

# USEPA'S Shift In Focus Toward Enforcement

## The Implication to Property Right-Of-Way Acquisition

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### INTRODUCTION

Prior to March 1989, the United States Environmental Protection Agency (USEPA) focused its hazardous waste cleanup program on upfront cleanup of Superfund sites, then attempted to recover their cost from the responsible parties (RPs) through litigation.

This cleanup philosophy required large multi-disciplinary, multi-million dollar contracting arrangements with hazardous waste cleanup consulting firms. The money to fund these cleanup actions were available from congressional appropriation in support of hazardous waste (i.e., public funds) legislation. Specifically, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and the 1984 Superfund Amendment and Reauthorization Act (SARA) established trust funds exceeding \$6 billion. This money is derived primarily from taxes on petroleum, feed stock, and selected chemicals sold in the United State. A small amount of the funds was appropriated from general tax revenues (CERCLA) through 1985.

The over-reliance on Superfund money to finance these private site cleanups, drew a great deal of criticism from Congress and the general public. As a result, a new USEPA "enforcement first" policy was recently unveiled by the USEPA

Administrator. This new policy prioritizes the identification of all responsible parties which contributed to the disposal of hazardous waste at the Superfund site. Then, through a variety of enforcement tools (enforcement orders, costs of litigation, and potential cleanup costs), the USEPA will require the responsible parties to fund the cleanup under their supervision. This approach will be accomplished by aggressive enforcement of existing policy. Because of high litigation and cleanup costs and uncertain liability exposure, many responsible parties have settled with USEPA rather than participating in protracted litigation. This more

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cooperative attitude can also be partially attributed to provisions within CERCLA that responsible parties may be jointly and severally liable for the entire cleanup of costs of a Superfund site. USEPA has estimated that an average Superfund cleanup in 1988 costs \$30 million. Exceptions to private financing of his cleanup policy will be limited primarily to situations where an immediate endangerment to the public and/or environment exists, or where responsible parties cannot be located and then federal money will be utilized in the cleanup action.

### SUGGESTED RESPONSE

This policy shift to strict enforcement by the USEPA should encourage those parties considering acquisition of right-of-way property or an industrial complex to develop and implement a Pre-Acquisition Environmental Management Plan (PAEMP). This approach may avoid acquiring property which may undergo USEPA

enforcement scrutiny, resulting in cleanup costs far exceeding property acquisition costs. The following task checklist for a suggested general PAEMP should be considered for use in evaluating and screening potential property acquisitions.

- I. Phase I—Conduct Site Historical Use Evaluation Audit—Collect the Following Site Data:
  - A. Site information (past owners, enforcement history, etc.)
  - B. Site characteristics (soils, ground and surface water, etc.)
  - C. Operations (type of facility, location of current and historical disposal, ponds, lagoons, etc.)

- D. Underground storage tanks (location, contents, etc.)
- E. Evidence of waste disposal (discolored soil, surface water, unusual mounding, etc.)
- F. Regulatory records review (compliance history and identification of all applicable regulations)

This information can generally be obtained from existing records and legal documents and is frequently accompanied by a site visit.

Based on the findings of the Site Historical Use Evaluation Audit, a site sampling program (Phase II) may be required to further define the extent of any contamination located during Phase I activities, and to establish a basis for estimating site cleanup costs.

- II. Phase II—Conduct Site Investigation (Soil and Ground Water)
  - A. Identify and classify potential contaminants identified in the Site Historical Use Evaluation Audit and from Material Safety

- Data Sheets (MSDS) if the property is an operating industrial facility regulated by hazardous waste laws.
- B. Prepare Site Safety Plan based on findings of II.A
  - C. Preparation of field study design (Work Plan) including well placements for monitoring, if required.
  - D. Submit formal Work Plan to applicable regulatory agencies for review and incorporate comments where appropriate.
  - E. Conduct field sampling program following USEPA sampling and analysis protocol.
  - F. Submit field sampling to a laboratory which is in compliance with USEPA analytical protocol. Proper labeling and shipping requirements for field samples must also follow USEPA and U.S. Department of Transportation (USDOT) requirements and strict adherence to chain-of-custody and field log book procedures is critical.

