

Phase I Environmental Site Assessments

EMS Environmental, Inc.



Contents

- 3 | Letter from the CEO
- 4 | What is a Phase I Environmental Site Assessment?
- 6 | Is a Phase I ESA Necessary for Every Commercial Property Purchase?
- 7 | Top 5 Reasons Banks Require a Phase I ESA
- 10 | What are the Qualifications of a Phase I ESA Provider?
- 11 | How Much Does a Phase I ESA Cost?

Letter from the CEO

We put this eBook together to teach prospective property buyers and sellers about the importance of conducting an environmental site assessment before closing the deal. Very often the completion of Phase I ESA is a condition set forth by the lender, but its value in due diligence is much greater.

We have had many clients over the years who either neglected to perform an ESA when they purchased a property or also when they sold a property. Below are two examples.

Example 1 - Property Purchase

A buyer purchased a commercial property that had been used for storage. The property was in a great location and priced right by the estate of the deceased owner. The buyer began to operate a new business at the facility. Several years later, groundwater contamination was discovered in the area. The contamination was traced back to solvents that had been discharged into an on-site drain field by a previous owner, who had a machine shop on the property. Since the previous owners/entities no longer existed, environmental laws dictated that the new property owner was liable for the cleanup costs, regardless of the fact that he did not cause the contamination.

Example 2 - Property Sale

A service station property was sold "as is" to a former manager of the facility. Many years later a neighbor discovered gasoline contamination in a potable well. There were recent documented gasoline spills on the property but the new owner claimed there were also undocumented leaks prior to the purchase. The owner of the neighboring property sued the current owner and the seller. As the seller had much deeper pockets, the seller spent several hundred thousand dollars defending the suit.

In both of these cases, had the buyers and sellers conducted Environmental Site Assessments prior to the purchase, the prospective purchasers and sellers could have made informed decisions and addressed environmental issues before they turned into very expensive problems.

Enjoy the book!

Allan Blanchard
CEO
EMS Environmental, Inc.

What is a Phase I Environmental Site Assessment?

Prospective commercial property purchasers often first learn of the Phase I ESA requirement as a condition for obtaining a mortgage. When faced with the task of completing a site assessment on their property before receiving the loan, prospective purchasers turn to us for answers to all of their Phase I ESA questions.

A Phase I Environmental Site Assessment is a process used to determine the likelihood or potential for pollutants to be present on a commercial property.

The Phase I ESA is used to mitigate the risk that there is undiscovered contamination for which an investor, lender, or new owner could become liable in the future.

Each Phase I Environmental Site Assessment follows the same four-step process:

- 1. Records Review**
- 2. Site Reconnaissance**
- 3. Interviews**
- 4. Report Preparation**

The goal of a Phase I ESA is to determine if there are any situations on the property that fit the definition of a Recognized Environmental Conditions (RECs). A REC is defined as the **presence or likely presence of any hazardous substances or petroleum products in, on, or at a property.**

Observation of a REC does not necessarily mean there is contamination—it simply suggests there is a possibility. Presence of a REC does not disqualify a property owner from receiving a loan from the bank, but further investigation of the REC may be required to determine if there has been any sort of environmental impact.



“But how long will it take to complete?”

The ideal time frame for completion is 30 days. It is not uncommon for the purchaser to learn of the requirement late in the due diligence process which necessitates a much more rapid schedule with multiple environmental professionals simultaneously completing separate tasks. If RECs are identified, the timeline may have to be extended.

Comprehensive Environmental Response, Compensation, and Liability Act

In 1980, congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) gave the Environmental Protection Agency (EPA) the power to seek out those parties responsible for any release of contaminants to ensure their cooperation in the cleanup. Liability for incidents of contamination is imposed regardless of fault and can be imposed retroactively (before CERCLA was enacted). The liability is also *joint and several*, meaning that liability can be imposed regardless of relative contribution, including merely purchasing a property.

Brownfields Amendments

Twenty-two years after congress passed CERCLA, they also passed the “Small Business Liability Relief and Brownfields Revitalization Act”—known as the Brownfields Amendments. These amendments created a new landowner liability protection from CERCLA for **bona fide prospective purchasers** (BFPP) of brownfields properties.

The Brownfields Amendments added specific criteria for conducting All Appropriate Inquiry, which later became known as the **AAI Rule**. This rule provides an escape from liability called the “Innocent Landowner Defense,” but can only be used if appropriate due diligence was conducted prior to the acquisition of the property. CERCLA allows that appropriate due diligence has been exercised **only if a thorough investigation of a site’s current and former uses has been prepared**—otherwise known as a Phase I ESA.

