

# The ESA and What It Can Accomplish

by Tom K. Martella

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## 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 Liabil-

ity 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



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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

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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 statute 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 finan-

cial audits related to the property or the conduct of business.

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-

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