

Compliance Headliner

Pending Environmental Regulations Will Soon Affect Commercial Property Transactions...

What are Environmental Assessments?

Whether real or perceived, property that carries a stigma of environmental contamination can wreak havoc on the owner, business operator and financial lender. How can the risk be quantified? Is there a way to compare the liability to the development potential of a piece of land?

In short, yes. But, interested parties should understand the regulatory basis, upcoming changes, available incentives and ramifications of inadequate or incomplete research.

The most widely followed standard for evaluating the environmental condition of a parcel of land is conducted in accordance with the ASTM E-1527 *Phase I Environmental Site Assessment (ESA)*

Process, most recently revised in 2000. The Phase I ESA incorporates several components, to include a 1) **Site Inspection** of the property and adjacent properties to identify characteristics, physical features and potential environmental stresses; 2) **Environmental Records Research** of property, adjacent properties and surrounding properties for inclusion on state and federal environmental databases, such as CERCLA, underground storage tanks, RCRA hazardous waste, etc.; 3) **Historical Records Research** of available records for the target property for the last 40 years to identify past owners or operators who may be associated with hazardous substances or petroleum; 4) **Physical Setting** review of County Soil Surveys, current and historical topographic maps, etc. to identify threats to (Continue reading on page 2)

Autobody Shops Must Make Lead Exposure Determination...

A Federal Occupational Safety and Health Administration (OSHA) inspector recently cited a Autobody Collision Center near Atlanta, GA for not making an initial determination of employee exposure to lead through paints and related products used in the collision center. Specifically, OSHA's regulation states that "each employer who has a workplace or work operation covered by (the lead) standard shall determine if any employee may be exposed to lead at or above the action level." One of Crandall's first questions was, of course, which products contain lead? After reviewing their chemical inventory and material safety data sheets (MSDS), we discovered that only three paints/tints contained lead compounds, as 30-40% of the product. These specific tints are not used often and when they are used, only comprise a small amount of the entire paint mixture that is applied to the vehicle.

Nevertheless, OSHA requires monitoring for each specific workplace to determine the average concentration. Per 29 CFR, 1910.1025(d)(2), employees must not be exposed to a time-weighted concentration of 30 ug/m³ or more during an 8-hour period. Exposure may be through skin contact, inhalation, eye/tissue absorption and even ingestion. Multiple pathways allow lead to be carried through the bloodstream to target organs. As for toxicity, lead has been shown to affect virtually every major organ in the body (<http://www.pca.state.mn.us/waste/pubs/lm-arp.pdf>). Although the amount of the lead-based tint used in the paint mixture may be relatively small, lead is extremely hazardous and is a cumulative poison. (Continue reading on page 3)

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or from the target property from activities adjacent or on the target property, respectively; and 5) **Interviews** with former and existing owners, operators and occupants of the target property and adjacent properties, as available.

Why and when are Environmental Assessments necessary?

Commercial and industrial operations initiate numerous environmental regulations that can greatly impact the financial condition of a business. In regards to hazardous substances, CERCLA, also nicknamed *Superfund*, authorizes the EPA to sue responsible parties for releases that pollute private and public property.

The amendments made to CERCLA in 1986 (under SARA) created an "innocent landowner defense" to liability for those persons who could demonstrate they did not know and had no reason to know prior to purchasing a property that hazardous substances had been released on, in or at the property.

Additional revisions made to CERCLA in 2000 under the Small Business Liability Relief and Brownfields Revitalization Act identifies three entities who may qualify for certain liability exemptions: *innocent landowners*, *bona fide prospective purchasers* and *contiguous property owners*. Each party must demonstrate they did not cause, contribute, or consent to any releases of hazardous substances.

To demonstrate they "did not know," all appropriate inquiry must be made in to the previous ownership and uses of the property at the time of transaction... or, more commonly referred to as a Phase I Environmental Site Assessment.

Red flag properties...

While environmental contamination may be discovered with residential, commercial and industrial property, typical properties that may cause alarm include:

- Gas stations
- Petroleum storage/transfer facilities
- Cemeteries
- Dry cleaners
- Military and government facilities

Is there a governing Statute for completing Environmental Assessments?

