

Environmental Concerns and Property Transactions

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The purpose of this factsheet is to provide some basic information on environmental concerns the property transactions. People interested the more information or involved the property transactions should consult a qualified attorney, land appraiser, environmental engineer and/or other competent advisers. Many environmental factors are site specific; also laws, regulations and their interpretations change. This factsheet cannot substitute for competent, up-to-date professional advice and assistance.

Environmental concerns and risks should be considered in farm, agribusiness and other property transactions. Contamination can significantly reduce the value of property. Also, the buyer and other parties in a transaction, including the lender, may be held liable for clean-up cost even if the contamination occurred before the property was sold and the buyer had no knowledge of the problem. The cost of clean-up may exceed the value of the property. Contamination can turn an asset into a liability.

As a result, it is a good business practice to investigate the environmental quality of a property and the costs of complying with regulations. Further, since contamination can reduce property values, and a lender in some circumstances can be held responsible for clean-up, more and more lenders require an environmental assessment as a condition for a loan.

This factsheet briefly reviews federal legislation and outlines the kinds of questions which might be investigated in evaluating property.

Legal Background

In 1980, Congress passed the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), often called the Superfund. It was amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA). These laws give the federal government authority to require certain parties to remedy hazardous waste problems, or to clean up the problem and recover the costs from responsible parties.

Under this legislation, any one party can be held liable for the entire cost of investigation and clean up. Liability does not depend on fault or participation in creating the hazard.

Responsible parties can include:

- The present owner or operator, even if they did not cause or contribute to the problem or know about the problem.

- A lender who has foreclosed on the property or had significant control over the borrower.
- Owners and operators at the time the problem was created, even if they no longer have any connection with the property.
- Other past owners or operators in the chain of title from the time the problem was created until its discovery.
- The people who generated the waste, even if they never owned or operated the site and they complied with all laws and regulations in force at the time of disposal.
- The people who arranged for transportation and disposal of the waste or who transported or dumped it, even if they also complied with the laws and regulations existing at the time.

Generally, the best defense under CERCLA and SARA is the innocent buyer defense. This means that before the property was acquired, the buyer made all appropriate inquiry into previous ownership and use of the property and had no reason to know any hazardous substance was present.

Appropriate inquiry may include investigating the past and present uses of property, interviewing past owners and neighbors, reviewing files of federal and state agencies and inspecting the property in detail. Notes, copies of documents, statements and so on should be kept to verify the inquiry.

If any possible problem is found, a detailed environmental investigation should be made. Employing an environmental consultant may be advisable. These people can estimate the nature and extent of the problem and clean up costs. If a problem does exist, the potential buyer may walk away or the terms may be renegotiated. In any case, prompt corrective action is advised. A property owner can be sued for knowingly placing people in peril by not cleaning up a hazardous waste situation.

Action is also advised if a person buys property without being aware of a contamination problem and later learns about one. If the purchaser transfers the property without disclosing the hazardous waste situation, he or she has lost the innocent buyer defense and can be held liable for correcting it.

Environmental Consultants

Competent consultants are worth their fees. However, no licensing requirements or examinations regulate environmental consultants. "Let the buyer beware" is good advice; ask for references and check them thoroughly before employing any consultant. The opinions of state and federal agencies could also be considered.

A property assessment by a competent consulting firm will cost several hundred dollars at a minimum. The cost can rapidly increase, depending on the circumstances and work involved. This expense may be far less than the cost of cleaning up contamination discovered after the sale is finalized.

A consultant should provide a written report. A complete report will typically include:

- A statement of the consultant's qualifications
- A summary of what the consultant did

- History of the property
- Results of a search of government files
- A site visit report
- Sampling and lab testing results
- Recommended clean-up procedures and cost estimates for any problems identified.

Key Areas to Investigate

If you are involved in a property transaction, it is good advice to be environmentally aware. No list of questions can cover every possibility. The following list points out some key areas to consider.

Ownership. Who were the current and past owners and operators of the property? What did they use the property for? Are they aware of any possible problems, critical areas or unusual conditions?

Pesticides. What pesticides have been used on the property? Where are they stored and mixed? Where is the equipment cleaned? How are rinsates, empty containers and excess pesticides disposed of? Are there any unusable or outdated pesticides, empty containers or unidentified materials on the property?

Storage Tanks. Where are they located? What is stored in them? How big are they? Are any leaks known or suspected? Have they been tested? If not exempt, have they been registered? Are there abandoned tanks on the property?

Waste Disposal. Has the property been used as a landfill, dump or other waste disposal site? What was dumped? When? For how long? What disposal methods were used? Is there any suspicion of midnight dumpers?

Animal and Human Wastes. If livestock are raised, how is the waste managed? Has sewage sludge been spread on the property? If so, where, when and in what amounts? Are lab analyses available? Are septic systems present? How do they function? When were they last pumped?

Critical Areas. Are there sinkholes, active or abandoned wells, dredge and fill areas, wetlands, endangered species or their habitat, or other environmentally sensitive areas on the property? If so, where are they located, how are they managed, what permits are in force, are any state or federal agencies involved?

Water Sources. Where does the water for domestic and production purposes come from? Are wells properly installed and protected? Are test results and lab analyses available? What treatment devices are in place? Why were they installed? How have they been maintained?

Other Possible Problems. Has asbestos been used on the property? Any discarded electric transformers present? Are any unidentified or unidentifiable materials present? Have easements been granted for pipelines, mineral or oil exploration, electrical transmission lines or other purposes? Are there any permitted point source discharges on the property? Has any government agency investigated complaints or taken action on contamination problems?

Because of the possibility of discovering problems in the future, a seller should not guarantee or warrant a risk-free property. Answering questions from potential purchasers or their agents to the best of one's ability and knowledge should not imply a risk-free guarantee. Likewise, a seller's agents and others, including agency personnel, should not warrant a property to be environmentally risk-free.

Property Inspection

Visiting property to look for signs of possible hazardous waste problems is a common practice today. Signs of possible problems that may be observed include:

- Stained or discolored soil, floors, concrete pads, rocks or drainage ways.
- Abnormal, dying or dead crops or plants that should be healthy.
- Abnormal, dying or dead livestock, fish or wildlife.
- Unusual odors in unexpected places.
- Pools of unusual-looking water or unidentified liquids.
- Poor housekeeping in pesticide storage and mixing areas, animal waste-handling facilities or other sensitive areas.
- Presence of outdated or obsolete agricultural chemicals, empty containers, electrical transformers, asbestos-containing materials or other hazardous materials.
- Evidence of spills, leaks or other on-site liquid disposal; signs of incineration; evidence of dumping; fill areas with materials from unknown sources.
- Evidence of liquids flowing in from adjoining properties; questionable or hazardous practices on adjoining properties.

Summary

Hazardous wastes and water contamination are possible problems even in the most remote rural area. There is no way to guarantee that you will avoid contamination problems and possible liability. Investigating and being environmentally aware can minimize your risks and contribute to a better quality of life for you, your family and all Tennesseans.

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