

Environmental Due Diligence in Real Estate

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Environmental Due Diligence is the collection and assessment of data relative to environmental conditions or impacts prior to a transaction to identify and quantify environment-related risks and liabilities. It involves the systematic verification of environmental conditions of a site in order to establish the current or potential environmental liabilities. Persons involved in buying, selling, lending, and managing of commercial real estate routinely perform a variety of types of commercial property due diligence.¹ It is a critical component of any property transaction where potential environmental risks are a concern in order to minimize risks and protect oneself from liability.

Let's face it, in today's tough economic times, navigating the real estate market continues to be a challenge for everyone. Part of the challenge comes from understanding the broad framework of potential environmental liability imposed by state and federal regulations on parties involved in commercial real estate deals. Ensuring environmental due diligence is met to avoid liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), commonly referred to as the "Superfund Law" is just one of those requirements.²

CERCLA is a United States federal law designed to clean up sites contaminated with hazardous substances, such as solids, liquids, or gases that can harm people, other living organisms, property, or the environment. These dangerous or hazardous goods include materials that are radioactive, flammable, explosive, corrosive, oxidizing, asphyxiating, biohazardous, toxic, pathogenic, or allergenic. Also included are physical conditions such as compressed gases and liquids or hot materials, including all goods containing such materials or chemicals, or may have other characteristics that render them hazardous in specific circumstances.³ These hazardous substances are also subject to chemical regulations by appropriate regulatory agencies.

¹ http://en.wikipedia.org/wiki/Due_diligence

² It is important to understand and consider the financial implications of all types of environmental risk, not just superfund liability.

³ http://en.wikipedia.org/wiki/Hazardous_substances

CERCLA provides broad federal authority to clean up releases or threatened releases of hazardous substances that may endanger the public health or the environment. The law also authorizes the Environmental Protection Agency (EPA) to identify parties responsible for contamination of sites and compel the parties to clean up the sites. Where responsible parties cannot be found, the Agency is authorized to clean up sites itself, using a special trust fund.

Environmental due diligence during commercial real estate and transactions can include Phase I and II Environmental site assessments.⁴ It is important in real estate transactions to successfully negotiate the scopes of work for and complete Phase I and Phase II environmental site assessments in order to avoid liability under CERCLA.

An Environmental Site Assessment (ESA) is a report prepared for a real estate holding which identifies potential or existing environmental contamination liabilities.⁵ The analysis typically addresses both the underlying land as well as physical improvements to the property. Phase I ESA (also called a Level I Environmental Site Assessment) does not include actual physical sampling or collection of soil, air, groundwater or building materials. Nor does it involve any chemical analysis. Rather, Phase I ESA is considered the first step in the due diligence process. It often involves examination of the site and scrutiny of the land for potential soil contamination and ground and surface water quality. During Phase I ESA an examination of a site may include things such as defining any chemical residues within structures; identification of possible asbestos containing building materials; assessment of mold and mildew, an inventory of hazardous substances stored or used on site; and evaluation of other indoor air quality parameters.⁶

If a site is considered contaminated, a Phase II ESA may be conducted, which is a more detailed investigation involving chemical analysis for hazardous substances and/or petroleum hydrocarbons. Contaminated sites are often referred to as "brownfield sites." Brownfield sites are abandoned or underused industrial and commercial facilities available for re-use. The land may be contaminated by low concentrations of hazardous waste or pollution but still has the potential to be reused once it is cleaned up. Land that is more severely contaminated and has high concentrations of hazardous waste or pollution, would not fall under this term, but rather would be added to the National Priorities List (NPL)⁷ where it would be subject to the U.S. EPA's Superfund program. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation.⁸

⁴ http://en.wikipedia.org/wiki/Due_diligence

⁵ http://en.wikipedia.org/wiki/Phase_I_Environmental_Site_Assessment

⁶ Id.

⁷ The National Priorities List ("NPL") is the list of hazardous waste sites in the United States eligible for long-term remedial action financed under the federal Superfund program.

⁸ http://en.wikipedia.org/wiki/National_Priorities_List

Environmental due diligence is a critical component of any real property transaction where potential environmental risks are a concern. In addressing the more obvious issues, in order to truly minimize risks and protect against liability, it is important to keep abreast of all the current state and federal requirements, laws and policies affecting environmental due diligence that can impact your transaction. Therefore, staying on top of cutting edge issues such as environmental disclosure and other cleanup incentives; mitigating liability risks by creating an environmental risk management plan; and being fully prepared to act on policy trends and changes to the law are just a few ways to also minimize your risk and liability.



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