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When to report or when not to report the results of your Phase II ESA

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Property owners, sellers, buyers, and lenders, as you know, Environmental Site Assessments (ESA) are now the standard operating procedure when it comes to real estate transactions involving commercial properties. Virtually all lenders and savvy buyers now require some level of "due diligence" to rule out the possibility of current or historic sources of soil or groundwater contamination on a property. A Phase I ESA is the most common type of ESA performed.

In Connecticut, the Phase I, at a minimum, should reveal if the property was or is occupied by a dry cleaner, furniture stripper or auto body shop. If not, it should also be determined whether the facility ever generated or stored hazardous wastes, or whether hazardous wastes were ever brought to the facility from an off-site source for disposal or treatment.

If none of the above apply, then the property would not be considered an "Establishment" under the Connecticut Department of Environmental Protection (CTDEP) Property Transfer Program. However, what if the Phase I research reveals that the site was used for photo development, printing, manufacturing, or as a machine shop or other industrial use? Although the available databases provided by the state and federal governments will likely show no violations or records of any kind indicating improper disposal of waste, these properties still carry the potential for liability. Petroleum products and gasoline could be released on the property if it ever housed an auto repair garage or gasoline station. Commonly used cleaning solvents, some of which are heavier than water, increase in toxicity as they break down. Metals, such as arsenic, lead, chromium and mercury, were once widely used in various manufacturing activities. All of these contaminants can remain in the soil and groundwater many years after their use has ceased.

The potential for releases of these materials will result in the environmental consultant recommending a Phase II Environmental Site Assessment. The Phase II is a subsurface investigation, which includes the collection of soil and groundwater samples in order to determine whether soil or groundwater contamination exists. If no contamination is found on the property, then no further activities will be required. Should impacts be detected, certain reporting requirements may have to be addressed.

If the site is not an Establishment, the results of the Phase II subsurface investigation do not necessarily require CTDEP notification unless a significant hazard exists. It's important to note that the definition of a "significant environmental hazard" is clearly spelled out by the DEP. Determination of an environmental hazard is based upon comparison of the analytical results with specific criteria. These criteria are generally related to the Remediation Standard Regulations (RSRs) and the Water Quality Standards (WQS).

As spelled out in the Connecticut General Statutes (CGS), the environmental professional (EP) conducting the investigation that identified the pollution is required by law (CGS 22a-6u, as amended) to notify the property owner that these hazardous conditions exist. The owner is required to report significant environmental hazards to the DEP within a specified time period (typically one to 90 days, depending on the findings). The Consultant will strongly urge the owner to open communication with the DEP, which typically partners with the responsible party to appropriately address and mitigate the hazard.

If no significant hazards are found during the Phase II investigation, then no reporting requirements to any authority or government agency would apply. In these cases, even if contaminants are found, the results of the Phase II Environmental Site Assessment remain confidential between the consultant and the client.

The Phase II is an excellent business tool for the property owner/seller because it could eliminate any questions regarding potential environmental contamination on a property. The seller can also use the Phase II findings as a marketing tool to limit the liability and risk to a future buyer.

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