaps litigated, the final remediation plan would then be approved by the agency and remediation can begin. Then finally, during the remediation process, the source of contamination is either removed or treated, and tested to a level satisfactory to the lead environmental agency.



This process can take anywhere from a minimum of six months to several years. During the course of the environmental assessment and remediation process, typically, the construction project such as a highway, railroad, or utility installation is prohibited until further approval by the environmental agency. Therefore, the impact of the discovery of latent environmental hazards can, in fact, stall the entire project, causing significant financial losses and delays to complete the project.

Cleanup Liability And Compliance Liability

Under various federal and state laws, owners of real estate may be held liable for cleaning up contaminated property. Owners, in this sense, can include both owners of fee simple title, as well as those who own "an interest" in real property, such as a right-of-way or an easement. Additionally, public utilities and government agencies do not ordinarily have any specific exemptions that would minimize this problem.

Liability for cleaning up contaminated property can arise even though the current owner acquired the property after, and without knowledge of, the contamination. Because the main purpose of environmental cleanup laws is to catch those who have the greatest ability to pay (i.e., "deep pockets"), liability arises even without the fault of the current owner. Accordingly, because many right-of-way professionals represent companies which would be considered "deep pockets," it is especially important to take all appropriate measures to avoid ownership of contaminated property.

Toxic Tort Liability

Another, and perhaps, more significant source of environmental risk in right-of-way transactions is now only beginning to surface. Ownership

and/or operation of contaminated real estate can lead to liability to neighbors, employees, contractors, and tenants who become exposed to hazardous substance on or in the vicinity of the property. Under common law, as well as federal and state statutes, owners and operators of real estate, including right-of-way professionals, owe a duty to guests, tenants, neighbors, and employees to "take reasonable care" to avoid exposure to hazardous conditions. This duty is arguably greater when ultra-hazardous activities, such as hazardous waste or materials, are involved. Further, environmental statutes such as CERCLA authorize individual plaintiffs to pursue remedies, not only to enforce the terms of the statutes, but also to avenge themselves of any damages that they may suffer due to their exposure to hazardous materials.

Therefore, the right-of-way professional, in acquiring property, has an even greater duty to be aware of any hazardous materials which might be on or nearby the subject property. If there are such hazards in the area, they have a duty to take all reasonable precaution, including notifying anyone who may come in contact with the property such as contractors, inspectors, surveyors, architects, and other construction or design professionals.

Techniques To Avoid Environmental Hazards

Under the original version of CERCLA (the federal environmental cleanup law), innocent purchasers who unwittingly bought toxic or contaminated real estate were responsible for cleanup costs even though they did not contribute to the contamination. In 1986, the U.S. Congress recognized the inequity imposed upon innocent parties with passage of the Superfund Amendments and Reauthorization Act, which provides a defense to liability for cleaning up contaminated property. Essentially, purchasers who acquire property after contamination occurred and did not know, and had no reason to know, of the contamination are exempted from cleanup liability.

To establish that a purchaser "had no reason to know" of the contamination, the Innocent Purchaser Defense requires that the purchaser show that, prior to acquiring its ownership interest, he made all "appropriate inquiry into previous ownership and uses of the property consistent with good commercial or customary practice." In applying that standard, Congress instructed the courts to consider:

- Any specialized knowledge or experience on the part of the defendant
- The price of the property compared to its market value, if not contaminated
- Commonly known or reasonably ascertainable information about the property
- The obviousness of the presence or likely presence of contamination
- The ability to detect the contamination by inspection

Accordingly, right-of-way professionals can use the following techniques to avoid environmental hazards in the acquisition of right-of-way properties.

Government Environmental Records

Environmental agencies at the federal, state and local levels have developed lists of known environmental hazards such as:

- Superfund sites
- Hazardous waste generators
- Hazardous materials spills
- Underground storage tanks
- Leaking underground storage tanks
- Landfills
- Waste disposal sites

While all of these lists are available under the Freedom Of Information Act, the process of acquiring them and keeping them up-to-date has often proven to be quite difficult. Additionally, because these records are not always sorted geographically, it takes a considerable length of time to determine whether or not a particular listing falls within a right-of-way which is being acquired.

Information companies have developed commercial services to compile these records and provide reports which show the locations of environmental hazards within right-of-way properties. Some samples of the computer generated right-of-way map illustrating the environmental hazards appears in the illustration with this article.

Historical Research

In addition to checking government environmental agencies to see whether any known hazards exist, common practice also includes historical research to determine if the property, now part of the right-of-way, may have been used for some environmentally risky use in the past. Typical methods for determining historical use of property include:

- Historical aerial photographs
- Sanborn fire insurance maps
- Chain of title information
- Other historical documents and/or interviews

Much of this information is provided by local historical societies, aerial photo collections, as well as through commercial services.

Site Inspections

In addition to the government environmental records and historical research, a site inspection should be conducted to determine whether or not there are any "obvious" signs of environmental contamination within the property identified for acquisition. Obvious environmental hazards

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and improved procedures for association members to achieve a designation which is characterized by quality professionalism. By maintaining standards, the SR/WA designation will continue to broaden the recognition it deserves.

Thus, the basic service of the IPDC still remains the SR/WA program and its requirements. The IPDC will address the other foundation areas of the Senior exams in later issues of this publication. (IRWA)

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would include such things as:

- Vent pipes indicating the presence of underground storage tanks
- Stained or unusually colored soil
- Unusually cracked asphalt
- Stressed vegetation
- Excavation or fill dirt
- Drums or other containers of chemicals

Typically, the site inspection is performed either by an appraiser, engineer, or trained environmental professional. The process of hiring a professional known to perform all of these functions is called a Phase I assessment, and can range anywhere from $2,500 to $5,000 for a basic property. For a right-of-way, a bid would be required to comply with the specific dimensions and length of the property acquisition.

In conclusion, environmental hazards present a new challenge for the right-of-way professionals. Because properties acquired for right-of-way purposes are more likely to have been used for some environmentally risky use, it is incumbent upon the prudent right-of-way professional to identify environmental hazards prior to concluding the transaction. New, cost-efficient techniques for real estate site assessments, including government records and historical research, are of great benefit to the right-of-way professional. By employing these techniques, the right-of-way professional can be more confident that his company will not end up with liability, impaired property values, or liability for personal injuries. (IRWA)