



ALL APPROPRIATE INQUIRIES

All Appropriate Inquiries (AAI) is environmental due diligence. It is the process outlined by the U.S. EPA for evaluating a property's environmental conditions and assessing potential liability for any contamination by investigating previous ownership and uses of that property. AAI must be conducted prior to property acquisition in order to obtain protection from potential environmental liability and, if applicable, eligibility for U.S. EPA Brownfields Program grants.

WHAT IS A REC?

The term Recognized Environmental Condition (REC) means the presence or likely presence of hazardous substances or petroleum products in, on, or at a property:

- (1) due to a release to the environment;
- (2) under conditions indicative of a release to the environment; or
- (3) under conditions that pose a material threat of a future release to the environment.

PHASE I ENVIRONMENTAL SITE ASSESSMENTS

The standard method for performing environmental due diligence is by hiring a qualified environmental professional to complete an AAI-compliant Phase I Environmental Site Assessment (ESA). Standards for a Phase I ESA have been established by ASTM International in compliance with the U.S. EPA's AAI requirements. These standards are widely accepted and adhered to by the environmental industry to provide liability protection for clients involved in potentially contaminated property transactions.

The purpose of a Phase I ESA is to identify, to the extent feasible, Recognized Environmental Conditions (RECs) in connection with a property. This process includes reviewing site records, visiting the site, and interviewing individuals with site knowledge. Upon evaluation of commonly known and reasonably ascertainable information, the environmental professional provides conclusions and an opinion regarding appropriate additional investigation. Note that a Phase I ESA does not involve collection and laboratory analysis of environmental samples.

FOUR COMPONENTS OF A PHASE I ESA

1. Records Review

The environmental professional reviews government environmental records and historical use information.

2. Site Reconnaissance

The environmental professional conducts a site visit to observe the property and any structure(s) on the property, as well as adjacent properties. Contamination can result from activities that took place on the site or from activities at a nearby property.

3. Interviews

The environmental professional interviews present and past owners, operators, and occupants of the property, as well as knowledgeable local government officials.

4. Report

The environmental professional compiles a report to document findings, identify data gaps, and provide conclusions, and, if applicable, recommends further investigation of RECs identified at the property.



WHEN TO CONDUCT A PHASE I ESA

A Phase I ESA may be conducted at any time to evaluate potential environmental conditions associated with a property. However, a Phase I ESA must be conducted or updated within 180 days before the date of a property acquisition to obtain protections from potential environmental liability.

If a Phase I ESA does not identify any RECs, the barrier to redevelopment for a site previously perceived to be contaminated is removed.

If a Phase I ESA identifies RECs, a Phase II ESA may need to be completed for further evaluation of the property's actual environmental conditions.

The Phase II ESA involves collection and laboratory analysis of environmental samples by an environmental professional.

PHASE I ESA USER RESPONSIBILITIES

The Phase I ESA user is defined as the party seeking an environmental assessment of the property.

The user may be a potential purchaser of property, a potential tenant of property, an owner of property, a lender, or a property manager. Regardless, a user has specific obligations that must be fulfilled in conjunction with a Phase I ESA to qualify for environmental liability protections.



User responsibilities include providing the environmental professional:

- Any discovered environmental liens and activity and use limitations (AULs) after reviewing title and judicial records
- Commonly known information within the local community about the property
- Any specialized knowledge or experience that is material to RECs in connection with the property
- Relationship of the purchase price to the fair market value of the property if it were not contaminated

ADDITIONAL RESPONSIBILITIES FOR ATTAINING LIABILITY PROTECTION

After conducting a Phase I ESA and acquiring a property, to maintain liability protections, landowners must comply with “continuing obligations” during their property ownership.

Continuing obligations include:

- Provide all legally required notices for the discovery or release of a hazardous substance.
- Exercise appropriate care of the hazardous substances by taking reasonable steps to stop or prevent continuing or threatened future releases and exposures, and to prevent or limit human and environmental exposure to previous releases.
- Provide full cooperation and access to individuals authorized to conduct response actions or natural resource restoration.
- Comply with land-use restrictions and not impede the effectiveness of institutional controls.
- Comply with information requests and subpoenas.

It is also important to note that the landowner cannot be affiliated with any liable party through any familial relationship to any contractual, corporate, or financial relationship (other than a relationship created by conveying or financing the property).

WHY IS ENVIRONMENTAL DUE DILIGENCE NECESSARY?

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, in response to growing concerns over health and environmental risks posed by hazardous waste sites. This law authorizes the U.S. EPA to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment, seek reimbursement of cleanup expenses from potentially responsible parties (PRPs), and order PRPs to abate releases or threatened releases.

A key element of CERCLA is that whenever possible, the party responsible for contamination must pay for cleanup work performed at a Superfund site. Persons, including buyers, lessors, and even lenders, can be held strictly liable for contamination at hazardous waste sites that they either currently own or operate, or owned or operated in the past, even if a prior owner caused the contamination. Strict liability under CERCLA means that liability for environmental contamination can be assigned based solely on property ownership.

In the years after CERCLA passed, developers and lenders became increasingly risk averse to investment in formerly used properties, citing a fear of becoming a PRP. In response to this trend and as an effort to overcome the challenges of redeveloping potentially contaminated properties, Congress amended CERCLA to clarify liability defenses and require AAI for liability protections. The U.S. EPA established standards for AAI in 2006.

Potential liability of hazardous substances contamination through CERCLA has been a primary driver for environmental assessments in commercial real estate transactions.



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REFERENCES

- 42 U.S.C. 9601 et seq.
Comprehensive Environmental Response, Compensation, and Liability Act
- 40 CFR Part 312
Standards and Practices for All Appropriate Inquiries
- ASTM E1527
Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process
- ASTM E2247
Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property