Environmental Audits—Past to Present[1]

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In 1980, congress passed the Comprehensive Environmental Response, Compensation and Liability Act (known also as CERCLA, Superfund, or the Act [reference 1]), which authorized the federal government to clean up inactive hazardous waste sites that threatened human health or the environment. Also known as "Superfund", this law provides a fund for the cleanup of contaminated sites when no other parties are able to conduct the cleanup. The Act enables the Environmental Protection Agency (EPA) to recover the cleanup costs from those parties responsible for the contamination, if they can be identified, with little or no direct costs to the American taxpayer.

Because of the need for reauthorization of the original law and calls for legislative clarification of what has been cited as poorly drafted legislation (reference 2), CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act, also known as SARA (reference 3).

To date, these amendments are also criticized as inadequate because of inconsistent judicial interpretation and implementation of the Act's stringent provision regarding liability. The calls for legislative reform continue.

Environmental audits have appeared largely as a result of CERCLA. As amended, CERCLA enables the Environmental Protection Agency, acting by itself or working in conjunction with state governments, to compel cleanup by, or to recover cleanup costs from those parties responsible for environmental contamination.

CERCLA recognizes several distinct classes of parties responsible for the cost of cleanup. These potentially responsible parties include waste generators and transporters (including those who arrange for transportation), and current or past owners or operators of a contaminated facility. A facility is broadly defined as any area where a hazardous substance is located. This would include contaminated farm and ranch lands.

Environmental Liability

Cleanup costs can easily exceed the value of a property. This lesson has not been lost on lenders and others engaged in property transactions who have been found liable as owners and operators under CERCLA. Because of this, and the liability protection that an audit may provide under the law, environmental audits have become a standard business practice for most lending institutions. While the audit doesn't guarantee a risk free real estate transaction, it can dramatically limit liability exposure by uncovering potential environmental hazards present on the property.

The Audit Process

The foundation of all environmental audits rests on research of the history of use and abuse of the property. Properly conducted, an audit should turn up such indicators of contamination as abandoned dumps, leaking underground storage tanks, and pesticide mixing and loading sites.

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Audits are generally triggered by a seller or buyer's response to questionnaires prepared by a lender's loan officer or environmental attorney. If the questionnaire raises concerns of environmental contamination, the lender may call for an audit. Lenders normally provide the buyer or seller with a list of reputable environmental firms capable of carrying out the audit. Choice of auditing firm and costs of audits are the responsibility of the end user.

Auditing procedures may differ from firm to firm. Generally, an audit will consist of one or several phases depending on the condition of the property. Phase One normally includes a search and review of all documents related to the history of the property, interviews with neighbors, a simple walkthrough, and limited sampling. Under most circumstances, this phase of the audit will satisfy lender requirements. However, if potential problems are uncovered, a more detailed study of the property will be required by the lending institution. Since these later phases require additional sampling and analysis as well as possible cleanup, they can be expensive.

Implications for Producers

Storage, use, and disposal of crop management materials and other hazardous substances are practices common to farm and ranch operations. As a result, lending institutions are increasingly cautious of becoming financially involved with farming operations for fear of being strapped with cleanup costs. To limit their liability exposure, many institutions are now at a minimum, requiring completion of environmental questionnaires as a condition of all property transactions, including production loans. Farmers and ranchers are also becoming wary about leasing their lands for crop production and are also screening potential lessees with detailed environmental questionnaires. In some cases, lessees have called for Phase One audits prior to leasing property.

Preparing for an Audit

Preparation begins long before the need for an audit arises. Essentially, it involves developing sound agricultural chemical risk management practices to limit environmental contamination. At a minimum, the crop producer should establish a process to identify and analyze inherent chemical risks within the operation; implement procedures for managing those risks; and periodically review the process as procedures and laws change.

Since an environmental questionnaire normally triggers the audit, the producer should consult with an environmental attorney to clarify any ambiguities or concerns with a questionnaire. Lists of attorneys specializing in environmental law can normally be obtained from most state bar associations.

The auditing team should contain an attorney. An attorney may assist in protecting the confidentially of the survey; evaluate what, if any, information is required to be reported under federal and state law; and provide the auditing team with information regarding laws and regulations relating to that particular operation.

Conclusion

In time, because of the concern of environmental liability, the environmental audit will become as commonplace in real estate transactions as the termite inspection. CERCLA and other environmental laws and regulations are spurring a variety of industries, including agriculture, to address even further hazardous waste issues and develop environmentally friendly procedures as a prerequisite for doing business. The environmental legislation of the 1970s and 1980s has become a business reality of the 1990s.

References

1. 42 U.S.C. 9601-9675 (1982 & SUPP V 1987).
2. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823, 839 (W.D. Mo. 1984).
3. Pub. L. No. 99-499, 100 Stat. 1613-1782 (1986). Codified throughout 42 U.S.C. sections 9601-75 (1982 & Supp. V 1987).