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What might landowners learn from the Gulf oil spill?

By Curtis Seltzer

As I write this at the end of the first week in June, the cost estimates to clean up the BP oil-blowout and compensate for damage are over \$30 billion, and going up. Some portion of that will find its way to beachfront property owners whose land and/or businesses were negatively impacted.

Beachfront landowners could have their properties permanently devalued if the oil stays around over many years as it has in Alaska, as well as by buyers who fear future blowouts and long-term effects.

Environmental disasters -- some caused by human activity, others not -- often ruin or devalue property. The killing of the buffalo on the Great Plains in the late 19th Century certainly ended the utility of those lands to Native tribes and ended their way of life. We are familiar with the many ways that land value has been discounted by wildfires; floods; water pollution from industrial plants (Love Canal), waste products and agriculture; coal-waste mismanagement (Pittston's 1972 gob-pile failure in Buffalo Creek, W.Va.; Massey Energy's Martin County, Ky., sludge spill in 2000; TVA's Kingston Fossil Plant's fly-ash spill in 2008); land adjacent to the approximately 1.4 million acres that have been mined through mountain-top removal methods, principally in East Kentucky and West Virginia; landslides; sinkholes; underground coal fires; surface subsidence from underground mining; hurricanes; tornados; water issues from land-based oil and gas drilling; volcanic eruptions, acid rain from hydrocarbon combustion; timber diseases and pests; and on and on.

Disasters happen, though episodically. Some can be expected in certain areas. Hurricanes routinely smack the Gulf Coast and the Southeast Coast, and tornados are more frequent in the southcentral states, on both sides of the Mississippi, and especially in Oklahoma. Heavy rains produce floods in mountainous areas and then downstream.

Environmental assessments may or may not include discussions of all the environmental risks a buyer faces. My experience with these assessments is that they focus on the sale property itself, and not much, if any, on its surroundings.

Here are a few guidelines that might help land buyers think about environmental risks in property they're evaluating for purchase.

Research the past, present and future.

Buyers have to look in three time dimensions to assess the type of environmental risks a property presents.

The past and present can be accessed through documents, newspapers and conversations with neighbors, public officials and the buyer's local lawyer. The buyer has to know the questions to ask.

For example, I live over a karst formation. Though no sinkholes are visible on my acreage, the caves in the limestone beneath us can carry pollutants a long distance and sinkholes can appear. Its good dirt for pasture and timber, but you might not be able to have a new pond seal unless you line it with clay. A buyer should ask me about how karst might affect water quality and reliability, among other things.

Research below, above and next to.

Surface-land values are at risk when sub-surface minerals are severed in ownership and present prospects for mineral development. Old underground mining works may underlie the surface, which can cause surface subsidence, floods and smoldering fires.

Where possible, buyers should purchase land in fee simple, with all rights included in the sale.

The buyer should be aware of air-quality issues that might affect the seller's property. What is the property downwind of? I recently recommended to a client that she not purchase property in a

West Virginia county along the Ohio River, because she was concerned about air pollution. Several coal-fired power plants were located west of the county she preferred, and EPA data showed relatively poor air quality in that area.

If you're in a windy spot, might you face the prospect of a large wind farm being developed next door? Has your seller, or the neighbor, sold wind rights? Wind turbines may or may not be a negative aesthetic; some buyers view them as eyesores.

Consider what can be "carried" above the earth's surface—fog, rain (or not rain), noise, smells, pollution, snow, dusts, light and so on. Think about how each might affect your target property.

Nuisances from neighboring properties -- loud noise, barking dogs, smells, night activity, high-intensity outdoor lighting, wind-borne "pollution" (like GMO seeds or Roundup-resistant weeds) and teenagers -- are frequent complaints from new landowners. As buyers, they did not "see" these irritations on the sunny Saturday afternoon they visited the property. Buyers need to look beyond the property they're buying to protect themselves against unpleasant surprises.

Research the site, the immediate surrounding area and the region.

A buyer can see what's in front of him on the day he visits, but he needs to think about what might be around this property in the future, both adjoining and further away.

Most buyers quickly glance at neighboring properties. A much smaller number ask specific environmental questions about neighboring properties, and even fewer ask about what goes on a couple of miles away from the seller's tract.

The Gulf beaches have been affected by a regional environmental accident that is miles away. Water and air risks need to be considered regionally from the seller's property.

Understand that improbable events happen, and risk is not always subject to preventive management.

Low-probability events -- a 200-year flood, an oil spill on an inland waterway, a 10-year drought, a bug that destroys the money trees in your timber stand -- always happen, but not often. When your property research indicates some historic pattern of occurrence, you might want to look elsewhere.

Any property near a large industrial site must be approached with great caution. We cannot assume that our system of public regulation, inspection and enforcement will prevent environmental accidents. We cannot assume that companies are not pushing their envelopes on environmental safety or cutting corners.

Buyers need to ask themselves what risks are being assumed with the purchase of a particular property. Probabilities are difficult, if not impossible, to calculate. Therefore, a buyer should assume that a not-very-probable event will befall the property in some form or another, sooner or later. I think that's one lesson of the BP spill that landowners should learn.

Finally, buyers should consider that the likelihood of being made whole after an environmental disaster is not high. A percentage of damage will be paid in most cases. But it won't cover long-term issues that persist after the compensation check is cashed. And it will take a long time to get paid.

At some level of consciousness, beachfront homeowners on the Gulf knew their property was at risk from a well blow out, or a tanker spill or a rupture in a sub-sea pipeline. They bought anyway, because location trumped caution. Maybe, it's time for buyers to rethink that balance.

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