



How many environmental consultants are needed in a transaction? - by Chuck Merritt

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Over the past few years, real estate values in the New York metropolitan area have soared. Since the dark days of 2008 when prices plummeted and financing was nearly impossible to come by, things have rallied nicely. So much so, that the real estate around the Gowanus canal in Brooklyn is now desirable. As an environmental consultant, this is a sea change to an area formally considered too toxic to go near. Many areas traditionally known for their industrial heritage now adorn the boroughs with high rise residential buildings. As investors prospect for the next great redevelopment site in these areas, there will be environmental challenges. These challenges are typically vetted through phase one and phase two investigations conducted during the due diligence phase of a potential buyer. While those investigations are being conducted, many times the potential buyer is also prospecting for a lender.



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Lenders are competing with each other for these real estate loans while trying to mitigate their risk. Many factors come into play when mitigating risk but the environmental component is a major part of the loan process. Lenders retain environmental consultants to better understand what the conditions are at the property before closing. The goal of the lender is to have some comfort that they will not be taking back a toxic stew that imperils the value should a foreclosure be necessary in the future. This process is conducted on the largest of development sites and the smaller commercial real estate loans in a similar manner. As history has taught us, the family dry-cleaning tenant within a strip center can present expensive cleanup costs just as much as the large development site that housed former industrial operations.

The friction point in the industry is when the buyer is prospecting with several lenders while engaging his own environmental consultant. That consultant's job is to advocate the best way possible for his client (the buyer). There can be many unknowns in this process as the consultant is trying to obtain as much data as possible within the scope of work agreed upon with the client. Sometimes, more investigation is needed to delineate an issue discovered during the "base line" investigation. It may take several weeks for the consultant to have the required data to paint the best or worst case scenario for the client. Once it is discovered that an environmental impact is present, the next question typically posed to the consultant is "what is the cost to cure?" This is the most important component for the buyer to communicate with the lenders so it can factor

into their risk management. The issue arises when more than one lender is considering the deal or when a lender wants to speak with the consultant retained by the buyer. This puts the consultant in a difficult position, especially if they are not recognized by that lending institution as "an approved vendor." Exchanging information is fine, but when a consultant is being asked to advise the lender, things get complicated as the consultant now finds them self in the role of advising two parties on risk tolerance that may not have the same threshold of risk.

The more beneficial route is for the potential lender, to request a copy of the investigations conducted and then forward on to a consultant they have worked with before and trust. That consultant can opine back as to whether they agree with the borrower's consultant, disagree with their conclusions (and cost to cure estimates if available) or advise the lender more investigation is required. As the buyer of the property is not yet in a position of ownership, assumptions can and must be made about the strategies to be deployed when they become the owner. Is the site going to be fully redeveloped allowing access to the impacted soils and groundwater that may exist? Will the site remain intact forcing a different strategy to remediate with access limitations? Has the air quality been impacted to the point that remediation of that media is required? Is the site be a candidate for the New York City brownfields program? What benefits will that offer? Will that agency reject the application and recommend the state brownfield program be the lead agency? An experienced environmental attorney well versed in the regulatory requirements may also be needed to assist in developing a remediation strategy.

These are questions that may not have answers until the client takes possession and can decide the best approach. However, lenders are going to want as definitive estimate as possible prior to scheduling a closing. So the answer to how many consultants are needed depends on how many lenders, investors and other entities may be involved in the transaction. Each should rely on a firm they trust and have worked with in similar situations. Just as one attorney should not represent the interests of multiple parties in a real estate transaction, nor should an environmental consultant be expected to do so.

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