

# The Inspector Speaks<sup>SM</sup>

## All Commercial Real Estate Needs: A Phase I Environmental Audit

Are you buying commercial real estate or lending money to buy commercial estate? If so, you need to be aware of the potential for environmental liability and how to protect yourself against such liability.

Buyers should know if they are purchasing a contaminated site and lenders should know if they are lending money with a potential Superfund site as collateral. The possible presence of air pollution, contaminated surface or groundwater, hazardous wastes, underground storage tanks (USTs) and a myriad of other pitfalls significantly affects the worth of the property as well as the potential for liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S. Code Sections 9601-9675, often referred to as Superfund.

For these reasons, we recommend a Phase I environmental audit for all commercial real estate prior to purchase.

### Superfund Implications

Superfund is a comprehensive program that authorizes the U.S. Environmental Protection Agency to clean up hazardous waste sites and undertake emergency response actions with regard to releases, or threatened releases, of hazardous substances in the environment. The Superfund statute provides for two alternative mechanisms for hazardous waste clean-up and reimbursement. First, EPA can order potentially responsible parties (PRPs) to undertake remedial measures to clean up contaminated properties. Second, EPA can take remedial actions on its own initiative and sue for recovery of its expenses from PRPs. This legislation was designed to replenish the Superfund, totaling approximately \$10 billion, through EPAs recovery of incurred clean-up costs from liable parties.

### The “innocent landowner” defense

Superfund is strict, and joint and several liabilities are broadly imposed. There are three basic exceptions, or defenses, to the liability that can accompany a contaminated

site. The first exception is an act of God. The second exception is an act of war. The third is an act or omission of a third party, against which the property owner took all appropriate precautions. This final defense, often called the “innocent landowners” defense, is applicable when the owner has used due diligence in the determination of whether or not the site is contaminated prior to the acquisition of the property.

Generally, in order to avoid liability, the purchaser or potential lender must, at a minimum:

1. Pre-site evaluation through historical review and owner/operator questionnaires;
2. Site inspection through visual observation of the property; and
3. Submission of a written report.

### Phase I Environmental Audits

The purpose of a Phase I audit is to screen a property through the evaluation of existing information that reveals a property’s environmental status. The Phase I audit must be conducted by an environmental professional. His or her professional judgment is vital to the performance of appropriate inquiry at the Phase I level.

The Phase I audit has three distinct categories:

1. Pre-site evaluation through historical review and owner/operator questionnaires;
2. Site inspection through visual observation of the property; and
3. Submission of a written report.

This assessment is usually performed through extensive background review and site visits that consist of:

- a history of actual site usage.
- a review of available public records (such as records, permits, licenses, etc.) that could provide relevant information.

- a site reconnaissance of the property and adjacent properties within a 1/2 mile radius.

The final report should include the following:

1. Documentation to support the analysis.
2. A description of all evidence of recognized environmental conditions on the property.
3. Photographs of the site.
4. An in-depth statement of the environmental professional’s findings and conclusions. It should also be noted that any conclusions generated by a Phase 1 audit cannot confirm the presence or absence of potential environmental liabilities at the site because discrete samples of surface soils, subsurface soils and groundwater are not collected or analyzed.

Typically, Phase I audits cost between \$2,000 and \$3,000.

### Phase II Audits

A Phase II audit is conducted when the client or prospective lender suspects a hazard exists on the property or when the environmental professional suggests further testing after conducting a Phase I audit. The information gathered in the Phase II investigation should identify, with some assurance, the presence or absence of a potential environmental hazard, or the approximate magnitude of an observed environmental hazard.

### Phase III Audits

A Phase III environmental audit is required when current site conditions, past usage of the property or neighboring environmental hazards identified in the Phase II testing indicate a strong potential for on-site subsurface contamination of soils or groundwater. These remedial actions may include complete or partial removal of all contaminated media. Phase III activities also include managing and maintaining the successful and continued cleanup of the subject property.



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