

The Basics of Environmental Due Diligence

Are you thinking about purchasing, refinancing, or leasing a commercial property?

If the answer is yes, please read on for more information to provide you with environmental liability protection.

What is Environmental Due Diligence?

- Environmental due diligence can take many forms, and will be dependent upon the transaction type, environmental risk of the property. Types of due diligence can include Environmental Questionnaires, Transaction Screens, Internal Environmental Screens, Phase I ESAs and Phase II ESAs.
- All Appropriate Inquiry (AAI) is the formal process of assessing properties for the presence or potential presence of environmental contamination. It involves evaluating the current and historical uses of the subject property in an effort to identify recognized environmental conditions (RECs) and historical recognized environmental conditions (HRECs) in connection with the subject property.
- AAI is obtained by completing a Phase I Environmental Site Assessment in accordance with the ASTM Standard E-1527-2005 and/or the Small Business Liability and Brownfield Revitalization Act (Brownfield Amendments) of 2002 (the Federal rule which describes what constitutes AAI).

What is a Phase I ESA and Why Are They Needed?

- A Phase I Environmental Site Assessment (ESA) is a tool to determine whether a property may be contaminated. Prior to the purchase or occupancy of a property, the purchaser or future tenant has the option to complete a Phase I ESA to investigate the current and historical use of that property.
- The Phase I ESA utilizes a variety of historical resources, including local, state, and federal records, to identify past uses and/or occupants of the property that may present an environmental risk.
- Certain users of Phase I ESAs (i.e., new purchasers of property) may be able to satisfy one of the environmental due diligence requirements to qualify for the bona fide prospective purchaser, contiguous landowner, or innocent landowner liability protections available under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, the Superfund Amendments and Reauthorization Act (SARA) of 1986. AAI is intended to reduce, but not eliminate, uncertainty regarding the potential for RECs and HRECs in connection with the subject property.
- Many banks, and the US Small Business Administration, require environmental due diligence be completed before they will issue commercial loans. Additionally, it is a good idea to complete environmental due diligence, even if a bank is not involved, to prevent future liability for existing contamination on the property in question.

What If the Phase I ESA Reveals RECs?

- Don't despair!
- The next step is to investigate the RECs. This is usually done by completing a Phase II ESA. A Phase II ESA often involves the collection and analysis of soil and/or groundwater samples from the highest risk areas of the property to determine if contamination is actually present. Each state has pre-determined "cleanup criteria" for various contaminants. The samples collected from the property will be compared to these criteria to determine if contamination is present at concentrations that present environmental or health risks.
- Geophysical surveys can also be performed to investigate RECs, if they involve the potential for buried drums, underground storage tanks, etc.
- If a Phase II ESA determines that contaminants are NOT present above cleanup criteria, a report is issued, and the purchaser's environmental due diligence is complete.

What If Contamination is Identified Above the Applicable Cleanup Criteria?

- Some states offer liability protection for purchasers/new tenants if contamination is documented prior to their purchase/occupancy. If this is the case, often a report is required to be filed with that state documenting what contamination is present and at what concentrations. In Michigan, for example, this is known as a Baseline Environmental Assessment, and is a separate report from a Phase II ESA.
- A purchaser of a contaminated property is also often required to adhere to certain “Due Care” obligations, depending on the concentration and type of contamination present (i.e., the purchaser may not be able to install a drinking water well on the property).
- If the above situation applies, and the purchaser applies for and is approved for state liability protection with the above documents, their environmental due diligence is complete.
- In states that do not offer liability protection for purchasers of contaminated property, several options are available.

Contamination is Present, but Liability Protection is Not

- The purchaser can apply for local, state, or federal Brownfield funding for cleanup activities necessary at the property.
- The purchaser can enroll in a voluntary cleanup program administered by the state, which may provide match funds or tax credits for cleanup activities.
- The purchaser can pay for cleanup activities out-of-pocket or negotiate these costs with the seller.
- The purchaser can purchase the property and assume liability for the existing contamination.
- The purchaser can decide not to purchase the property, if the above options are not fiscally viable for the transaction.

If You Have Further Questions

- Every situation is different. PME is happy to provide assistance with every aspect of the due diligence process, whether the project is large or small. If you have questions, please refer to our professional services page for more information.

<http://www.pmenv.com/environmental-services-site-assessments.html>