To qualify as **bona fide prospective purchaser**, a person must:

1. Not be potentially liable for contamination on or at a property;
2. Acquire the property after January 11, 2002;
3. Establish that all disposal of hazardous substances occurred before the person acquired the facility;
4. **Make all appropriate inquiries into previous ownership and uses of the property prior to acquiring the property;**
5. Not be affiliated with a party responsible for any contamination



Is a Phase I Necessary for Every Commercial Property Purchase?

Are you considering the purchase of a commercial property but worry about the legal ramifications of perhaps buying something that contains hidden contamination? As a new property owner, do you worry that you could be liable if you find contamination?

Lenders and prospective property buyers must gauge the cost of a Phase I ESA versus the probability that an environmental issue exists, which could negatively affect the value of the property.

Federal regulations do not require that a Phase I ESA be conducted on every commercial property transaction.

CERCLA liability protection is only afforded when such assessments are initiated prior to the purchase of a property. Two main factors-- **current property use and historical property use**—dictate whether or not a bank will require a Phase I ESA before offering a loan. Since everyone's risk tolerance is different, there are some gray areas.

Some current property uses clearly indicate a Phase I ESA is necessary for proper due diligence:

1. The business sells, supplies, or dispenses fuel, gasoline, heating oil, and/or other hazardous materials
2. If there are actual or suspected hazardous substances on the property, in the subsurface, or in the soil/groundwater, either from current or past activities on the property or on any surrounding properties
3. There is a known or potential threat to the environmental or potential exceedance of any cleanup standard
4. There is an issue that has been, currently is, or will potentially become the subject of an enforcement action under Federal or state laws, especially cleanup-related and waste-related state laws

Examples of environmentally-sensitive industries

- *oil and gas extraction*
- *laundry & dry-cleaning facilities*
- *photofinishing laboratories*
- *heavy & civil engineering construction*
- *food manufacturing with USTs present*
- *Beverage & tobacco manufacturing*
- *chemical manufacturing*
- *air, rail, & pipeline transportation*
- *gasoline stations*
- *exterminating & pest control*
- *waste management & remediation*
- *skiing facilities*
- *plastics and rubber manufacturing*
- *metal and mineral merchant wholesaler*
- *fuel dealers*
- *general medical & surgical hospitals*
- *marinas*
- *death care services*
- *golf courses & country clubs*
- *automotive repair & maintenance*



Property history is also used to gauge the need for a Phase I ESA

If a property has been used for an environmentally-sensitive industry or is in close proximity to a business in an environmentally-sensitive industry, conducting a Phase I ESA is of vital importance to determine the presence of environmental conditions.

Special Use Facilities also require Phase I ESAs

Prudent lending practices dictate that specific additional environmental assessments be performed that are outside the normal scope of a typical Phase I ESA.

For example:

- Property constructed prior to 1980 that will be used for daycare or child-care centers or nursery schools should undergo a lead risk assessment for lead-based paint and testing for lead in drinking water.
- Individuals living in residential care facilities constructed prior to 1980 may also be at increased risk for lead exposure. Prudent lending practices dictate that these facilities also undergo a lead risk assessment.

There are five main reasons why a bank will require a Phase I ESA:

1. Environmental Risk Policy
2. Federal Regulations
3. State Regulations
4. EPA's All Appropriate Inquiry Rule
5. ASTM Standards

Bankers share your concerns when it comes to the ramifications of purchasing a property with possible hidden contamination. The main risk a banker will consider is the impact of environmental conditions upon the value of the property. The stakes are high when dealing with EPA regulations and all of their back references and guidance documents.

The cost of an environmental cleanup can far exceed the value of a property. Alternatively, great deals can be had by savvy investors who understand cleanup costs and regulations.

-Allan Blanchard, CEO, EMS Environmental, Inc.

1. Environmental Risk Policy

Banks have established safeguards and controls to limit exposure to potential environmental liability associated with real property. Environmental contamination—and its associated liability—may have significant adverse effects on the value of real estate. In certain circumstances, it may cause a lender to be held directly responsible for the environmental cleanup of the property. The cost of the cleanup may exceed both the amount of the loan granted to the borrower as well as the value of the property.

