



More contaminated commercial real estate being discovered every day - by Chuck Merritt

June 11, 2024 - Long Island



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After thirty years of environmental consulting, I will be the first to admit this statement is a bit overkill. In addition, we have performed thousands of inspections which rendered a “clean” phase one Environmental Site Assessment (ESA). However, the term “clean” is subjective and can mean different things to different stakeholders. A buyer has the most to gain (or lose) with the title of this article and should want to leave no stone unturned during their environmental due diligence period. A seller’s best interest (for a property they already own) is to not have anyone look too high or too low so the transaction goes through without any environmental hiccups. Lenders want to make sure the real estate they are lending money on is not environmentally tainted and rely on their consultants to help with that objective. And finally, those refinancing with a lending institution prefer not to have anyone look at the property in the first place.

Back when environmental consulting became a thing with the introduction of the ASTM E1527 standard in the early nineties, most phase one reports concluded with no further recommendations. Then again that standard of care focused on “obvious signs of contamination” which is a pretty nebulous term. The recently adopted ASTM standard (30 years since the first version) known as E-1527-21 brings some new elements to the phase one arena that are not so obvious. The most significant change is the requirement to look at adjacent property the same way you would look at the target property. So now the former drycleaner a few stores away will be an issue for the property owner refinancing with a lender. That was not something typically pointed out in older versions of the ASTM standard. The report issued today may very well point this out as a Recognized Environmental Condition (REC) prompting further investigation typically referred to as phase two. With sites like current and historic drycleaners and gasoline stations dotted along the main streets of America, the more consultants conduct additional testing, the more likely they are to find issues that were not previously thought to be a concern in the initial phase one report.

Over the past several years, vapor testing has become a more common trend. Since contamination tends to breakdown chemically over time, it can volatilize into a gaseous state and move through soil and into buildings through cracks in the foundation. Vapor testing may not tell you everything, but it can help in determining if that neighboring property has impacted the sub-surface conditions which have now migrated onto the subject site being purchased or refinanced. When the results indicate elevated level of vapor under a structure or within the structure requiring additional remedial efforts. Sub Slab Depressurization Systems (SSDS) are more common these days to keep the harmful vapors out of a building.

It is important to note that the standard was always and continues to be a resource best utilized for a purchase to provide certain legal protections under CERCLA law and innocent landowner defense. This is not a protection typically needed for a refinance. But there is currently no refinance for a lender environmental standard. There are other products lenders can rely on to help mitigate risk and make a business decision. But the current 21 standard is the only one available when a phase one ESA is required within the bank’s environmental policy.

When buying land or a site to be redeveloped, I have always advocated for considering

soil/groundwater regardless of the phase one outcome. Once excavation begins, should there be issues with the sub-surface conditions, costs will escalate, regulatory notification may be required, and delays will occur. Even fill material that was once easy to transport and dispose of has become more and more expensive once discovered.

Forever chemicals such as PFAS/PFOS and 1,4 dioxane have become more problematic as we find out how dangerous and prevalent they are. The Environmental Protection Agency (EPA) recently added two types of PFAS chemicals to the list of hazardous chemicals which will become effective July 8, 2024. That will automatically make them part of CERCLA law and required to be part of phase one assessments. The action level established by the EPA is very low, so these chemicals will be found in many situations. With no current viable remediation available things will become complicated for all stakeholders involved with the property.

In a vacuum yes, there are more contaminated sites being discovered than ever before and there are several reasons that is occurring. From a more comprehensive ASTM standard, government regulations, cautious lenders and investors trying not to buy someone else's problem sites are being vetted with more rigor these days. Does not mean one cannot navigate to a favorable outcome. For the purchaser, start with a comprehensive phase one ESA with a reputable firm that has experience and the proper insurance coverage. Be open to the concept of conducting a phase two investigation based on the findings of the report. Consider an insurance policy. They exist for situations you may not have thought possible. These three steps can play an important role in ensuring the property value is not diminished, which will aid in obtaining financing with a lender and provide a comfort level when trying to sell the property in the future.

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