Buyer beware of the environmental site assessment (ESA) closed spill event

June 09, 2014 - Long Island

Many times while conducting a phase one environmental site assessment (ESA) spill events are discovered while checking the database at the site and adjacent properties. Often, these spills have listings of a closed date which was entered into the computer or are not yet closed according to the computer. The latter of the two listings is easier to advise clients about. "Why is the spill not closed?" is the first question. Many times through communication with the responsible party (who the spill has been levied against), a consultant can figure out the reason for the open spill event and advise their client appropriately.

The more complex scenario is when the site has received regulatory closure on a spill event. When representing a buyer who is relying on the phase one report, consideration needs to be given to the client's future use of the site as not all "closed spill events" are equal. A minor surface oil spill such as an above ground tank overfill event may be easy to dismiss as such (minor). However, if a client is redeveloping an old gasoline station, the closed spill event in the database should be the beginning not the end of the investigation. The first step should be obtaining the documents that supported the spill closure. This can be obtained from either the responsible party (presumably the seller) or through a Freedom of Information Act (FOIA) request to the regulatory agency that issued the spill and closure letter. When the impact that occurred was significant, the consultant should ask "would it meet today's cleanup standards?" Every spill closure letter I have ever read, leaves open the possibility of the regulators re-opening a case for a variety of reasons. So a spill closed ten years ago may not meet today's standards, and is something a client needs to be aware of. This is pertinent when considering vapor intrusion (VI). This is the process by which contamination breakdown volatizes into a gaseous state. This gaseous state can migrate into the structure by cracks in foundations causing air quality concerns. For many years, the soil and groundwater were the primary media investigated and subsequently remediated when required.

We recently handled a project with a similar situation of a former gas station ready for development. After asking the questions outlined above, we were finally provided with the reports issued to the regulators that facilitated the spill closure. However, there in the regulatory files was a copy of the email exchange that very clearly indicated the soil and groundwater had minor impacts above the standards for that agency. The regulators agreed to allow this impact to remain but noted that should the site be redeveloped in the future, special handling and disposal of the soil would be required. Since this was exactly what our client was planning on doing, the impact of the spill closure was a game changer for them knowing that the cost of their development would increase.

The recent changes to the American Society of Testing Materials (ASTM) for performing phase one assessments included a clarification of this section. The E1527-13 standard outlines the importance of the regulatory file review section and its need to be in the report.

This scenario illustrates the importance of working with firms that are conforming to the new standard during the due diligence phase. Hiring a firm with the proper experience and insurance coverage will serve the buyer well versus hiring the most inexpensive provider.

Chuck Merritt, LEED AP, is the president of Merritt Environmental Consulting Corp., Hauppauge, N.Y.