# Environmental due diligence

## How to take proper precautions when buying real estate

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The environmental due diligence process can be time-consuming, which is why buyers should get started early when entering into negotiations to purchase property.

"Depending on when environmental due diligence begins, environmental issues might not be discovered until close to the end of the deal. That could result in a transaction not closing for months after initially planned, which was the case in a matter we had this year," says Meagan Moore, a partner at Brouse McDowell. "Be ready to begin a Phase 1 assessment when you initiate discussions regarding a purchase."

*Smart Business* spoke with Moore about Phase 1 and Phase 2 environmental assessments, and the protections they provide buyers regarding potential liability related to contamination.

**What is the first step in the environmental due diligence process?**

Hire an environmental consultant to perform a Phase 1 study. That will give you a better understanding about the property. Because of the way certain environmental regulations are written, even a purchaser that has no culpability for what is on the property could be responsible for cleanup costs. Therefore, it's best to know what you're getting in advance so you can plan for it during the transaction.

Phase 1 is a report intended to identify potential environmental issues associated with the presence of hazardous substances or petroleum products on a property. It involves a review of federal, state and local records, government databases, interviews with people familiar with the property and an on-site inspection by the environmental consultant. The review provides an overview of the property's history and whether there is any information or visible signs of a release or contamination on the property.

Some sellers may conduct a Phase 1 study in order to expedite the transaction. It is important to note that Phase 1 is only valid for 180 days and typically the environmental consultant must grant third parties authority to rely on the report.

There are some environmental issues that the Phase 1 investigation does not cover, including whether the property has wetlands or the building contains asbestos. Those can be added to the scope of a Phase 1 if a buyer envisions potential issues with a property. Any documented or visible signs of contamination noted in the Phase 1 are considered a recognized environmental condition (REC).

**If the Phase 1 report includes a REC, what should a potential buyer do next?**

A Phase 2 assessment should be conducted, which typically involves a subsurface investigation. Soil and groundwater samples are taken for lab analysis to determine if there is hazardous material present. It's not going to delineate the extent of the contamination, but it will confirm or deny the presence of hazardous materials.

If the contamination is confirmed, you'll have to determine how it should be addressed — whether remediation should be done or if the material can be left in place.

All these concerns can be factored into the negotiation process with the seller. You could include indemnity agreements with the seller and establish an environmental escrow account to pay for any issues that arise.

**Do any former uses require a different approach?**

A Phase 1 assessment should be done for any industrial or commercial property. But you definitely need an assessment if there was a gas station, dry cleaner, auto repair shop or industrial use of the site. Phase 1 assessment requirements are the same no matter what type of business; it doesn't matter if it was a textile plant or gas station. But if you're looking at a property that had historical operations that could have led to contamination, a Phase 1 assessment is necessary to determine the condition of the property so you're aware of what you're buying. As a buyer, you want to know everything upfront so that can be a part of the negotiations and you can limit your liability. ●