

ENVIRONMENTAL SITE ASSESSMENTS

PHASE I ASSESSMENTS AND ALL APPROPRIATE INQUIRY

Phase I “AAI” Standards:

- Interviews with past and present owners
- Review of government records
- Review of historical sources of information
- Searches for recorded environmental cleanup liens
- Visual inspection of the facility and adjoining properties
- Specialized knowledge or experience of the user
- Relationship of the purchase price to the value of the property were it not contaminated
- Commonly known or reasonably ascertainable information
- The degree of obviousness regarding the presence or likely presence of contamination, and the ability to identify the contamination through appropriate investigation
- Results of an inquiry conducted by a Qualified Environmental Profession (QEP) in a written report



Recognized Environmental Conditions can include dumping areas and leaking drums.

ENVIRONMENTAL DUE DILIGENCE AND ALL APPROPRIATE INQUIRY

Environmental due diligence, also known as All Appropriate Inquiries (AAI), refers to the requirements for assessing the environmental conditions of a property prior to its acquisition. Due diligence includes deed and title research, a search of government records, a review of historical information regarding property ownership and uses, a visual inspection of the property, and other research necessary to properly assess potential environmental conditions, a property’s value, and to understand liabilities associated with a property.

The standard method for performing environmental due diligence is through completion of an AAI-compliant Phase I Environmental Site Assessment (ESA). If the Phase I ESA identifies Recognized Environmental Conditions (RECs), a Phase II ESA may need to be completed.

The purpose of an ESA is to identify if the past and present uses of a specific property, as well as nearby properties, may have resulted in environmental contamination of the property in question. An ESA may also evaluate the risks associated with actual or potential contamination.

WHY IS ENVIRONMENTAL DUE DILIGENCE NECESSARY?

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the “Superfund Law.” One of the primary emphases of CERCLA was that whenever possible, the party responsible for pollution should pay the cleanup costs. With that principle in mind, the Superfund law established a strict liability scheme that has been interpreted by courts such that it could require buyers, lessors, or lenders to be responsible for the cleanup of hazardous substances, even if a prior owner caused the contamination. Subsequent amendments to the “Superfund Law” required purchasers of property to conduct an AAI as part of the requirements for asserting liability protections. In 2002, Congress passed additional amendments to clarify defenses, including the Bona Fide Prospective Purchaser defense against “Superfund liability,” and required the EPA to establish standards for AAI.



STANDARD PRACTICES FOR ALL APPROPRIATE INQUIRY

By the late 1980s, the environmental industry had begun to recognize the need for standard practices for the completion of ESAs intended to provide liability protection for parties transacting potentially contaminated properties. In 1989, the American Society for Testing and Materials International (ASTM) convened a sub-committee to develop a standard practice for conducting environmental due diligence, or AAI, consistent with good commercial and customary practice, and specifically for Superfund liability protection. The first standard, ASTM 1527 Practice for Phase I Environmental Site Assessment was published in 1993 and was quickly accepted as the baseline process for conducting an AAI.

After Congress passed the Brownfields Amendments in 2002, EPA through a negotiated rulemaking process, developed a regulation establishing standards and practices for AAI. At the same time, ASTM revised its standard to be compliant with the final AAI regulation. When EPA's final AAI rule became effective in November 2006, the agency announced that ASTM Standard E1527-05 would be considered to be in compliance with the final AAI rule. The ASTM standard was updated in 2013, and in 2014, EPA announced that the new standard (ASTM E 1527-13, Standard Practice for Environmental Assessment: Phase I Environmental Assessment Process) "may be used to comply" with the AAI requirements.

HOW, WHERE, AND WHEN SHOULD A PHASE I ESA BE COMPLETED

Any piece of real estate can be the subject of a Phase I ESA and Phase I ESAs can be conducted at any time to evaluate potential environmental conditions associated with a property.

Both the AAI Rule and the ASTM E1527 Standard describe the necessary qualifications for persons performing an ESA Phase I (or AAI) and also establish a shelf life for ESAs. AAI must be conducted and documented by an "environmental professional," which is defined as a person who possesses sufficient education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property. (40 CFR 312.10)

The AAI Rule and the ASTM E1527 standard also establishes that the ESA must be conducted no more than one year prior to the acquisition of a property, and if the ESA is more than 180 days old, certain aspects of the assessment (the site visit, interviews, and government records review) must be updated for the assessment to be valid.

REPORTING REQUIREMENTS – FINDINGS AND CONCLUSIONS

A written report will be prepared by the environmental professional that will outline findings from the Phase I ESA. Of particular importance is the identification of recognized environmental conditions (RECs) in the findings section of the report. The definition of a REC is "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."

The environmental professional may make recommendations in the conclusions section of the report to conduct further investigation of the RECs identified at the property. These recommendations may indicate that a Phase II investigation is warranted.

CONTACTS FOR STATE BROWNFIELD REDEVELOPMENT PROGRAMS

Most States operate brownfields redevelopment programs that strive to help redevelopment and revitalize properties that are abandoned or underutilized due to real or perceived contamination. You may find contact information for state and local tribal information at the following web address:

<https://www.epa.gov/brownfields/state-and-tribal-programs-and-resources>