

A Property Purchaser's Tool Box – Part Two

Select the right tools to protect yourself from environmental liabilities

A few months ago, I wrote *A Property Purchaser's Tool Box*. Working in an auto garage as a young man, I learned that the right tool made every job easier, and *Tools Part One* identified the availability and importance of selecting the right legal/technical tool to secure environmental liability protection in the purchase of real estate. I have received a lot of comments from readers (mostly amazed that I knew how to weld—apparently, a Zeus-like task for a mere lawyer) regarding the tools in the box and their use. These discussions lead to interest in *Tools Part Two*.

Part One identified several different tools in the box: the ASTM Phase I Environmental Site Assessment (ESA), reasonable steps letters, insurance, state immunity programs and brownfields policies, to name a few. While each tool has its purpose, I identified the ESA as the fundamental tool for liability protection. However, although the ESA is essential to liability protection, it is not the end all be all. Minimizing liability is certainly a principle goal, but it is not necessarily the only consideration.

Operational integrity

New property owners frequently come to me expressing concern that they secured an ESA only to find an issue on the land that interferes with property use. The frustration comes because the issue was not identified by the ESA. It may be that the property is missing (or the previous owner failed to transfer) permits necessary to operate, or an environmental condition exists that cannot be disturbed, or there are conditions that require additional capital.

I refer to this concept as operational integrity—the ability to use the property for its intended purpose. While selecting appropriate tools and structuring property review, one must determine the extent to which operational integrity is a concern.

Examining the purpose and scope of an ASTM Phase I ESA reveals how the operational integrity issue may be

overlooked. Per the ASTM standard, the purpose of the ESA “is to define good commercial and customary practice ... intended to permit a user to satisfy one of the requirements to qualify for ... CERCLA ... landowner liability protections ...”

To achieve this objective, ASTM sets a standard scope for environmental professionals to follow. A typical ESA then theoretically addresses these standard scope items. An ESA that includes standard scope elements will establish one of the elements of all appropriate inquiry and the basis for certain liability protection.

However, operational integrity of an asset may be impacted by what is not included in the standard scope. There are several areas (referred to as “non-scope items”) not typically examined in an ESA. For example, a standard ESA will not include an examination for wetlands, threatened and endangered species, asbestos-containing material, lead-based paint, mold or radon. Moreover, the standard file review will not typically include a compliance review of the environmental permits necessary for the operation of the business. These non-scope environmental issues can result in operational interference.

Consider this: The buyer commissions a standard scope ESA that is admirably completed by the environmental professional, the ESA does not identify any recognized environmental conditions, and the deal closes. The buyer submits a development plan to the municipal planning department and public notice of the project is given. During the comment period, commenters identify the existence of an endangered species on the property. While the Phase I ESA may be sufficient for purposes of avoiding liability, the project is now, at best, delayed until the issue of the endangered species can be addressed.

Other examples of non-scope issues that may cause delay or financial impacts could be the identification of asbestos in

the building or the existence of wetlands on the property, either of which add cost to a development pro forma and additional time for project completion.

Adjusting the tool

I recall watching my Dad bend an old screw driver into a shape that allowed him to make certain adjustments to an engine. He called it a “J Tool” (probably should have been patented); the point being that the tool needed to be tweaked to meet his needs. The key to avoiding operational integrity is to tweak the tool.

First, the simple awareness that non-scope issues exist will send the buyer down the right path. Knowing that an ESA may not address operational integrity should cause a buyer to ask additional questions to help define the needed tweak. Second, a buyer should evaluate the nature of the real estate project with the project team and potentially seek advice from people knowledgeable of environmental issues. Third, a buyer should evaluate (with help from others if necessary) whether there are facilities or practices on the property that require environmental permits.

Once these questions have been addressed, a buyer can either use a standard ESA, tweak the tool by requesting that non-scope items be added, or restructure the approach and use a different form of environmental audit. In this way, the buyer is not only protected from liability but gains greater certainty that the property can be used as intended without environmental interference. **UB**



Kevin R. Murray is an environment, energy and real estate attorney at Holland & Hart LLP. He advises clients on a broad range of matters concerning the acquisition, remediation and redevelopment of contaminated property.