

**A PRACTICAL APPROACH
FOR DEALING WITH
ENVIRONMENTAL ISSUES THAT
IMPACT THE DEVELOPMENT
PROCESS**

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PART 1 – THE ENVIRONMENTAL DUE DILIGENCE INVESTIGATION PROCESS

I. Potential Exposures

By purchasing property, the new owner can be taking on various exposures related to environmental conditions. Some of those exposures will be generic and apply to all properties; others are site-specific.

A. Liability Exposure

1. Potential Liabilities

a. Remediation or “clean up” liabilities

- Arise out of statutory scheme under federal and state environmental laws that impose “status” liability (in contrast to liability based upon acts or omissions)
- status liability is strict and, depending on the fact situation, can be joint and several

- b. Property and bodily injury damages
 - arise primarily as a result of common law tort.
 - c. Property may also be burdened with covenants running with the land or post-closure obligations
 - d. Depending on how the purchase is structured, the new owner may be subject to successor liability or contractual obligations
 - e. Governmental entities can bring claims for natural resource damages, impose fines and penalties, and request injunctive relief
2. Potential complainants/plaintiffs
- a. Claims can come from various directions:
 - State government
 - Federal government
 - Local government
 - Onsite persons
 - Offsite persons
 - Contract beneficiaries
 - b. Complaints can arise because of release reporting or disclosure requirements imposed by environmental law
 - c. Complaints can also arise from the results of the type of due diligence investigations discussed below and performed in the surrounding neighborhood

B. Other Exposures

1. Environmental impact can impair future marketability and resale value
2. Developing an environmentally impaired property can result in other exposures
 - a. Increased construction and development costs
 - b. Potential cleanup cost overruns
 - c. Increased operating expenses
 - d. Increased costs of financing
 - e. Business interruption/construction delay
3. Properties that are cleaned up may have restrictions on permissible use imposed upon them by governmental authorities

II. Tools for Managing Exposures

Various tools have been developed over last twenty years to help identify and then manage the exposures noted in I.

A. Environmental Site Assessment (ESA)

1. The ESA is the primary tool for determining if there are environmental conditions potentially impacting a property.

COMMON RECOGNIZED ENVIRONMENTAL CONDITIONS

- **Dry Cleaners**
- **Gas Stations**
- **Auto Service Facilities**
- **Manufacturing Facilities**
- **Agricultural Facilities**
- **Landfills**

2. ASTM Standard E1527-05

- a. Reflects current “best practices” for the assessment process
- b. Designed to meet the “all appropriate inquiry” component required to qualify for defenses available under the federal Superfund law

3. An ESA incorporates various component parts and uses an investigative process to highlight potential “recognized environmental conditions” at a site:

- a. Review of historical use and regulatory records
- b. Property reconnaissance and physical setting review
- c. Interviews

4. ESA process has various shortcomings:
 - a. No subsurface investigation component
 - b. Gaps in information availability
 - c. Opportunity for consultant to create “science project” to track down unresolved issues.
 - d. Assessment scope does not require analysis of certain potentially important concerns:

POTENTIAL CONCERNS NOT INCLUDED IN ASTM STANDARD

- **Wetlands**
- **Endangered species**
- **Asbestos**
- **Lead paint**
- **Mold**
- **Regulatory compliance**

B. Third Party Protection

1. Obtaining protection from liability to government
 - a. Texas
 - Voluntary Cleanup Program (VCP)
 - Utilizes risk-based cleanup
 - Provides liability releases for new owners and lenders

- Enforcement bar
- Municipal Setting Designations (MSD)
 - Not a stand-alone program; needs to be coupled with State closure program
 - Eliminates human ingestion risk factor
 - Can allow for less extensive site assessment and cleanup
 - Reduces cost and time to obtain regulatory closure
- Texas Innocent Owner/Operator Program (IOP)
 - No remediation
 - Does not run with the land
- Texas Dry Cleaner Remediation Statute (DCRP)
 - Site ranking process
 - State assumes remediation obligations

b. Federal

- CERCLA liability exemptions and defenses
 - Contiguous Property Owner
 - Bona Fide Prospective Purchaser
 - Innocent Landowner
- EPA Ready for Reuse Initiative
- EPA Prepurchase Agreements

2. Other Tools

a. Contractual risk allotment mechanisms

- Release
- Indemnity
- Environmental insurance

b. Negotiated price reduction

- Seller post-sale remediation agreement
- Cost recovery/contribution
 - Complexity
 - Expense
 - Need to get assignment of claims

c. Carve out of portions of tract to exclude contamination

- Migration potential?

