

## All commercial real estate needs a Phase I environmental audit

**A**re you buying commercial real estate? If so, you need to be aware of the potential for environmental liability and how to protect yourself.

Buyers should know if they are purchasing a contaminated site because contaminated surface or groundwater, hazardous wastes, above-ground and underground storage tanks, air pollution and myriad other pitfalls, both onsite and off site, can significantly affect the value of the property. What's more, purchasers can be held liable for preexisting site contamination under the Comprehensive Environmental Response, Compensation, and Liability Act, commonly called the Superfund law.

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

■ **The Superfund statute.** Superfund is a program that authorizes the U.S. Environmental Protection Agency to clean up hazardous waste sites and respond to the release, or threatened release, of hazardous substances in the environment. The Superfund statute provides for two alternative mechanisms for hazardous waste cleanup and reimbursement. First, EPA can order potentially responsible parties (PRPs) to clean up contaminated properties. Second, EPA can clean up properties and sue PRPs for recovery of expenses.

■ **The "innocent landowner" defense.** There are three basic defenses against Superfund liability that can accompany a



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contaminated site. The first is an act of God, and the second 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 landowner" defense, applies when the owner has used due diligence *on or before the date of purchase of the property* to determine whether or not a site is contaminated.

To exercise prudence in avoiding liability, purchasers must satisfy the requirements of "all appropriate inquiry." These include:

1. Reviewing title and judicial records for environmental liens or activity and use limitations.
2. Sharing any insights or special knowledge about the property's potential contamination with a qualified environmental inspector.
3. Making written note of any factors that contribute to a purchase price that is significantly below apparent market value.

A Phase I environmental site assessment by a qualified environmental professional satisfies the requirements of "all appropriate inquiry," referred to in the Federal Register as 40 CFR Part 312-Standards & Practices for All Appropriate Inquiries.

■ **Phase I environmental site assessments.** The purpose of a

Phase I assessment is to screen a property through the evaluation of information that reveals a property's environmental status. The Phase I audit must be conducted by an environmental professional.

The Phase I assessment has four parts: records review, site inspection, interviews with present and past owners, operators and occupants as well as local government officials, and a written report.

The final report includes supportive documentation, analysis and conclusions about possible or probable contamination. It should also be noted that any conclusions generated by a Phase I audit does not confirm the presence or absence of environmental hazards at the site because discrete samples – surface soils, subsurface soils and groundwater – are not collected or analyzed. Typically, Phase I audits cost between \$2,000 and \$3,000.

■ **Phase II assessments and Phase III remedial exercises.**

A Phase II audit is conducted when the client suspects a hazard exists on the property or when the environmental professional suggests further testing after a Phase I audit. The Phase II investigation confirms the absence or presence and magnitude of environmental hazards. A Phase III environmental remediation is required when current site conditions, past usage of the property or neighboring environmental hazards identified in Phase II indicate the need for cleanup. Remedial actions may include complete or partial removal of all contaminated media.▲