The ESA and What It Can Accomplish

by Tom K. Martella

Tom K. Martella is a senior hydrogeologist and site assessment manager for Environmental Engineering & Services Corporation, an affiliated company of Parsons Brinckerhoff Quade & Douglas. He has 17 years of environmental compliance experience and is a registered environmental assessor in California, certified asbestos inspector/management planner under AHERA, OSHA trained for investigations involving hazardous wastes, and is a registered geologist in several states and with the American Institute of Professional Geologists.

Abstract

The Environmental Site Assessment (ESA) was initiated due to the enactment of the "Innocent Land Owner Defense" provided in the Superfund Amendments and Reauthorization Act (SARA) of 1986. Since that time, the ESA has been incorporated into various projects, both large and small, because of the liability imposed by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) or Superfund, enacted in 1980. CERCLA places liability on the current owner or operator of real property, whether the owner/operator was responsible or not. Liability under CERCLA is strict, joint, several, and retroactive. The ESA was initially conducted to provide a purchaser of real property with information on the property, satisfying criteria to establish the innocent land owner defense.

The collected data on the property and the surrounding area have also been found to be useful in other project related tasks. The information assists project planners on major public works projects in completing the alternatives analyses and identifying additional environmental permit actions that may be required. The ESA has also become another environmental investigation that needs to be completed for Environmental Assessments (EAs) and Environmental Impact Statements (EISs). If the property is to be purchased, the information is used for modifying project schedules to incorporate remedial actions, if taken. The information has also been used to determine the value of contaminated property, inform concerned citizen groups on health risks and contaminant conditions present, determine impacts on proposed landscaping from contaminated soil, and determine future response actions for encountered contaminated soil.

The ESA must accomplish its primary goal of managing risks associated with hazardous wastes. The data gathered for the ESA, however, can be useful in providing information to make informed decisions on other project objectives. The ESA must be tailored to the project to accomplish these objectives and provide the information in a cost-effective manner.

Background

The ESA was initiated due to the "Innocent Landowner" defense provided under SARA. The act was included in SARA because of owner liability issues raised under CERCLA, also known as Superfund. CERCLA states that the current owner or operator is responsible for any cleanup action resulting from the

improper release of contaminants to the environment, whether the current owner or operator was responsible for the release or not (42 USC Section 9607 (a)). For instance, if a person purchases property and hazardous wastes are later detected, that "Potentially Responsible Party" (PRP), as they are referred to in the CERCLA regulations, may be responsible for cleanup. These cleanup actions can cost millions of dollars and can significantly reduce the value of the property.

As an owner of real estate under investigation by the Environmental Protection Agency (EPA), the owner would continue to be subject to orders issued by the EPA, which could include any cleanup action. However, the owner could seek reimbursement from the Superfund if he could demonstrate that he had a right to the innocent landowner defense.

The defense may be used if the contamination was caused solely by an act or omission of a third party (42 USC Section 9607 (b)). A third party can be a person unrelated to the owner or the property that illegally disposes of hazardous waste. This defense is available if the third party is not an employee or agent of the PRP; the third party's act or omission did not occur in connection with a contractual relationship, existing directly or indirectly with the PRP; the PRP exercised due care with respect to the hazardous substance; and the PRP took precautions against foreseeable acts or omissions of such third party and the consequences that could foreseeably result from such acts or omissions (42 USC Section 9607 (b)) (3)). The act or omission statement refers to the connection with a contractual relationship. Contractual relationship is broadly defined to include land contracts, deeds, or other instruments transferring title or possession.

The innocent landowner defense, referred to previously, was instituted due to the provision in regulations that stated a purchase with a contractual relationship may rely on the defense if: 1) the purchaser acquired the property after the disposal of the hazardous waste occurred on the property, and 2) at the time the purchaser acquired the property, he did not know and had no reason to know that any hazardous substances had been disposed on-site (42 USC Section 9601 (35) (a)). Further, the purchaser must have undertaken, at the time of acquisition, all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial practice in order to show that he had "no reason to know" of the presence of hazardous waste. The courts are directed by statue to consider the following:

1. Any specialized knowledge or expertise on the part of the defendant.
2. Relation of the purchase price to the value of the property if the property were not contaminated.
3. Whether there was commonly known or reasonably ascertainable information about the property.
4. Whether contamination was obvious or likely to be perceived on-site.
5. The overall ability of a person in the position of the defendant to detect such contamination by appropriate inspection.

