



Environmental Corner: An Attorney's Role in Reviewing a Phase I Environmental Assessment

By M. Joel Bolstein

Whether you are buying a former industrial brownfield or a green stretch of farmland, you need a Phase I environmental assessment to understand the environmental condition of the property you are buying and to protect yourself from potential environmental liability. A Phase I report is a non-intrusive investigation (i.e., no soil or groundwater sampling is involved) that is performed by an outside environmental consultant. The consultant does a file review, interviews current and former owners, checks applicable environmental databases, and does a walk-around the site looking for potential environmental issues, such as underground storage tanks and distressed vegetation. At the conclusion of the work, the consultant produces a Phase I report, which provides findings and conclusions, including whether any additional investigation in the form of a Phase II assessment is required. A constant question at this stage is whether or not an environmental attorney needs to review the Phase I assessment.

There are a number of reasons why an environmental attorney should review a Phase I Report before it is signed and sealed by the consultant. The first reason is the nature of the report and the fact that it serves multiple purposes. The Phase I report is not only part of the due diligence process in a transaction, but it often is provided to the purchaser's lender in order to obtain financing, and it generally becomes a document placed in the property owner's file that is made available for review by any future purchaser. As such, the contents need to be accurate, consistent with current law and practice, and the findings need to be presented in a manner that is matter of fact and not overly alarmist. Once a statement is made in a Phase I report it stays there forever, and we've been involved in numerous transactions where a statement in a prior Phase I was inaccurate or misleading and later became difficult to correct, because the prior consultant was no longer in business.

Experienced environmental lawyers are familiar with the standards for completing a Phase I to be consistent with the US EPA's current All Appropriate Inquiry standard. They also know what questions to ask the consultant, especially when it comes to recommendations being made to perform intrusive sampling as part of a Phase II. Furthermore, because the legal advice given by an environmental attorney to his or her client is protected by the attorney-client privilege, when a consultant is retained by the environmental attorney for the purpose of providing legal advice to the client, the information exchanged between the attorney and the consultant is arguably protected from disclosure by the attorney-client privilege.

Our recommendation is that all draft reports be marked "Privileged and Confidential - Attorney-Client Communication" and that all other written communications between the attorney and the consultant be similarly marked, in order to maximize the potential that the privilege will attach and the documents will be protected from disclosure. Following this process, including the review by a skilled environmental counsel, will ensure that the Phase I report is accurate and that the findings and

conclusions, including whether a Phase II assessment is necessary, are consistent with the applicable law and standards.

If you have any questions about Phase I or Phase II environmental assessments or if you need a recommendation for an environmental consulting firm to perform an assessment, please contact Joel Bolstein at 215.918.3555 or jbolstein@foxrothschild.com.



Fox Rothschild LLP
ATTORNEYS AT LAW

© 2008 Fox Rothschild LLP. All rights reserved. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.

California Delaware Florida Nevada New Jersey New York Pennsylvania

www.foxrothschild.com