

## **Seller Beware, Too**

**By John Slavich**

Property owners should consider how environmental concerns may impact a proposed sale of their property. Concerns may include environmental issues seller believes have been previously resolved. Seller's failure to manage buyer's environmental due diligence process can not only impact the proposed transaction, but also stigmatize the property into the future if the sale does not occur.

**Conditions can change.** Even if seller received a "clean" Phase I when it purchased its property, a buyer may raise potential environmental issues. Site conditions can change during the period of ownership of the property. New site conditions triggering concerns can arise from operations on the marketed property and conditions on neighboring properties. The presence of fill on the seller's property can cause concern, especially when there is no sampling data confirming the fill is clean. If buyer's consultant concludes there are Recognized Environmental Conditions (RECs) at seller's property, seller should expect that those RECs will need to be addressed before buyer is willing to close.

**Regulators' concerns can change.** The Texas Commission on Environmental Quality (TCEQ), the State's environmental regulatory agency, may unilaterally change its approach to regulatory concerns without prior notice to the regulated community. Those changes can complicate deals. Of particular note currently is TCEQ's approach regarding vapor intrusion from volatile organic compounds (VOCs) present in soil or groundwater. Although TCEQ has not issued regulatory guidance regarding sites where VOCs are present, recent experience is that TCEQ is *de facto* regulating those issues by requiring additional investigation, mitigation or restrictive covenants before agreeing to grant regulatory closure. Seller should also keep in mind that a No Further Action letter issued for its site by TCEQ really means "no further action at this time." Matters considered as a significant change in circumstances may result in TCEQ reopening its previous regulatory closure.

**Corral the buyer's consultant.** Sellers have to live with the consequences of poorly performed investigations by buyers' consultants. Our clients have run into several instances recently where the consultant engaged by the prospective buyer, or the analytical lab hired by the consultant, did such a poor job that it left seller at a distinct disadvantage when the prospective buyer then decided to walk away from the transaction. Consultants' reports have a life of their own extending far into the future. That becomes an issue when buyer's contract requires seller to provide all environmental reports in its possession regarding the site, or where seller provides all reports to avoid any later claim of failure to disclose if it were to withhold outdated reports.

**Control the data.** A confidentiality clause in the purchase contract can control dissemination of the environmental data developed. Until the transaction is completed, any environmental information developed by buyer with respect to seller's site should be subject to

strict confidentiality, with buyer and its advisors as the only persons with access to that information. No third party disclosure should be allowed without the express, advance written agreement of seller. One of our clients recently faced a situation where the conclusions of buyer's consultant were not supportable and the prospective buyer not only dropped the contract, but then spread the erroneous story that seller's property was contaminated. A confidentiality provision could have provided seller with recourse in such a situation.

**Avoid kicking the sleeping dog.** Seller needs to think carefully about allowing buyer to perform subsurface investigation. New sampling data regarding environmental conditions at a property can create previously-unanticipated concerns for seller. If seller's property has already received regulatory closure, additional sampling results may only muddy the waters where TCEQ determined the property meets applicable regulatory standards even though residual contamination continues to be present. Also, subsurface sampling may lead to governmental reporting obligations as a result of data collected. Seller may condition its agreement to subsurface sampling upon a contractual provision allowing buyer a walk-away from the deal without providing a reason for exercising its right to walk away and without providing sampling data to seller.

The foregoing is not an exhaustive discussion of environmentally-related concerns of a seller. The noted items are, however, matters that my colleagues and I see on a recurring basis and for which we have developed various approaches in counseling clients that are selling real property.

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