

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.

I ncreasing 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, commer-

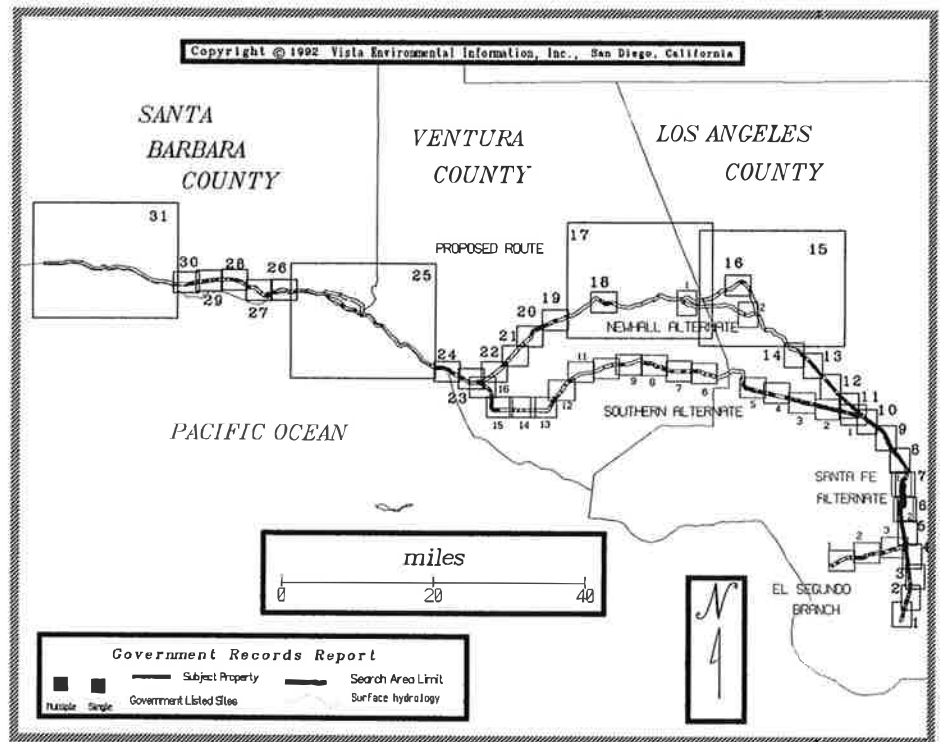
cial and industrial waste in what was known as the community landfill or "town dump." In the past, the process was relatively simple, whereby a developer acquired a piece of property, dug a hole, accepted waste from the local town and simply buried it in an unlined pit. Then, after the pit became full, 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 accept 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 sig-

nificant 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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