

The Environmental Corner

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So What Triggers An Environmental Investigation?

For years we've worked with drycleaners that suspect they might have an environmental problem, but have been afraid to find out whether they do or not. It is completely understandable why drycleaners would be afraid of collecting soil and groundwater samples at their site. Of course, the biggest reason for not looking into the environmental conditions at your site or sites is opening up that proverbial "can or worms," or maybe it's "Pandora's Box." Simply stated, the cost of an environmental cleanup would cause financial hardships at best. That being said, this issue causes many a drycleaner to lose sleep.

So what triggers an environmental investigation? Sometimes you can control the situation, but most of the time you can't. More times than not, the triggering event is a requirement by a bank lending on the property. Specifically, the property owner wants to refinance his or her property or a perspective buyer

of the property is trying to obtain financing. What happens next is that a bank will require a Phase I Environmental Site Assessment or Phase I ESA.

A Phase I ESA is a due diligence evaluation of the property to identify potential or existing environmental contamination liabilities. This work is conducted under guidelines established by ASTM International. ASTM International is an organization made up of engineers, scientists and policymakers

that set technical standards for all types of materials, products, systems and services. The consultant conducting the Phase I ESA will inspect the site for signs of staining, evidence of spills, stressed vegetation, determination of underground and above ground tanks, secondary containment, violations and operating practices. They will evaluate records at the fire department, local health department, state environ-

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mental agencies and federal EPA, to determine whether fires or chemical spills were reported on the subject property or on neighboring properties. This review would also evaluate what businesses are operating in the near vicinity that could cause environmental impacts that could impact the subject site. The most current guidance protocol is set forth in ATM E 1527-05, known as "All Appropriate Inquiries" and can be found on the internet. Never does a Phase I include actual subsurface samples such as soil, soil gas, or groundwater.

Should the Phase I ESA identify a reasonable potential that soil and groundwater may be impacted, the consultant will suggest that a Phase II ESA be conducted. This will include actual collection of subsurface samples to determine whether the property has been impacted with chemicals that pose a risk to human health or the environment. And this is where the costs start to mount, should chemicals be identified.

Other issues out of your control that trigger environmental investigations include: 1) contamination showing up in municipal or private drinking water wells; 2) contamination showing up beneath neighboring or downgradient properties; and 3) regional investigations conducted under the direction of state or federal regulatory agencies such as those conducted in Modesto and a new investigation starting in

Visalia.

In these situations, typically perchloroethylene (PERC) has been identified in the groundwater and because PERC is a common dry cleaning solvent, focus is put on drycleaners both past and present. We have seen situations where the State of California found levels of PERC in municipal drinking water wells and immediately set out to identify all drycleaners that operated within a mile radius of the well over the past 50 years. By using old phone books and city directories it is fairly easy to identify the address, name and period of time that a drycleaner has operated at a location. We have seen the State pursue a retired couple that operated a drycleaner for just two years from 1958 through 1959. While we don't believe that in the end the State required this couple to cleanup the contamination, they spent time and money defending themselves from the long arm of the law.

While I hate to be the bearer of bad news, it is important that all drycleaners understand how investigations are triggered and what to expect once they are triggered. For this reason we always talk about finding the businesses or property owner's old comprehensive general liability (CGL) insurance policies. Most people that know me understand that these old policies may be the most valuable paper you could ever have. Old CGL policies written before 1985 or 1986 do not

have absolute pollution exclusion language in them and therefore may be used to defend the insured against claims. A claim is what an "injured" party can bring against a business or individual that owned or operated a business that is found to have any amount or responsibility for the contamination found in the subsurface, typically the groundwater.

This topic is an article in and of itself and one that we will write about in a future article. For now, my goal is to educate you about the environmental arena, for you to understand how investigations are triggered and to understand that old insurance policies of yours or those that you bought your businesses from may be worth millions of dollars. I want drycleaners to be aware of their surroundings and what drilling activities are happening in your neighborhoods, know your rights by reviewing your lease agreements, find your old insurance policies and store them securely, write down and secure store information regarding the individuals that operated at your location before you did, and seek qualified environmental assistance. And one more thing, remember the story of Pandora's Box? Zues had given Pandora a box and told her not to open it, but she did anyway. And even though all evils subsequently unknown to man escaped from the jar, at the very bottom of the jar there lay hope.