

All Appropriate Inquiries

What does it mean for the future of Environmental Site Assessments?

by

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Environmental Site Assessments (ESAs) are typically conducted prior to purchasing, selling, financing and/or developing commercial and industrial real estate in order to assess real property for potential environmental liability and reuse limitations. The type of ESA that is appropriate for a given transaction is largely dependent on the type of property (low vs. high risk potential for environmental contamination) and the property value or loan amount. Additionally, as the cost of resolving environmental liabilities has increased over time, so has the level of attention given to the environmental due diligence process.



Regulatory History

The increased demand for ESAs began in the 1980's as a result of the Comprehensive Emergency Response Compensation & Liability Act (CERCLA), enacted by congress in 1980, and the 1986 amendments to the CERCLA known as the Superfund Amendments Reauthorization Act (SARA), which together introduced the idea of an *innocent landowner defense* to liability for the cost of cleaning up "Superfund" sites. Eligibility for the *innocent landowner defense* to CERCLA liability required that "on or before the date on which the defendant acquired the property, the defendant carried out *all appropriate inquiries* into the previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices."



In 1989, a new American Society for Testing and Materials (ASTM) subcommittee was organized with the principal goal of developing a standard practice for conducting all appropriate inquiries for CERCLA liability protection. In 1993, the first ASTM *Standard Practice of Environmental Site Assessments: Phase I Environmental Site Assessment Process* (E 1527) was published. The ASTM E 1527 Standard was subsequently republished again in 1997 and 2000 (E 1527-00).

The Small Business Liability Relief and Brownfields Revitalization Act, signed by the president in 2002, created new CERCLA liability protections (in addition to *innocent landowner*) including *contiguous property owner* and *bona fide prospective purchaser*. Soon after the enactment of this Act, Congress mandated that the Environmental Protection Agency (EPA) establish federal standards and practices for conducting all appropriate inquiries as required by the CERCLA. The EPA's Standards and Practices for All Appropriate Inquiries (AAI) final rule and a revised ASTM E 1527 Standard (E 1527-05), in full compliance with the final rule, were published in November 2005 and became effective in November 2006.



Property Assessment Process

Since 1993, the real estate development community has relied on the ASTM Standards as the primary guidance to assess real property for potential environmental liability and reuse limitations. The following methods have been developed by the ASTM to meet the varied needs of the industry:

ASTM STANDARDS	APPLICATION
<i>Transaction Screen Assessment (ASTM E 1528-06)</i>	<i>Low risk / low value properties (not AAI compliant)</i>
<i>Forest or Rural Property Assessment (ASTM E 2247-02)</i>	<i>Forestland / rural properties in excess of 120 acres (not AAI compliant)</i>
<i>Phase I Environmental Site Assessment (ASTM E 1527-00)</i>	<i>Low risk / high value or high risk / low value properties (meets innocent land owner defense only)</i>
<i>AAI Compliant Phase I Environmental Site Assessment (ASTM E 1527-05)</i>	<i>High risk / high value or special considerations¹ (AAI compliant)</i>

¹ Special consideration could include: low user risk tolerance, proximity to CERCLA Sites, loans related to lender workout/foreclosure, etc.

EPAs AAI Rule/ASTM 2005 Standard

Several changes were made to the ASTM Phase I Standard in order to make the ESA practice consistent with the EPA's AAI rule, including the following:

- **Scope** – *New liability protections added & new language on controlled substances.*
- **New Emphasis on Activity and Use Limitations (AULs)** *including engineering and institutional controls.*
- **User Responsibilities** – *Land title search for environmental cleanup liens, consideration of purchase price, specialized knowledge & New Appendix: User Questionnaire.*
- **Professional Qualifications** – *Environmental Professionals (EPs) have new qualifications to meet in terms of licenses, education and/or relevant experience; at least one EP must review and interpret information and sign off on report, declaring that federal rule was followed.*
- **Core Phase I Components** – *Records review (tribal and local records search, institutional and engineering controls and certain federal sources), historical use information, site reconnaissance and interviews.*
- **Evaluation/Report** – *Must include staff qualifications, document data gaps, and provide certain opinions.*
- **Phase I Shelf Life** – *One year shelf life from the date of purchase, with 180-day life for certain components.*

Phase I Pricing Implications

Based on the increased level of research and documentation discussed above, the price for completing an AAI-complaint Phase I ESA is greater than that for a Phase I ESA in compliance with the old ASTM 2000 standard. The following table summarizes data obtained from *Environmental Data Resources, Inc ESA Scorekeeper® Phase I Pricing Data – 2006 Summary*:

SCOPE	NATIONAL AVERAGE	NORTHEAST AVERAGE
Basic Phase I ESA	\$2,310	\$2,642
AAI-Compliant Phase I ESA	\$2,740	\$3,188

According to this data, the average increase in cost for performing an AAI-compliant Phase I ESA is approximately \$400-\$500.

The Future of Phase I ESAs

AAI-compliant Phase I ESAs may not be appropriate for all commercial and industrial real estate transactions; however, educated decisions must be made by environmental professionals, lenders and property purchasers about whether and when to adopt the AAI-compliant Phase I protocol. Some things to consider in making these decisions include the following:

- How important is it to be eligible for CERCLA liability?
- Does the property have a high risk potential for environmental contamination?
- What is your risk tolerance on different types of transactions and what level of environmental due diligence will be satisfactory?
- If you are a lender, what is the loan amount and/or are you foreclosing on or accepting a deed in lieu of foreclosure on real estate?

Lenders, developers, buyers and/or sellers of commercial and industrial real estate are faced with the challenge of assessing potential environmental liability based on the results of ESAs. Making educated decisions regarding the type of ESA that is appropriate for a given transaction is a key component in this process. Please click on the following link for a copy of a typical [*Environmental Site Assessment Decision Tree*](#) that can help guide you in sorting out your ESA needs.

About the Authors



Mark House, *Vice President and Principal Scientist* for Resource Controls, has over 17 years of environmental consulting experience that includes managing and conducting field investigations, feasibility studies, and remediation activities at a variety of hazardous waste sites throughout New England and the East Coast. He specializes in overseeing complex site cleanup actions at industrial sites under state and Federal regulatory orders with a focus on cost-effective, practical solutions that are consistent with clients' business and site reuse goals. Mark received an M.B.A from the University of Rhode Island in 1998 and a B.S. in Water Resources from the State University of New York at Oneonta in 1989.



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