### III. Phase III—Remediation and Cost Estimate

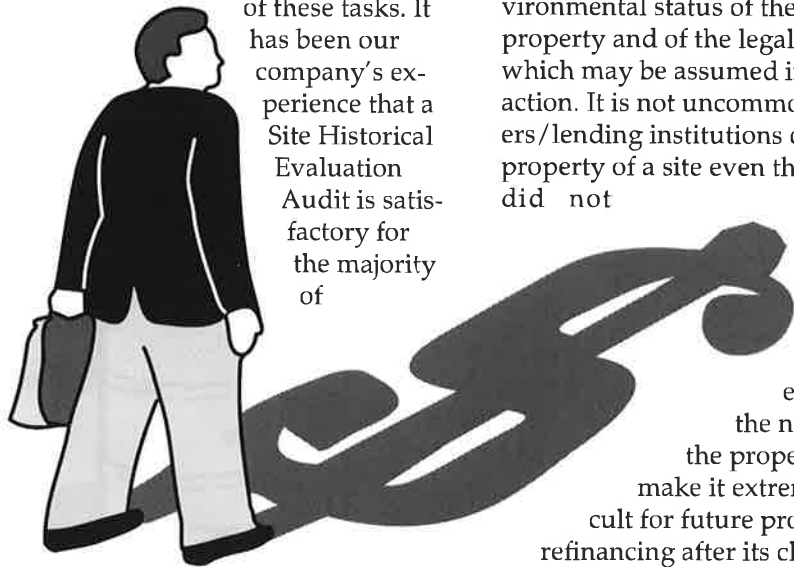
- A. Based on the field observations and analytical results from the field samples, a determination must be made whether hazardous waste contaminations exists on the site and if a remedial action is necessary. If hazardous wastes are not encountered, the property acquisition negotiation process can continue and no additional environmental work is required. If the decision, however, is that remediation and subsequent long term monitoring is required, this may preclude property acquisition from both a financial and liability standpoint.
- B. If a final decision regarding

property acquisition is still uncertain, a cost estimate for remediation and potential long-term monitoring can be prepared to assist in the decision making process. Generally, the cost analysis addresses the following areas:

- Capital costs (direct or indirect)
- Annual operations and maintenance costs
- Accuracy of the costs (optional)
- Present worth analysis (optional)
- Cost sensitivity analysis (optional)

These remediation and monitoring costs also serve the potential buyer with a defensible position to negotiate a final property value should the acquisition process continue.

The key factor to keep in mind is the sequencing/chronological order of these tasks. It has been our company's experience that a Site Historical Evaluation Audit is satisfactory for the majority of



audits for ascertaining the potential for encountering hazardous waste on a proposed site. When we recommend to a client to proceed with a Phase II Site Investigation and/or Phase III Remediation Cost Estimate, it is generally for one of the following three reasons:

1. Potential/suspected waste is

encountered during the Site Historical Use Evaluation Audit and the nature and extent of contamination is difficult to ascertain.

2. The potential buyer or lending institution wants an increased level of certainty and concomitant risk reduction by performing a more in-depth field study/remediation evaluation.
3. An adjacent property has an industry which disposes of hazardous waste in a questionable manner, increasing the probability of off-site contamination to the property to be acquired.

### SUMMARY

It is critical that all participants in a commercial or industrial property transaction be totally aware of the environmental status of the subject property and of the legal liabilities which may be assumed in the transaction. It is not uncommon for owners/lending institutions of new property of a site even though they did not

contribute to the contamination. These cleanup costs can easily exceed the net worth of the property and will make it extremely difficult for future property sale or refinancing after its cleanup. With the USEPA's increased emphasis on enforcement, the development and implementation of a structured response to property acquisition presented in this article may provide an acceptable risk management tool to shield your company from future environmental liabilities.