

Buyers of Commercial Property Must Perform a Phase 1 Study

By Kim Andereck, J. D.

A decade ago, Congress passed the Superfund Cleanup Acceleration Act of 1998, which requires purchasers of commercial property to perform a Environmental Site Assessment (ESA) study. The purpose of this study is to determine whether or not contamination is present on the property.

Buyers and lenders may face potential liability in the form of clean-up costs or reduced property value if it is later determined that there is contamination on a commercial real estate site. And liability can extend beyond the party who actually caused the contamination.

Leaking underground storage tanks are one source of hazardous substance liability. The presence of surface water or groundwater contamination is another.

Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the U.S. courts have held that a buyer, lessor or lender may be held responsible for remediation of hazardous substances, even if a prior owner caused the contamination

One way a buyer protects himself is to order a Phase 1 ESA prior to the actual purchase. The Phase 1 ESA is an investigation conducted by a certified environmental specialist. It determines the potential for contamination of soil, water, air or building materials on a property. It does this by looking at current

and past use of the site, as well as surrounding activities that could impact the site.

Available historical information is reviewed, such as aerial photos, land titles, insurance maps and other data. The property is examined for potential soil contamination, groundwater quality, surface water quality and sometimes issues related to hazardous substances in plants and animals of the region.

The examination may include identification of asbestos in building materials, storage of hazardous or caustic substances on the site, assessment of mold or mildew and the evaluation of other indoor air quality parameters.

A visual inspection is conducted and site personnel are interviewed, when possible. This may include past owners and occupants. Records are obtained from government agencies to identify potential non-compliance issues. A Phase 1 ESA does not include sampling or chemical analyses.

Normally, it takes the certified environmental specialist about 7 to 10 business days to complete a Phase 1 ESA, depending on the type of property.

Payment for the Phase 1 ESA is a point of negotiation between buyer and seller, but typically the buyer pays for it. This is because the buyer's bank requires it as a part of due diligence before it can fund the transaction.

The information in a Phase 1 ESA report is confidential and becomes the property of the party who commissions the study. If the Phase 1 ESA suggests

potential for contamination, a Phase 2 ESA may be needed. Phase 2 ESA is more intensive and involves sampling and analysis of soil, water, air or other components. If the Phase 2 ESA findings point to contamination, a Phase 3 ESA may follow to examine options for site clean-up.

Purchasers and owners of residential property, however, need only conduct a site inspection and chain of title survey. They are not required to commission a Phase 1 ESA for non-commercial endeavors.

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