2. Federal Regulations

CERCLA authorizes the United States EPA to respond to human health and environmental hazards posed by hazardous substances at properties. The courts have applied a strict liability standard under CERCLA: liability is imposed regardless of fault and can be imposed retroactively.

Under CERCLA, the EPA can require liable parties to conduct cleanups, or the EPA can conduct a cleanup and subsequently seek cleanup cost recovery from liable parties.

CERCLA defines a liable party as:

1. The current owner/operator of a contaminated property
2. Any owner/operator at the time of disposal of any hazardous substances
3. Any person who arranged for the disposal or treatment of hazardous substances, or arranged for the transportation of hazardous substances for disposal or treatment
4. Any person who accepts hazardous substances for transportation to the property and selects the disposal site

Lender Liability for Contamination under CERCLA

Banks that hold mortgages on property as secured lenders are exempt from CERCLA liability if certain criteria are met. A secured creditor exemption that eliminates owner/operator liability for lenders who hold ownership in a facility primarily to protect their security interest in that facility provided they do not “participate in the management” of the facility.

“Participation in management” may apply if a bank exercises decision-making control over a property’s environmental compliance, or exercises control at a level similar to that enjoyed by a manager of the facility or property.

In addition, the secured creditor exemption provides that simply foreclosing on a property does not result in liability for a bank, provided the bank takes “reasonable steps” to divest itself of the property “at the earliest practicable, commercially reasonable time, on commercially reasonable terms.” Generally, a bank may maintain business activities and close down operations at a property, so long as the property is listed for sale shortly after the foreclosure date or reasonable time.

3. State Regulations

In addition to CERCLA, most states have also enacted legislation that established similar liability under state law for contamination cleanup costs. Some states have a law which also allows the state to place a *super lien status* on the property to secure the state's cost of cleanup. The *super lien status* may be prior to and senior to the bank's mortgages and may substantially reduce the value of the bank's collateral position.



4. EPA's All Appropriate Inquiry Rule

To be eligible for liability protection under CERCLA as an innocent landowner, contiguous property owner, or bona fide prospective purchaser, prospective property owners must conduct All Appropriate Inquiries prior to acquiring the property. The AAI Rule sets Federal standards and practices for conducting AAIs. All Appropriate Inquiries must be conducted or updated within one year prior to acquiring ownership of a property. Certain aspects or provisions of All Appropriate Inquiries (i.e., interviews of current and past owners, review of government records, on-site visual inspection, and searches for environmental cleanup liens) must be conducted within 180 days prior to acquiring ownership of a property.

<p>The AAI Rule applies to anyone who is:</p> <ul style="list-style-type: none">• Purchasing commercial or industrial property• Financing or re-financing commercial or industrial property• Seeking Federal grant money for contaminated site characterization and assessment	<p>The Inquiry of the environmental professional must include:</p> <ul style="list-style-type: none">• Interviews with past and present owners, operators, and occupants• Reviews of historical sources of information• Reviews of Federal, state, tribal, and local government records• Visual inspection of the facility and adjoining properties• Commonly known or reasonably ascertainable information• Degree of obviousness of the presence of contamination at the property	<p>Additional inquiries that must be conducted by or for the prospective landowner or grantee include:</p> <ul style="list-style-type: none">• Searches for environmental cleanup liens• Assessments of any specialized knowledge or experience of the prospective landowner or grantee• An assessment of the relationship of the purchase price to the fair market value of the property, if property was not contaminated• Commonly known or reasonably ascertainable information
---	---	---

5. American Society for Testing and Materials

The EPA recognizes both **ASTM International's E1527 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process"** and **ASTM E2247 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland and Rural Property"** as compliant with All Appropriate Inquiries Regulation. These ASTM International Phase I standards may be used to satisfy the statutory requirements for conducting AAI under CERCLA. The individual who supervises or oversees the conduct of the AAI investigation and signs the final report required in the AAI regulation must meet the definition of an "Environmental Professional."

What are the Qualifications of a Phase I ESA Provider?

The expertise of your Phase I ESA provider is a key component of the due diligence process when purchasing commercial property.

Minimum Qualifications of Environmental Professionals

As part of the AAI criteria, the EPA established the following minimum qualification standards for Environmental Professionals (EPs) who prepare Phase I ESAs. To meet these qualifications, a person must:

1. Hold a Professional Engineer's or Professional Geologist's license or registration and have three years of relevant full-time work experience
2. Be licensed or certified by a state, tribe, or the Federal government to perform All Appropriate Inquiries and have three years of relevant full-time work experience
3. Have a Baccalaureate degree or higher from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science, and five years of relevant full-time work experience
4. Have 10 or more years of relevant full-time work experience



Recommended Qualifications for Environmental Professionals

Based upon the importance of strictly complying with the AAI process and also upon the importance of providing appropriate due diligence for prospective buyers and their lenders, the following qualifications are recommended traits of EPs.

