

What is the “real” role of your environmental consultant? - by Chuck Merritt



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The term “environmental consultant” can be very broad in which many tasks and responsibilities may fall. Within the commercial real estate arena there are some basic tasks the consultant typically provides. This begins with the phase one Environmental Site Assessment (ESA) which is typically ordered by the purchaser as part of their due diligence during acquisition or the lending institution providing the loan. Depending on the findings of the ESA, further investigation may be recommended to address any concerns, or “red flags” discovered. If the client is a buyer, they need to make a business decision on whether to proceed with the additional investigation which is generically known as the phase two (2), accept the report as is (along with the risk) or potentially walk away from the deal.

Things start to become a bit more complicated when that path is not so clear. For example, many times prior environmental reports exist and given to a buyer from when

the seller purchased the property or from the bank that ordered a phase one report at the time that loan was originated. In an effort to save money and time, a buyer may request another firm review the older report and “update it” for them. That puts the consultant in a difficult position as they are being asked to verify the contents of the previous report as accurate. Many times, these reports are years old and do not reflect the current American Standard of Testing Materials (ASTM) most recent standard. So just updating it with a new database and historical review may not provide the best information for the client. In addition, the protections offered in a “new” phase one may be lost without approval from the client who the original report was prepared. Therefore, many firms decline this request and need to educate their clients on why “updating” is a bad idea.

In addition to preparing a new ESA is the consultant familiar with regulatory programs available to deal with contamination that may be discovered? New York currently offers a few different programs to assist clients who purchase contaminated properties. The E-designation program administered by the New York City Office of Environmental Remediation (NYCOER) supervises sites listed in the department of buildings (DOB) website for the five (5) boroughs as having the potential for contamination to exist. In addition, the New York State Department of Environmental Conservation (NYS-

DEC) manages the state Brownfield Cleanup Program (BCP). Although there are tax credits and other incentives to the programs, they take time to complete all the tasks which may not line up with the skill set of the consultant and the expectations of the client. Environmental attorneys can offer an invaluable expertise in explaining the pros and cons of each program and should be consulted when needed. This is a service beyond what the consultant can offer, but can work with the attorney on behalf of the client.

When consultants are tasked with advising their lender clients making loans on commercial real estate, many times they are asked to help with the potential risk the lender may be taking on. How much will it take are typical questions asked before a closing is scheduled and without the benefit of the additional investigation being conducted. If the consultant was hired by the lender to provide a phase one report (or other due diligence product like a transaction screen), they have pretty much “gathered” information and presented such in their work product. So, this next step should be considered an additional service although many consultants provide the information as a courtesy. Without the data from sampling the soil/groundwater/air, the best a consultant can do is provide a cost to cure based on their prior experience with similar projects. In providing this information, the consultant is serving another role

for their client. Relationship with the borrower, amount of the loan and loan to value (LTV) are considerations the lender should make in determining “their” risk and not information consultants necessarily have when issuing their report

Due diligence reports like phase ones, transactions screens, etc., do not currently require a licensed professional like an engineer or geologist to prepare them. However, phase 2 investigations and working on sites with regulatory oversight like the BCP do. New York State now has a licensing requirement for geologists working in the state. Does your environmental firm have access to a licensed geologist when needed? Is this the role the client expects them to serve?

As the industry changes, so does the role of the environmental consultant. The ASTM just released the newest version of the phase one standard that may once again redefine the role of the environmental consultant. Many projects (especially redevelopment sites) will require expertise beyond the scope of preparing the ESA. Larger firms tend to offer these services under one roof while smaller firms may need to create alliances with professionals that offer a needed expertise. Going into a project, the consultant and the client should have a clear understanding of the expectations of one another.

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