C. Government Incentives

1. Government reimbursement funds
2. Tax incentives
3. Economic incentives

PART 2 – STRATEGIES FOR DEALING WITH ENVIRONMENTAL ISSUES IDENTIFIED

Not too many years ago, discovery that a site was contaminated killed projects before they even reached the planning stage. Now, utilizing the tools noted above, developers are undertaking and completing those projects. Note, however, that contamination can introduce significant complexities into the project planning and construction process. Those complexities require a strategic approach to the project.

I. Keep the Big Picture in Focus

A. Begin with the end in mind and develop a strategy to coordinate with your plan.

1. Develop an information baseline regarding environmental conditions
2. Scope the investigation using experienced professionals (see below)
3. Keep development goals in mind when planning investigation and remediation
4. In choosing strategic approach, consider:
 - a. Regulatory standards
 - b. Site specific issues (including cleanup targets)
 - c. Client's exit plans

B. Enlist the assistance of professionals with expertise and experience.

1. Supplement, at the earliest stages of the project, real estate / development / construction team with additional expertise:
 - a. Environmental attorney
 - b. Environmental consultants
 - c. Remediation contractors
 - d. Environmental insurance brokers
 - e. Community relations and governmental affairs liaisons.
2. Coordination among the different disciplines is crucial:
 - a. Legal concerns
 - b. Regulatory concerns
 - c. Risk management
 - d. Governmental affairs concerns
 - e. "In-the-field" issues

C. Remember that the client's risk profile regarding a deal, or the property involved, is not necessarily shared by others.

1. Identify other parties that will need to be satisfied with the environmental strategy
 - a. Governmental agencies (multiple federal, state and local)
 - b. Equity investors
 - c. Lenders
 - d. Insurers

- e. Future tenants
 - f. Future purchasers
 - g. Community “stakeholders”
2. Avoid the “risk sandwich”

D. Recognize the issues of concern to the various parties.

1. Greed and fear
2. Different parties; different concerns
 - a. Cost
 - b. Timing
 - c. Certainty
 - d. Finality
 - e. Complexity
 - f. Cleanup standards
 - g. Financing
 - h. Insurance

E. Never lose sight of the fact that you are working on a real estate project.

1. Can the project support the additional transaction costs and time?
2. Avoid the “science project”
3. Reevaluate and adjust, the strategy used at various stages of the project.

II. Sweat the details

It does not matter that the developer has formulated a great strategy if it is not properly executed. The details arise during the planning and construction phases of a project involving redevelopment of contaminated property.

A. Media Specific Concerns

1. Soil
 - a. Shorter-term remediation
 - b. Soil management of known impacted materials
2. Groundwater
 - a. Longer-term remediation
 - b. Management of groundwater encountered

B. Remediation Strategies

1. Layered remediation: soil first, then groundwater
2. Staged remediation: remediate, then build
3. Engineering controls: cap, then build
4. Integrated remediation: coordinating site remediation with development
5. UST closure only

C. Addressing Site Soils

1. Grading plan and balancing determinations
2. "Import" sites
 - a. Avoiding recontamination

- b. Protocol for analyzing imported fill
- 3. "Cut" sites
 - a. Test before export
 - b. Reuse on-site
- 4. Coordinating geotechnical and environmental soil investigations

D. Addressing specific regulated matters

- 1. Remodel/reuse vs. demolition
 - a. Asbestos
 - b. Lead paint
 - c. Mold
 - d. Other materials
- 2. Waters of the United States
- 3. Endangered Species Act
- 4. Methane/vapor issues

E. Protecting designated areas

- 1. Monitoring wells
- 2. Areas of known contamination (cross-contamination concerns)
- 3. Restricted development areas

F. Managing other issues

- 1. Clean-up target levels
- 2. Impact of controls on proposed redevelopment
 - a. Deed restrictions and other institutional controls

- b. Engineering controls
- 3. Other regulatory issues
 - a. Regulatory decision process
 - b. Reopening a previously closed site
 - c. Storm water regulations
 - d. Worker safety concerns
- 4. Multiple overlapping governmental jurisdictions
- 5. Unexpected site surprises