1. Experience with current ASTM standard

- Effective December 30, 2013, the EPA issued a rule formally recognizing ASTM E1527-13 Phase I ESA standard as meeting the requirements of AAI under CERCLA.

2. Experience with similar properties

- EPs who are familiar with the historical uses of a property may have knowledge of industrial processes and storage areas and will thus have a better understanding of where to investigate for potential problems.

3. Remediation experience

- EPs with remediation experience will be able to provide buyers and lenders an estimate of potential assessment and remediation costs.

4. Professional Liability Insurance

- It just makes sense that the environmental firm you trust to conduct an ESA has insurance.

5. Responsiveness

- It is important to have an experienced, adaptable EP who can efficiently produce a quality ESA within the due diligence time frame.

How Much Does a Phase I ESA Cost?

The cost of a Phase I ESA is reflected in the level of effort required to meet the objectives in the ASTM standard.

There are multiple factors that affect the cost of a Phase I ESA. Continue reading to learn more about the seven factors that have the greatest influence on costs.

Property Use

If the current business is engaged in environmentally-sensitive activities, the completion of the assessment will require more effort. There are several questions that can be asked to gauge the environmental sensitivity of the site: Does the business store or manufacture chemicals or petroleum products? Are there polychlorinated biphenyl (PCB) transformers on the property? Are there drains or disposal pits present?

Historical Use of the Property

There is always a possibility of hidden contaminants on a property, even if the current owner operates a relatively benign business. The previous property owner may have operated an environmentally-sensitive business, which could potentially make the assessment more extensive.

Size of the Property

Assessments conducted on larger properties require much more time and effort to complete. A small building on a ¼-acre parcel will be cheaper than a several-acres piece of land with large industrial buildings built upon it.

History of Regulatory Activity

The more regulatory activity associated with a property, the more time it will take to complete the ESA. Are there existing environmental permits in place? Is there a history of Notices of Violation, citations, or complaints/lawsuits regarding environmental problems? If so, the EP must sift through all records, thus increasing the amount of time it will take to complete the ESA.



Adjacent Property Use

Waste from neighboring properties can spread far beyond their borders and cause adverse impacts. The level of effort required to ascertain the potential for off-site impacts varies with the types of businesses in the area.

Location of the Property

An EP must travel not only to the property for the assessment, but also the Federal and state offices in order to inspect regulatory files. The more travel time required, the higher the cost.

Experience Level of the Environmental Professional

ASTM requirements dictate the minimum qualifications of the EP who is responsible for the final report. However, based upon the complexity of the property, it may be wise to enlist the help of someone with more than just the minimum experience.

In Conclusion...

A Phase I Environmental Site Assessment is a prescribed method of inspecting a property and investigation its history in an effort to uncover potential environmental issues that could adversely affect its value.

Environmental liabilities can severely affect the value of a property and sometimes even exceed the value.

Under Federal regulations, liability is imposed regardless of fault and regardless of relative contribution.

Due diligence and risk tolerance will dictate the need for a Phase I ESA. There are often great bargains to be had when purchasing a property that holds or was previously occupied by an environmentally-sensitive industry.

Our staff of professionals has performed thousands of site assessments. Using our experience, we can apply the Phase I ESA process to your property to identify hidden environmental disasters that may put you at risk for future liability.

Since 1988, Environmental Management Services Inc., or EMS Environmental, has steadily grown and expanded to meet our customers' needs. We serve clients throughout the Eastern U.S., operating out of three regional offices located in New York, North Carolina, and our headquarters in Pennsylvania.

EMS Environmental has a diversified staff of dedicated engineers, geologists, scientists, regulatory specialists and technicians whose knowledge bridges several environmental disciplines including soil, groundwater, and air quality, as well as legal support. It's our knowledge of how these disciplines interact that brings additional value to our customers across several industries.

Our technical expertise, coupled with our understanding of fiscal and regulatory concerns minimizes disruptions, allowing our clients to focus on the daily operations of their business.

Our mission is to successfully anticipate, assess and resolve environmental issues for our clients through our thorough analysis, innovative best practices, and unrivaled service integrity.

