



Environmental Issues in Real Estate

Phase Is from the Buyers Side

For buyers of commercial or industrial properties, understanding the purpose of a Phase I ESA is critical to their protection from financial clean-up liability under CERCLA because that protection solely is based on the completeness and accuracy of the Phase I. Most banks require an environmental property review as a means to gauge their risk on a loan. A bank does not want to loan on a property only to find out there is contamination. In some cases, the clean-up costs can exceed the value of the property, and the owner walks away leaving the bank to dispose of the problem. While this is an extreme case, it has been known to happen. Had a Phase I been done to the current AAI standard, the likelihood of contamination being discovered would have greatly increased. In instances where the Phase I was done properly and still failed to discover contamination, the Innocent Landowner defense under CERCLA protects the owner from clean-up cost liability. If responsible parties can be determined, they would pay the costs; otherwise, if none can be found, the government would clean-up the issue.

Continuing Obligations

Once a new buyer gains protection through one of the three CERCLA defenses, that buyer must keep his property clean. If contamination occurs after the buyer takes ownership, he/she is responsible for all clean-up costs. These continuing obligations can be as simple as annual drywell inspections or as complex as complete Spill Prevention, Controls, and Countermeasures program. Failure to take steps to stop contamination releases, prevent threatened releases, and prevent risk to human health and the environment may result in loss of AAI protections.

Choosing an Environmental Professional (EP)



The Right EP Makes All the Difference!

In Arizona and other states, it can be difficult to evaluate the competency of environmental consultants; Arizona does not have licensing requirements for Environmental Professionals. So, how do you compare consultants? First, ask how long they have been in business. The longer a company has been consulting, the better quality you will likely receive. Second, ask how much professional insurance they carry. For most, a minimum of \$1 million in errors and omissions insurance should be held. The more insurance a company carries, the more likely it is they have a commitment to quality. Next, ask what certifications the company has. A company that has several certifications in different states demonstrates their ability to perform the environmental work. Finally, ask if the company belongs to the ASTM organization and if they participate on the standards committees to which their work conforms. Belonging to the ASTM committee that develops the standards the EPA uses to determine liability ensures the company's commitment to understanding how these laws were meant to be interpreted. In short, the age of the company, amount of insurance, certifications, and involvement are the best ways to measure the qualifications of your environmental professional.

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Without a Proper Phase I, Purchasers Can Unknowingly Buy a Contaminated Property

Three CERCLA Defenses

Under CERCLA, there are three defenses that can be claimed by purchasers/owners of properties: Bona Fide Prospective Purchaser, Contiguous Property Owner, and Innocent Landowner.