

Other Considerations

As was the case with previous Phase I ESAs, buyers should note that AAI and ASTM E 1527-05 evaluate only for potential Superfund liability. However, additional evaluation is often requested to determine the presence of asbestos, lead-based paint, radon, or mold; the need for air, water, or hazardous waste permits; or other environmental, health or safety compliance matters. When considering acquiring property for commercial purposes, the buyer should work closely with the environmental professional to develop a scope of work specific to the project.



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HWS Consulting Group is a full service engineering consulting firm that was founded in 1944. HWS has conducted thousands of Environmental Site Assessments for hundreds of clients - financial, commercial, industrial, retail, developers and others - for nearly 25 years.

HWS personnel meet - and exceed - the "Environmental Professional" standards for conducting ESAs. We are highly responsive to client needs, with personnel and resources located throughout the Midwest. We can also draw upon an established network of on-call employees and subconsultants throughout the United States.

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Phase I Environmental Site Assessments (ESAs)

*EPAs 'All Appropriate Inquiry' (AAI) Rule and
ASTM Standards for Environmental Due Diligence*

*Elements of the AAI rule
provide some challenges
to users and purchasers of
Phase I ESAs.*

Highlights include:

- New Investigation Requirements
- The "Environmental Professional" is Redefined
- New Documentation Requirements
- Additional Purchaser's Responsibilities



On November 1, 2005, the United States Environmental Protection Agency (EPA) issued the final rule defining the standard for conducting “All Appropriate Inquiry” (AAI) for Phase I Environmental Site Assessments (ESAs). Phase I ESAs are the most common means by which parties to a property or business transaction conduct “environmental due diligence” to understand the potential environmental liabilities and costs associated with a property. Phase I ESAs are also typically a minimum requirement for lenders to provide financing for commercial real estate transactions.

Background

The AAI Rule was developed as a result of the 2002 Small Business Liability Relief and Brownfields Revitalization Act, which amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980. Under the law, Congress required the EPA to develop standards for parties to conduct “all appropriate inquiries” before taking title of a property to determine if there were conditions indicative of releases, or threatened releases, of hazardous substances or petroleum products on that property. The AAI requirements are intended to clarify the following defenses or exemptions to CERCLA liability.

The AAI rule took effect on November 1, 2006. Phase I ESAs conducted after that date need to satisfy the AAI standards to qualify the user of the Phase I ESA for certain defenses and protections available under the federal Superfund law. The AAI rule is now the driving force for environmental due diligence for all property transactions that occur in the nation.

Property purchasers and other parties requesting Phase I ESAs typically obtain a study that conforms to ASTM Standard E 1527-Phase I Environmental Site Assessment Process, commonly recognized as the industry standard. ASTM issued standard E 1527-05 that was determined to comply with the AAI rule.

Changes to Phase I ESA Process

Elements of the AAI rule provide some challenges to users and purchasers of Phase I ESAs. Some of the differences include:

- **New Investigation Requirements.**

An AAI compliant investigation needs to seek additional information not required by previous ASTM E 1527 standards. This might raise confidentiality concerns for clients on either side of a transaction. For example, the final AAI rule requires interviews with current and past owners of a facility, as well as occupants, managers and, where necessary, even employees. A prospective purchaser will have a stronger basis to push a seller for increased site access during a Phase I ESA; a seller, conversely, may have new concerns over maintaining the confidentiality of a pending deal during due diligence.

- **Definition of an “Environmental Professional”.** The AAI standard requires that the ESA be performed by a qualified Environmental Professional (EP). The standard sets forth requirements for an EP in terms of minimum education and/or ten relevant years of experience for conducting ESAs.

- **New Documentation Requirements.** AAI must be conducted within one year prior to the date of property acquisition. Certain information in the report that is more than 6 months old must always be updated. ASTM E 1527-05 indicates that the report shall identify and comment on “data gaps” that affect the ability of the EP to identify “Recognized Environmental Conditions” (RECs) and identify the sources of information that were consulted to address the data gaps.

- **Purchaser Responsibilities.** The AAI rule requires documentation of the specialized knowledge of the purchaser, such as whether he or she is a real estate developer or Brownfields professional. Such an acknowledgment of specialized knowledge could threaten the viability of the “innocent” purchaser defense AAI is meant to support. The rule also requires an AAI Phase I to “consider” the relationship between the purchase price and the value of the property. For purposes of business transactions, written documentation of such strategic information could certainly impact current or future negotiations, as well as litigation, regarding the property.