Q: My company is buying property; how much due diligence is enough?

A: Developers and other businesses involved in real estate transfers are generally aware of the need to investigate the environmental status of property before it is purchased or leased. To most people, this means obtaining a “Phase One,” or an environmental site assessment conducted according to the American Society of Testing and Materials (ASTM) standard 1527. Unfortunately, this standard does not address a number of issues that can dramatically affect the value and potential use of property. In many cases, depending on the type of transaction, more “diligence” may be due. ASTM updated its standard in 2005 to mirror new EPA regulations about conducting “All Appropriate Inquiries” to avoid federal superfund liability. The new standard has increased the quality (and the cost) of standard Phase One assessments, by requiring the review of title information, gathering data on adjoining landowners, and requiring more critical analysis of the information obtained – and information that is missing.

While Phase Ones have gotten better in addressing the potential for contamination on a site, the ASTM scope leaves a number of issues unaddressed – issues just as critical to development. Water resources have become a major hurdle for development and a lightning rod for environmentalist criticism of new projects, but their impact is not assessed in a standard Phase One. What’s more, the definition of what types of “water” are subject to the jurisdiction of state and federal agencies has been the subject of a recent U.S. Supreme Court case (with no majority opinion providing clear rules) and new guidance from the Army Corps of Engineers. Parties with plans for development or modification of existing improvements should hire competent hydrologists and biologists to assess the potential impact of streams or wetlands on their plans, and consult competent counsel for guidance on the legal requirements for permitting.

Threatened or endangered species can also delay or wreck a project, and are not covered in a Phase One assessment. While a review of T&E species is not required by law in most cases (unless a federal permit or federal funding is involved), it is illegal at all times to “take” an endangered animal species, whether it is intentional or not. Ask your environmental consultants to review available state and federal databases for T&E species near your target property and to assess the potential for habitat on the site. If this screening identifies a potential impact, more detailed analysis of the site by biologists may be needed.

Historic and archaeological resources, whether on-site or nearby, can affect a development plan. While the discovery of human remains requires an immediate stop to earthmoving work, other historical items can also subject a project to public criticism. As with T&E species, a formal review is required only when a federal undertaking is involved. Early investigation, however, can often allow for experts to plan to manage or avoid impacts, or for development plans to be modified to accommodate competing interests in a cost-effective way.

If buildings exist on the target property, it is important to know that investigations for asbestos, lead paint, or mold – issues that can mean significant costs for characterization, abatement and waste disposal – are specifically excluded from the ASTM scope of work. While the production of asbestos-containing building materials was phased out in the United States decades ago, materials already in commerce and materials produced outside the country continue to show up in buildings of relatively recent vintage. Therefore, asbestos should not be ruled out as a concern based on a construction date alone. Lead paint is specifically regulated in certain public housing, but can be a concern in a number of contexts, including residences, schools, and day care facilities. Removing or abating lead paint can be labor-intensive and affect project costs. Toxic mold can develop in buildings with sources of water and result in expensive abatement work. The abatement costs, however, can pale in comparison to the jury verdicts awarded to plaintiffs sickened by exposure to the mold. A standard Phase One addresses none of these important issues.

A number of problems for land acquisitions and subsequent development can be managed effectively when they are identified at the earliest stages of a project. However, the common Phase I report – the widely accepted standard of due diligence in real estate transactions – leaves many of these issues completely unaddressed. Businesses buying land should be aware of these limitations and work with their counsel to develop a supplemental scope of work appropriate to their project to avoid costly delays and controversy.