Elements of an ESA

The ESA is conducted to establish due diligence for the innocent landowner defense. The ESA is primarily conducted as an assessment of the possible presence and extent of contamination on a property and of the related risks of liability. An ESA can include reviewing the property for environmental hazards, permitting requirements, building and other inspections such as financial audits related to the property or the conduct of business.

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A phased approach to conducting the ESA is generally done to provide the client with milestones from which critical decisions regarding the project can be made. The first phase is identifying potential contaminant sources on the property and in the general area of the property. The second phase is a detailed site investigation conducted on suspected contaminant sources identified in the first phase. The detailed investigation is done to assess the presence of contamination, characterize encountered contamination, and provide initial estimates on the extent of contamination.

Phase I Activities

The first phase consists of a review of existing records and databases. Records may include files maintained on sites being investigated by the EPA or state agencies for environmental regulation violations under the Resource Conservation and Recovery Act (RCRA), Toxic Substances Control Act (TSCA), Clean Water Act (CWA) or the Clean Air Act (CAA), or other environmen-

Continued on Page 10

The ESA and What It Can Accomplish

Continued from Page 9

tal laws. Databases maintained by the EPA and the state on hazardous waste releases, underground storage tanks, facility notification for the generation, treatment, storage, or disposal of hazardous wastes and identification of Superfund sites are a few of the databases available for review.

Title searches on specific property may also be a part of the investigation to identify previous owners. However, the majority of these records identify individuals rather than companies, and assessing the potential impact to the property from these past owners is difficult. Conducting these past owner inquiries should be done after the initial identification of potential contaminant sources to review the past titles of property suspected as contaminant sources. However, some clients, most notably financial institutions, prefer that these be done as part of the first phase.

A site inspection of the property is also done to physically identify possible unlisted contaminant sources. The site inspection also confirms the location and assesses the condition of the listed sites.

Interviews with people knowledgeable about the property and/or the surrounding area is done to further identify other possible contaminant source areas and provide information on-site management and general "housekeeping" activities. Obtaining site information from agency personnel familiar with a past or current site investigation is also part of the interview process. These conversations should be confirmed through records or confirmatory discussions with other people.

A report outlining the findings of this first phase is done to transfer the information to the client. The client is provided this information to make informed decisions regarding the project. The report should also outline other information needs that may be warranted to assess the condition of the property. This may include an additional records review or a detailed site investigation to identify and delineate the suspected contamination.

Phase II Activities

Phase II activities generally include the collection of subsurface soil and water samples for analysis to determine the presence of suspected contaminants. A sufficient number of samples are taken to assess the possible extent of contamination and quantify any contamination encountered. This investigation must follow specific collection, preservation, shipment, and analysis procedures in order for the data be representative of the conditions present. Worker health and safety concerns are also evaluated and sampling activities are planned accordingly.

Phase II activities may include an additional records or files review to gather specific information on an area of concern. The additional records or files reviewed may provide sufficient information on the condition of the property without further sampling of subsurface soil and water, providing information in a cost-effective manner to evaluate the impact to the project.

Other Aspects of an ESA

The ESA can accomplish other goals of the project. Because it is an inventory of potential contaminant sources, the ESA lends itself to fulfilling National Environmental Policy Act (NEPA) requirements for projects deemed environmentally sensitive. The ESA can preliminarily identify federal and/or state environmental permit requirements needed for project approval, such as Clean Water Act, Section 404 requirements for impacts to floodplains or wetland areas and the National Pollution Discharge Elimination System (NPDES) requirements for discharge to waters of the United States.

The ESA can also satisfy non-regulatory needs, such as providing information on the contaminants encountered to concerned citizen groups, the media, and agency personnel for information transfer. The information gathered for the ESA can also be used to assist in appraising the value of the property for property acquisition.

The information can also be used to assist project planners for developing project requirements, such as identifying required permit actions, coordinating project completion with agencies responsible for oversight, identifying possible cleanup requirements, and developing project schedules to manage the project around the remedial actions and assist in the alternatives analysis for major public works projects. In addition, the ESA information can be used to assess the impacts on proposed landscaping and assess the potential for future liabilities that may exist.

