Protecting Your Property Transaction Liabilities

**What is a Phase I Environmental Site Assessment?**

If your company plans to purchase, manage, lease, or sell a piece of commercial property, the phrase “Phase I Environmental Site Assessment” is bound to come up, and if it doesn’t, it should, because it’s key to limiting your risk with the transaction.

**What’s a Phase I ESA?**

Phase I Environmental Site Assessments (Phase I ESAs) are studies that research the current and historical uses of a property. The intent of the study is to assess current or historical property uses impacting the property that could pose a threat to the environment and/or human health. This research will help give insight if there’s a potential that you’ll be responsible for environmental issues found onsite.

**Who Needs to Conduct a Phase I ESA?**

* Property Owners
* Property Sellers
* Banks/Lenders
* Property Buyers

**What Federal Regulations Impact a Phase I ESA?**

EPA’s CERCLA (Comprehensive Environmental Response, Compensation and Liability Act), aka Superfund, gives the federal government the ability to respond to releases, or threated releases of hazardous substances. It also gives them the ability to pursue polluters (responsible parties) or potential polluters (potentially responsible parties) for the cleanup of contaminated sites. As a property buyer or seller, it’s up to you to do some due diligence and make an “all appropriate inquiry” into the environmental conditions of the site.

When you make that all appropriate inquiry, there are certain defenses allowed to protect yourself from CERCLA liability.

The ***Bona Fide Prospective Purchaser Defense*** allows a purchaser to first evaluate the property’s environmental conditions and assess potential liability for any contamination, then purchase the property with knowledge of hazardous substance contamination without incurring liability as an owner or operator.

The ***Innocent Landowner Defense*** is allowed if a purchaser “did not know and had no reason to know” that contamination existed on the property at the time the purchaser acquired the property, if a government entity acquires a property by escheat, involuntary acquisition, or eminent domain, or if a person acquired the facility by inheritance or bequest.

For the ***Contiguous Property Owner Defense***, the property must be contiguous to a property that is or may be contaminated by hazardous substances from other property that is not owned by that person.

Another defense, the ***Brownfield Defense***, can be used when a property is already assumed to have contamination, and it becomes a part of EPA's Brownfields Program for economic redevelopment.

**What’s Included in a Phase I ESA?**

All appropriate inquiries must be conducted by an environmental professional and they include:

***Site Visit***

The professional will conduct a reconnaissance of the site to determine if there is a likely presence of hazardous substances or petroleum products, and if there is an indication a release or threatened release could have occurred. The property’s exterior and interior structures are observed at this time.

***Historical Research***

Research of property records back to the property’s first development, or 1940, whichever is earlier is conducted. This research includes inspecting historical aerial photographs, topographical maps, Sanborn Fire Insurance maps, street/city directory searches, building permits, planning records, title searches, and government records review.

***Geology and Hydrogeology Studies – The environmental professional will look:***

* Soil types to determine the composition, texture, hydrologic group, and its drainage class.
* Physical setting/topography of the property.
* Groundwater depth and flow direction studies identify hydrologically upgradient source areas and risk of vapor intrusion and vapor encroachment.

Vapor intrusion occurs when volatile chemicals migrate from contamination in the soil or groundwater up into a building’s interior space. Vapor intrusion can be caused by contamination on-site or off-site from a property. A contamination plume can originate from an off-site source and migrate onto the property and underneath buildings. Vapor encroachment is a broader concern when compared to vapor instruction. Vapor encroachment is focused on the potential for vapors to exist within a building.

***Interviews and Other Documents***

The environmental professional will interview tenants, the current owner(s), and previous tenants/owners, and state and local regulators. Any additional provided documentation such as previous Phase I ESAs, spill reports, state or local contamination reports, etc. will be reviewed.

***Other Reviews***

While an environmental professional is already conducting this research, the entity requesting a Phase I ESA may also want them to look at other sources for potential environmental issues. The following items can also be included in a Phase I ESA, but are not a part of the EPA CERCLA regulation for sources of liability.

* Asbestos-Containing Building Materials
* Biological Agents
* Cultural and Historic Resources
* Ecological Resources
* Health and Safety Issues
* Indoor Air Quality (unrelated to vapor intrusion)
* Industrial Hygiene
* Lead-Based Paint
* Lead in Drinking Water
* Mold
* Radon
* EPA/OSHA/DOT Hazardous Materials Regulatory Compliance Items
* Wetlands

**Limitations of a Phase I ESA**

Phase I ESAs are valid for 180 days. Between 180 days and a year, the interviews, title search, government records research and visual inspection will need to be updated. Any Phase I ESA over one year old is consider invalid and outdated and will need to be redone.

Phase I ESAs can reveal the likelihood of existing and/or past evidence of contamination, but they

* Cannot prove that hazards are present;
* Cannot ensure hazards or pollutants will not be discovered at a later date; and,
* Cannot ensure landowners can avoid all responsibility.

Phase II Environmental Assessments (Phase II ESAs) involve further environmental sampling, including sampling of soil, water, groundwater and/or soil vapor to help better determine if contaminants are present. If a recognized environmental condition is found from the Phase I ESA study, a recommendation for Phase II ESAs will often be suggested.

If you have questions about Phase I ESAs, or would like pricing to conduct one for your next property transaction, [**please contact us**](https://isienvironmental.com/contact-us/)**!**