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“READING BETWEEN THE LINES: WHAT TO LOOK FOR IN ENVIRONMENTAL DATA PROVIDED BY A SELLER OF CONTAMINATED PROPERTY.”

The phrase, “caveat emptor,” or buyer beware, has never applied with greater force than to the purchase of contaminated property. Blind trust in the conclusion of a seller’s consultant, for instance, that contamination was not found or was minor, can lead to bankruptcy. A buyer of contaminated property should work with a technically knowledgeable environmental lawyer and consultant to methodically evaluate the nature and extent of contamination and attempt to quantify the value of the risk of the property.

Why shouldn’t the buyer save costs and rely on environmental data provided by a seller? Sellers who test their property rarely go beyond bare necessities: limited testing around areas most likely to generate concern or known to have contamination, such as where tanks, clarifiers or other underground containers of hazardous materials were located. Consultants rarely express opinions or discuss risks which they perceive to be against the interest of their client. The seller’s environmental data should always be presumed inadequate.

Testing is not only expensive, but the results usually suggest more hazards and the need for new tests. Knowledge of a problem may also trigger reporting requirements to a governmental agency, which may result in an order to further assess and remediate the site. The seller must then sell a known liability. A buyer must then ponder whether the known contamination is manageable or represents the tip of the proverbial iceberg.

There is no way to ever assess the risk of a site to 100% certainty. But one needs to have enough data to make an “educated” guess. What is “enough” will vary from site to site but will always include, at a minimum, sufficient tests to reasonably characterize and define the extent of all contaminants known, found or suspected to have been used around the site.

The following checklist offers a systematic approach to reviewing environmental data and valuing risk so that the buyer can better decide whether to place him or herself, or a company, and the investment in this site, at risk.

* Verify whether all environmental reports and data have been provided. Reports typically include site assessments prepared by an environmental consultant after underground tanks are removed, contamination is discovered and/or in anticipation of a sale of property. Avoid relying solely on maps showing contaminant concentrations prepared by the consultant: important lab data in the appendix may not be on the map.

Typically, county health departments and regional water boards have the most relevant
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records concerning recent chemical use, underground tank information and contamination problems; in addition, the state and federal Environmental Protection Agency (EPA) may have investigated a company's operations, overseen significant contaminated sites and received reports by companies concerning hazardous materials use. While all agencies' records are not essential in all cases, the buyer may need to examine more than one source of information to get a more complete picture.

* Get as much site (and possibly adjacent site) history so that all relevant chemicals are tested. One needs a good overall understanding of the historical uses of a site to decide what tests to use for the chemicals in question. A gas station, for instance, stores and uses different chemicals than a dry cleaner or plating operation. The environmental report which glosses over or omits a complete site history (with sources of information identified) may deliberately be withholding crucial telltale information. Interviews with the owner and operator, aerial photos, older telephone and business directories, and old fire department maps can all help draw a more complete picture of a site and its activities.

* Determine where chemicals were stored, used and spilled to know where tests should be performed. Were the tests taken at locations best calculated to find the worst potential contamination? When underground tanks are removed, for instance, the state now requires testing immediately underneath the former tank at time of removal. A consultant's conclusion there is no known contamination may not rule out the possibility of a spill where tests were not performed.

* Determine if the reports reasonably define the nature and extent of all contamination. Have all potential hot spots been adequately tested and is the contamination fully defined? The contamination must be defined from surface to depth at which it is no longer detected as well as horizontally at all depths found. To have any reasonable comfort level, one needs to be able to circumscribe contamination by drawing a circle connecting a reasonable number of test locations where insignificant or no chemical was found. If other factors suggest the possibility contamination might have spilled in, or migrated to, an area where testing does not exclude that possibility, then more testing is needed.

* Pay particular attention to the groundwater and property borders. Most remediation is very costly when groundwater is impacted. Moreover, chemicals generally dissolve in or float on the groundwater and contaminate clean soils above and below the fluctuating groundwater level. They can spread out and beyond the property lines. If impacted groundwater is in a zone designated as "beneficial" by a regional water board, then more stringent cleanup requirements apply, particularly if there is a drinking water aquifer nearby.

While groundwater generally follows broad topographical (surface) trends, it moves quite complexly up close. For instance, water travels more readily and faster through sand than clay, which can create different zones of pressure. As a result, groundwater may travel in directions contrary to prevailing gradient and gravity. If it seems counterintuitive that groundwater can travel uphill, just think of a spring or geyser forcing water to the surface.

* Are any other sites impacting this site? Until proved otherwise, assume close and upgradient gas stations, dry cleaners, platers or long-term industrial sites have contaminated groundwater, which could have affected the site. Has seller's consultant addressed these concerns adequately?

* Examine location of underground pipes and structures. Groundwater, and thus pollutants, commonly follow underground pipes, such as sewer and water, and structures, such as tanks, which intersect the groundwater. Determine their most likely location and depth. Migration of pollutants will likely have been altered from prevailing directions in those areas. Pollutants may have pooled unexpectedly in those locations, too.