As mentioned earlier, the industry standard for conducting all appropriate inquiry is the ASTM E-1527 Phase I Environmental Site Assessment process. The purpose of the standard is to define good commercial and customary practice for conducting an environmental assessment of commercial property. Because releases regulated by other statutes are **not exempt** from the CERCLA process, petroleum, pesticides, PCBs and even asbestos may be described in the Phase I ESA report. As such, the Phase I practice is intended to permit a user to satisfy one of the requirements to qualify for the innocent landowner defense to CERCLA liability.

The ASTM standard represents the first consolidated effort by environmental professionals, regulators and legal representatives to develop a uniform guidance document.

However, this standard, and even the phrase Phase I Environmental Site Assessment, may soon be a thing of the past. On Thursday, August 26, 2004 the US Environmental Protection Agency published their proposed *Standards and Practices for All Appropriate Inquiries* in 40 CFR, Part 312, marking the first time that environmental due diligence is codified in a federal regulation (www.edr.net). The EPA's proposed standard differs from the Phase I ESA standard in two major categories: 1) the scope of conditions indicative of threatened releases of hazardous substances and 2) the qualifications required for the Environmental Professional completing the assessment.

Who is qualified to conduct an Environmental Assessment?

The Environmental Protection Agency's recently proposed standard specifies the qualifications for an Environmental Professional to include a relevant degree (in engineering, geology or environmental science) and adequate full-time work experience (no less than 3 years). One study reports that 20% of consultants who are currently conducting Phase I ESA's do not meet the draft rule's definition of an Environmental Professional. (Continue reading on page 4)

Recent Lawsuit Creates a Stir in the Automotive Service Industry...

There have been numerous articles published recently about the settlement made by Jiffy Lube International in a class action lawsuit related to undisclosed "environmental fees." The company will reimburse a reported seven million customers who were wrongfully charged fees ranging from \$.80 to \$2.00 per repair order. While private businesses are free to charge their customers any price, questions arose because the fees were not included in advertisements for the price of the service. Furthermore, the fees were added to invoices without notifying the customer. Understandably, the lawsuit has created quite a stir among automotive dealerships and national repair shops. Fear of applying unlawful charges, not adhering to regulations and "double-dipping" have generated many inquiries from our clients. If you have questions or would like more information about a proper cost recovery program, please contact Crandall Corporation at **800-248-4801**.

Hazardous Pollutants Pose a Serious Health Risk in GA

The Atlanta-Journal Constitution published an article on November 15, 2004 highlighting deficiencies in the Georgia EPD's Hazardous Waste Trust Fund. According to the article, the \$13 million dollars contributed annually by regulated industries and governments has been depleted by other state programs, leaving humans vulnerable to toxic pollutants, such as paint solvents, still present in soil and groundwater at dozens of hazardous waste sites. Due to lack of funding, work at eight (8) sites has been terminated and delayed indefinitely at 26 others.

Superfund Sites are of course not unique to Georgia. In 2001, there were 81 million tons of hazardous pollutants released into the environment in the United States. This includes illegal and permitted releases. As of July 9, 2003, there are 193 Superfund Sites in South Carolina. Of these, 13% (26 sites) are owned by the government.

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There does not appear to be a "safe" blood-lead level for effects on these organs. Therefore, even small levels in the body can have severe effects (<http://www.epa.nsw.gov.au>). OSHA's lead standard defines "lead" as metallic lead, all inorganic lead compounds, and organic lead soaps. After researching automotive paints, Crandall determined that the following products may contain lead and/or lead compounds:

Topcoats with Lead Compounds

PPG	5082	Automotive Refinish Delta	Lead Chromate
Valspar	5034	Implement Refinish and Repair Enamels	Lead Chromate
PPG	5078	Automotive Refinish Duracryl	Lead Chromate & Cadmium
Du Pont	5018	Refinish Paint	Lead Chromate