Project Planning

The first phase of the ESA should be conducted at the initiation of the project to identify possible environmental problems or concerns that may impact or impede the completion of the project. The ESA can be used during the alternatives analysis process on major projects to screen the alternatives for environmental impacts and help select the best alternative. The information can then be used to help satisfy NEPA requirements for the preferred alternative. The hazardous waste issue is a concern and must be assessed as part of the EA and EIS process.

Environmental permit actions can be identified during the Phase I ESA by reviewing the site for impacts to floodplains and wetlands (Clean Water Act, Section 404), water quality and runoff (NPDES) from the proposed project, and other permit actions that may be apparent from the site inspection.

After the environmental issues and

possible physical areas of potential concern have been identified, project scheduling can incorporate permit completion and approval, estimate completion of possible Phase II activities, budget additional work activities, coordinate activities with agencies for remedial actions, and estimate the completion of identified remedial actions. Negotiations with land owners involving possible contaminated property can also be initiated and project alternatives can be identified to avoid areas of concern.

Detailed Site Investigations

Detailed site investigations (Phase II activities) can be used to determine the presence of contaminants, estimate the surficial area of contamination and depth of contamination, characterize the contamination detected, determine regulatory action levels or maximum contaminant levels (MCL), and assess additional information needs to determine remedial actions.

Supplemental information to the Phase II work may be needed to estimate the extent of contamination for cost estimation of remediation. Remedial action costs estimates can then be applied against the assessed value of the property to determine the market value of the property for land acquisition negotiations. The supplemental information can also be used for agency coordination to determine appropriate cleanup techniques.

The Phase II information can also be provided to agencies overseeing the project to determine current and future regulatory Response actions, to the media and public interest groups concerned about contamination to address possible health risks, and to project landscape architects to plan the selection of contaminant resistive plant species and assess possible project over-excavation to protect planned project landscaping.

Summary

Environmental implications of property ownership cannot be ignored, and environmental laws have been enacted to strengthen the agencies' response to these environmental issues. An appropriate and thorough ESA must conducted because of the liabilities involved with real estate ownership. The ESA must be completed by qualified professionals with experience in understanding the complexity in establishing due diligence. When conducted accordingly, the ESA can satisfy due dili-

Continued on Page 15

Continued from Page 11

life Refuge provides such an illustration of multiple land uses working.

Could El Paso have played hardball and not agreed to some of the items discussed here? They certainly could have, and probably saved some money in the process. But at what cost? El Paso has approximately 27 miles of pipeline right of way on the Kofa Refuge, and someday soon may be calling on Mr. Haderlie, or his successor, to ask for permission to allow more construction on the Kofa. The likelihood of successful negotiation in future projects will be greater because of El Paso's willingness to "do what's right."

And what advice would I have for someone considering the establishment or expansion of a right of way across environmentally or socially sensitive areas?

- Be creative. Don't be afraid to suggest alternatives. There are often several ways of arriving at the same end point.
- Be prepared to provide "unusual" mitigations. Remember the gift of a windmill motor for another refuge and the spreading of rocks on the right of way to deter off-road vehicles?
- Be prepared to deal with issues beyond the obvious. Keep in mind that the land managing agency or landowner usually has a different agenda and different priorities than you do. There may be additional sensitive issues that are not immediately apparent.
- Be prepared to meet the available construction windows established by the agency or landowner, or provide suitable mitigation.
- Be flexible. While it may look easy on paper, remember that the land managing agencies and landowners probably won't share the same sense of urgency for project completion that you have.
- Cooperate with the agencies and landowners, especially the field representatives. A little back-scratching usually goes a long way. IRWA

gence in assessing the previous uses of the property consistent with good commercial or customary practice for potential CERCLA "Innocent Landowner Immunity."

The ESA can also accomplish and provide information on other project concerns and issues. The client should be made aware of these additional benefits from conducting an appropriate ESA. Planning to institute the ESA at the earliest possible date will benefit the client and the project. Implementing the ESA during the early stages of the project can avoid problems later on during the project. Early initiation of the ESA can assist in planning the project to reduce project delays and cost overruns.

Understanding the project's environmental needs and planning ahead to satisfy those needs can be accomplished through the ESA process. When conducted from a sufficient planning approach, the ESA can be cost-effective, as well as protect the client from future liabilities. IRWA