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Understanding Environmental Risk

by [Michael P. Carvalho](#)

Undoubtedly, you have either heard of or experienced the perils of environmental liability as associated with real-estate transactions. Keeping these issues in perspective is an important component in understanding the nature of environmental risk and its impact on structuring real estate transactions.

Most prudent landowners will typically conduct an ASTM Phase I Environmental Site Assessment prior to purchasing or leasing commercial real estate. Restaurant owners should complete environmental due diligence because the findings, conclusions and opinions of the assessment are critical in understanding the risks.

Frequently, a property may be impacted by an adjoining landowner, such as a dry-cleaning operation or a service station. Similarly, the historic use of a property may include hazardous materials or petroleum products. Assessing the impact that such contamination may have on the property requires an understanding of the risks presented and how those risks may be mitigated in light of the property's proposed use.

In an effort to address this issue, many states have adopted Risk Based Corrective Action (RBCA). RBCA considers the current and future use of the property under consideration in determining what level of cleanup will be required. Generally, commercial properties do not need to be remediated to the same standards as residential properties. In some instances, low to moderate levels of gasoline, for example, may be left in place to naturally attenuate over time, rather than to undergo a costly removal process.

State and federal agencies may also require certain institutional controls, such as deed restrictions, which identify the nature and extent of the existing contamination and are recorded in local land-title records to alert subsequent purchasers of the problems. When appropriate, institutional controls can save money in avoided environmental-remediation costs. However, because of the development of laws and regulations, the mere presence of hazardous materials or petroleum products does not automatically mean the transaction cannot go forward.

When attempting to value potential environmental liabilities, keep in mind not only future costs associated with such concerns, but also consider the likelihood of such costs and the uncertainty associated with the inherent variability or lack of information. For example, the historic release of gasoline on a property may be mitigated by a "No Further Action" letter from a state agency. Such letters typically include "re-opener" provisions in the event new information comes to light that may negate the benefits of the state directive. While unlikely, such conditions do occur — property owners and lessees may want to consider appropriate indemnification and/or environmental insurance to minimize such exposures.

In today's market, the presence of environmental contamination need not be the deal killer of just a few years ago. Many states and the federal government have adopted a pragmatic approach, and now provide mechanisms to reduce the future risks associated with such transactions. Managing environmental risks requires the recognition, assessment, qualification and allocation of environmental-impairment liability. Consultation with an experienced environmental counsel is often the best start.

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