



CASE STUDY

CALIFORNIA COMMERCIAL/INDUSTRIAL PROPERTY

Sale of Property in 1995

- Commercial property in California containing two existing warehouses and another buildable parcel (collectively, the “Subject Property”) goes on sale in 1995. A Phase I ESA is commissioned by the Seller of the Subject Property in anticipation of the sale, with the following findings:
 - The Subject Property contained a single industrial building constructed in the 1920s, which was used for ball bearing production between 1920 and 1940. By 1940, the facility was converted to use for production of cleaning products, which continued until 1994, with expansion through the construction of a second building in the early 1960s. At time of Phase I ESA, buildings were vacant and the production equipment was being dismantled.
 - A 10,000 gallon diesel UST was removed from the Subject Property in 1990. Following the removal, a UST removal investigation was completed, and the County environmental regulatory agency issued a NFA.
 - Sanborn maps depicted 11 aboveground storage tanks associated with the cleaning product manufacturing operations as storing oil, fuel and tallow. During the site reconnaissance, the Phase I assessor identified 14 ASTs at the Subject Property. Other than the Sanborn map information, details regarding the contents (or former contents) of the ASTs are not included in the Phase I ESA.
 - Citing regulatory closure of the former UST and no evidence of any releases from the ASTs, the Phase I ESA concludes that there are no RECs associated with the Subject Property and does not recommend any further investigation.

Sale of Property in 1995

- A purchaser buys the Subject Property without commissioning its own Phase I ESA or obtaining a reliance letter from the Seller's Phase I consultant.
- The purchaser of the land is a Single Purpose Entity, which is affiliated with an operating company that will use the existing buildings at the Subject Property for warehousing and logistics, with the intent to build a third warehouse in the future.
- The operating company holds operational (i.e., new condition) Pollution Legal Liability coverage, which it renews on an annual basis, but no PLL policy is put in place for pre-existing conditions at the Subject Property.

2003 Refinancing – Phase I ESA

- In 2003, owner of Subject Property refinances.
- Lender allows owner to use the same consultant who conducted the Phase I ESA in the mid-1990s.
- The ASTs formerly located on the Subject Property had been removed, and consultant notes that there was no evidence of releases from the former ASTs.
- Phase I ESA again concludes that there are no RECs associated with the Subject Property and does not recommend any further investigation.

2015 Refinancing – Phase I ESA

- In 2015, a new lender becomes involved with the Subject Property and requires a new Phase I ESA, prepared by a new consultant.
- The consultant obtains files from the local Fire Dept., which indicate that an adhesive formerly used on-site as part of cleaning product manufacturing operations contained 8 percent by weight 1,1,1-TCE, a chlorinated solvent. These files were available from the Fire Dept. during both prior Phase I ESAs, but were not obtained or reviewed.
- In addition, during the site reconnaissance, the consultant observes two sealed floor drains in one of the buildings at the Subject Property.
- Based on the length of time the Subject Property was used for cleaning product manufacturing, the use of chlorinated solvents, and the presence of floor drains, the consultant concludes that they cannot rule out the possibility that there have been subsurface impacts, and considers this a REC.

2015 Refinancing – Phase II ESA

- Based on the Phase I ESA findings, the lender requires a limited Phase II investigation, consisting of three soil borings near the floor drains, and installation and sampling of five subslab vapor pins.
- None of the soil samples had concentrations of VOCs above laboratory reporting limits (RLs).
- Several VOCs were detected in subslab vapor samples at concentrations above laboratory RLs but, of the VOCs detected, only PCE was detected at a concentration that exceeded RWQCB ESLs for subslab/soil gas under a residential use scenario, and such detection was only at two of the five sampling points.
- Given the commercial use of the Subject Property, Phase II report concludes that no further action is required.

2019 Construction Refinancing – Phase I ESA

- In 2019, the owner of the Subject Property goes back to the 2015 lender for financing for construction of a third warehouse at the property.
- Another Phase I ESA is conducted (by a different consultant than the 2015 Phase I ESA), which identified an ongoing investigation of chlorinated solvent impacts to groundwater at a property upgradient of the Subject Property.
- The Phase I recommended completion of a Phase II to evaluate potential impacts to onsite groundwater from the office source and to evaluate the extent of PCE in soil vapor detected during the 2015 investigation, as PCE ESLs had changed in 2019, and the 2015 PCE detections were now above ESLs for commercial uses.

2019 Construction Refinancing – Phase II ESA

- To complete the Phase II investigation, drilling permits had to be obtained from the County Dept. of Public Works. The County environmental regulatory agency became aware of the drilling permit application, and requested a meeting with the Subject Property owner to discuss the work.
- The Phase II identified PCE in groundwater at concentrations exceeded the ESL for vapor intrusion under a commercial land use scenario. Concentrations in PCE in groundwater collected along the upgradient and central portions of the Subject Property were generally similar, but an elevated detection of PCE in one sample at downgradient portion of Subject Property suggested a potential onsite source.
- Benzene, chloroform and PCE were detected in soil vapor samples at concentrations above their respective ESLs for vapor intrusion under a commercial land use scenario.
- Following the Phase II investigation, the County environmental regulatory agency reviewed the data, opened an environmental case, and named the owner of the Subject Property as the Responsible Party.

2020 Voluntary Remedial Action Agreement

- In 2020, the property owner entered into a Voluntary Remedial Action Agreement with the County regulatory agency.
- The property owner has since been engaged in a data gap investigation trying to demonstrate that impacts to the Subject Property are attributable to an offsite source.
- Based on the investigation to date, a vapor mitigation system will need to be incorporated into the to-be-constructed warehouse, and vapor mitigation also may be required in the existing warehouse buildings.
- There is a residential neighborhood and a public school located adjacent to the Subject Property. The site investigation also is evaluating potential impacts to these sensitive receptors.

2020 Environmental Insurance Claim

- The operating company submitted a claim to its environmental insurer in 2020.
- The insurer denied coverage based on the fact that the Voluntary Remedial Action Agreement was entered into by the property owner (which also was the party designated as the Responsible Party by the County environmental regulatory agency), not the operating company, and the property owner was not an insured party under the policy.

Lessons Learned

- Environmental diligence is only as good as your diligence advisors
- Consider the context in which an environmental report was prepared (sell-side reports)
- Take steps to preserve eligibility for landowner liability protections
- Understand that a diligence advisor has an incentive not to contradict its own prior findings
- Evaluate and understand potential reporting requirements prior to conducting Phase II sampling
- PLL coverage – several opportunities to put PLL coverage in place for pre-existing conditions but did not do so; for PLL coverage that was put in place by operating company, failed to include affiliated property owner as a named insured