Tints with Lead Compounds

PPG	AUO7B	HS Bright Yellow	Lead Chromate
Sherwin	5144	#55-62 Auto toner	Lead Chromate
PPG	AUO7C	HS Sun Yellow	Lead Chromate Sulfate
BASF	145	Glasurit (21-Line)	Lead Chromate Molybdate
PPG	AUO7A	HS Orange	Lead Chromate Molybdate Sulfate

Topcoats with Lead Chromate Pigments

PPG	5017	American Finishes Supercryl Enamel	Lead Chromate
PPG	5080	Automotive Refinish Deltron	Lead Chromate

From the 1998 Product Review Reports, submitted by the automotive paint manufacturers for the 1997 calendar year, there is an estimated 12,000 pounds of lead, 166 pounds of cadmium and 7,400 pounds of hexavalent chromium in automotive paints per year (<http://www.pca.state.mn.us/waste/pubs/lm-arp.pdf>). Information reported by paint manufacturers is that Lead Chromate Molybdate and Lead Chromate pigments provide coverage, durability and accurate color match. However, there are alternatives... For example, the majority of PPG's 10,000-color pallet is unleaded.

It can be extremely expensive to determine the concentration of lead in each workplace. Multiple personal samples will most likely be required, which can cost several hundred dollars. (Continue reading on page 4)

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This, coupled with ambiguous language in the Phase I ESA Standard, has resulted in inconsistent practices. One stakeholder reported that “it is very likely to receive two entirely different reports on the same property from two consultants conducting an assessment.”

Crandall is a private consulting and contracting firm with 25 years of experience in the environmental field – including hazardous materials management, underground storage tanks, petroleum releases, asbestos, lead, contaminated soils, laboratory chemical packs, hazardous waste, recycling, transport and disposal. Crandall employs a team of qualified professionals, including *Environmental Professionals* (who meet the qualifications listed by the EPA in 40 CFR, Part 312.21), *Regulatory Compliance Specialists* and *Hazardous Materials Technicians* and *Certified Hazardous Materials Managers*, with an extensive array of educational disciplines, certifications and work experience.

What are the ramifications of not completing an Environmental Assessment?

Under CERCLA, financial responsibility for the clean-up of hazardous waste sites may be assigned on a *strict, joint and several*, and *retroactive* basis. *Strict* liability allows the government to place blame on polluters – regardless of fault. For example, a generator may be held responsible for a release caused by their transporter. Through *joint and several* liabilities, the government may sue numerous parties for financial reimbursement or they may assign the entire clean-up cost to one owner, operator, transporter, etc. *Retroactive* liability means that even if the party was conducting activities in accordance with the law at the time of the release, they can be held liable for future contamination. Let’s say a generator legally sends their solid waste to an off-site landfill for ten years. If after ten years, the regulations change and the solid waste becomes restricted from landfill disposal, the US government may sue the generator for clean-up costs of the landfill.

Small Businesses, Property Owners and Developers – Remediation of contaminated soil, groundwater and surface water can be extremely expensive and time-consuming. The stigma of being listed on a State or Federal priority list (“Superfund site”) can delay development and devalue the property substantially. By utilizing a qualified Environmental Professional, you can protect your assets for a small percentage of the property/business value.

Financial Institutions - Although CERCLA includes certain liability relief for financial institutions, it does not reduce the risk of foreclosing on contaminated property that is worth only a fraction of the loan value/mortgage.

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If concentrations are detected at 30 ug/m3 or greater, a medical monitoring program must be implemented and additional engineering controls may be required. To avoid these costs, review your product inventory and replace lead-based tints, topcoats and clearcoats with an unleaded alternative. Talk to your supplier and request all unleaded products, if available.

Regardless of the lead content, workers must always take personal safety precautions when handling paints and related chemicals. Applying the product in an approved location is extremely important and effective in reducing exposure. For example, AKZO Nobel states that certain metal emissions could be reduced up to 90 percent if the paints are applied in a spray booth (<http://www.pca.state.mn.us/waste/pubs/lm-arp.pdf>). In addition to engineering controls, workers can greatly reduce and possibly eliminate toxic metals in their bloodstream by wearing skin, eye and respiratory protection. For more information or if you think a **Lead Exposure Determination** is necessary for your workplace, contact Crandall at **800-248-4801**.

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