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Throwing away good money after bad: Cleaning-up parking lot storm drains is an exercise in futility



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Today, almost all real estate transactions involving commercial, industrial or large multifamily residential properties will trigger the need for a Phase I Environmental Site Assessment, particularly on deals that require financing from a major lending institution. Whether designed to adhere to the American Society for Testing and Materials' Phase I standard or the Phase I regulations promulgated by the U.S. Environmental Protection Agency (EPA), the primary goal of the Phase I is to determine whether "recognized environmental conditions" are present at the property in question. Generally, a recognized environmental condition or "REC" is defined as evidence of a spill of hazardous substances or petroleum. Unfortunately, that's a broad definition which, intentionally or not, captures a number of conditions that generally do not pose a substantial risk of liability for the purchaser or the lender but which usually must, if identified in the Phase I as a REC, be abated at the expense of one of the parties. Parking lot storm drains are an example of such a condition.

It seems that in at least one-half of the real estate transactions that require a Phase I, the consultant performing the Phase I identifies parking lot storm drains as a REC that requires follow-up investigation (i.e., a Phase II). To be fair, some consultants will only make that finding if during the Phase I inspection they observed a petroleum sheen or other sign of contamination in the storm drain, or evidence of nearby staining. Others, however, will list the mere presence of storm drains as a REC. The problem is that, until we start manufacturing drip-less cars, there's a better than 50% chance that at least some of the storm drains located in a parking lot will be impacted with petroleum products, and impacted at a level that, under the relevant agency's guidance, requires clean-up. That may not be a big deal to the parties if the property has one or two parking lot storm drains, but with larger properties, such as most shopping center parcels, 15-30 storm drains are the norm, and costs can quickly skyrocket. As a general rule, the clean-up of a storm drain involves several phases including: pre clean-out sampling; paying a contractor to pump-out

the liquid and/or sludge; the disposal of the liquid and/or sludge; post pump-out sampling; and the preparation of a report to the relevant agency. If the parties are lucky, they'll be done upon the completion of those phases. Often, however, the post pump-out samples are not clean and further pumping or excavation is required, or during the project the consultant discovers that the storm drain is actually connected to several other pools that now also must be addressed in the same fashion. In short, costs can quickly get out of hand.

Now clearly, few would question the need to sample storm drains located at a gasoline station or outside of a loading dock at an industrial facility. Today just about everyone has read about the problems associated with storm water run-off. But is it really necessary to sample parking lot storm drains located at an office building or apartment complex, particularly where everyone involved knows beforehand that, because cars drip fluids, at least some of the storm drains will be impacted? With few exceptions, the regulators do not usually go around on a routine basis and require sampling at such properties. Indeed, it seems that most parking lot storm drain clean-ups only occur when one of the parties is required, either by the other side or a bank, to bring it to the attention of an agency and obtain a "No Further Action" letter.

The reality is that parking lot storm drains are subject to regulation as Underground Injection Wells under the federal Safe Drinking Water Act. In fact, under those regulations, unless the property owner has submitted an inventory of its storm drains to the EPA, its use of those drains is illegal. However, one has to question the wisdom of risking losing a deal, or forcing the other side to pay what may well be tens of thousands of dollars to clean-out storm drains that, absent run-off from cars, will become re-contaminated months, if not days, after the cleanup.

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