* Take a sobering look at the potential liability of cross-border migration. Once contamination has moved offsite, the potential liability of the site expands greatly. Where there are other likely contributors to the offsite problem, potential liability increases exponentially due to the specter of protracted litigation. Similarly, if an offsite source has contaminated the property in question, buyer will probably be purchasing a lawsuit to get the property partly clean.

* Don't rely on a government agency's letter saying it will take no further action at the site. Take a close look at the so-called "no further action" letter: it requires no further action "at this time"! Once you change the use of the property, you may then have to take further action! Granted, placing a parking lot over a former gas station will not likely trigger further action. But if you dig on site, you may encounter previously undetected contamination, and off you go again. Health departments may require additional remediation if chemical gases are a threat to occupants.

* Remember, as knowledge of chemicals' toxicity evolves, cleanup requirements change. Likewise, the "no further action" letter is only as good as the agency's knowledge of the chemicals' extent and toxicity when it wrote the letter. Take, for example, MTBE, a fairly recent additive to gasoline to reduce air pollution. . . . Until a few short years ago, no one tested for MTBE. Even after limited testing for MTBE began, no remediation was driven by MTBE. By now, however, MTBE drives many site cleanups and has a very stringent cleanup target. What is next?

* Is "clean" ever clean enough? The seller's consultant says the property has been remediated and is "clean." What is clean enough for the seller or governmental agency will, with virtual certainty, never be clean enough for the buyer. But is it clean enough to avoid future problems? Generally not. Remember, buyer will face the same question when selling the property. Once contaminated, most properties remain less marketable as long as risk due to contamination is conveyed too.

* Don't forget the buildings themselves! Lead may remain in older paints, and asbestos remain in building materials such as vinyl tiles, wallboard and sprayed acoustical ceilings. Residues of chemical operations may have encased or eaten into building materials. The building may need its air tested to assess if there is a buildup of contaminants. Mold and mildew can also cause "indoor air pollution"; look for flooding history. An industrial hygienist

should survey a building for hidden hazards where occupants may be at risk.

Quantifying risk is problematic even when one has a fairly good understanding of the contamination on a property. But a systematic approach to ranking risks and placing a range of values on each risk using a best and worst case scenario is essential.

* Worst case valuation. First, one needs to review each of the known and unknown risks on and off a site and rank and value each from worst to least based upon a **worst case** scenario for each item. Consider known onsite risks; all other possible onsite risks unless scientifically ruled out; known offsite risks; all other possible offsite risks unless scientifically ruled out.

Within these broad categories, list and value all relevant possible risks and damages using the following guidelines (and accompanying chart):

- * Site assessment;
- * Site remediation;
- * Other costs of "closing" site with governmental agencies;
- * Development costs including delays due to contamination, extra costs resulting from discovery of additional contamination and higher interest rates;
- * Liability to third parties, e.g., governmental agency suit or claim; prior owners and operators of the property; tenants; downgradient property owner(s); water utility; gas utility; other potentially responsible parties regarding a commingled plume; parties who have been exposed to the contaminants. Include legal fees and costs; expert costs; settlement/judgment costs;
- * Suits you bring against third parties (to the extent not included as a cross-complaint above);
- * Long-term devaluation after remediation, if any (stigma);
- * VALUE OF BUYER'S TIME.

Include items even if they cannot yet be fully evaluated. For instance, if the possibility contamination has migrated to the adjoining down gradient property cannot be ruled out, then assess costs of remediation and lawsuit for severe contamination (relative to contamination found on site).

Be sure to consider as many things as possible which can go wrong -- they usually do. For example, even if the full nature and extent of contamination have been assessed, remediation costs are prone to cost overruns. How long could development be delayed while contamination is remediated? What if contamination remains where development will break ground? What if a tenant's business is interrupted substantially by remediation?

Second, now go through each of the foregoing items and place a value based on a **best case** scenario. The result usually produces a big gap between best and worst case scenarios. The values will differ greatly if you do not have enough information to evaluate highly ranked issues thoroughly. The greater the information, the closer these values will be, and the greater confidence buyer can have in them.

After valuing each of the above risks from worst to least, one should then consider the collective prior experience with other contaminated sites. Are the significant, but speculative, risks at this site really unmanageable in the real world? Are the odds of occurrence or damage claim very good? Are there ways to manage the risk? Sometimes, for instance, a governmental trust fund may be tapped for petroleum spills, or the parties might limit the costs of remediation by purchasing pollution insurance.

Get an estimate of the property's value without any contamination problem. Subtract the worst case value for the cynic's valuation. Subtract the best case value for the optimist's valuation. In all likelihood, the truth lies between, but closer to the cynic's valuation.

Resulting negotiations focus on shifting risks. The buyer asks for protections in the form of price reductions and/or indemnities or their equivalents. In many cases the seller is uncompromising, claiming there is no evidence of major contamination (and hoping to find a less discriminating buyer!)

If the seller refuses to retain those risks, the buyer must carefully evaluate whether to proceed. Is acquisition of this particular site necessary to achieve a broader business plan? How does the risk compare to the overall cost and projected return for the site?

A systematic review of the risks and range of values as described in this article can help the buyer focus soberly on the possible consequences of a purchase, which are often underappreciated by those outside of the environmental field. The buyer who tempers excitement over buying contaminated property by a business-like apprehension of risk will invariably be the long-term winner.