

Primer on Environmental Due Diligence

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This primer on environmental due diligence is meant to educate and inform the reader on the basics of environmental assessments. From there, they can then make an informed decision on what service best fits their current situation and needs. It seems a rather complex subject, but is actually rather simple at the core of it all. If, after reading through this primer, there are still questions, please don't hesitate to contact us.

The framework for this primer is as follows:

- I. Background
- II. Topics for Consideration
- III. Overview of Services
- IV. Transaction Screen
- V. Phase 1 "Lite" ESA
- VI. AAI/ASTM Phase 1 ESA
- VII. Conclusion
- VIII. Glossary of Acronyms

I. Background

In 1980 congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, aka "Superfund"). This was in response to the Love Canal disaster, in which residents became sick after purchasing homes built on top of a former dumpsite. CERCLA is meant to provide a means to cleanup, retroactively, sites with environmental contamination. It goes after parties responsible for the contamination, and/or current owners of the property to reimburse the federal government for clean-up costs. After the Superfund Amendments and Reauthorization Act (SARA) was passed in 1986, the law clarified further who can gain liability protection under CERCLA, and how.

Over the years, congress and the Environmental Protection Agency (EPA) have drafted legislation requiring appropriate levels of inquiry into the possibility, and/or extent of, contamination on a parcel of real estate. Most recently, congress and the EPA created the All Appropriate Inquiry (AAI) rule that went into effect on November 1, 2006. If a person wants to gain liability protection under CERCLA, they first have to meet the criteria outlined in the AAI rule.

II. Topics for Consideration

At the core of the Phase 1 process are Recognized Environmental Conditions (REC's), which are defined as:

“The presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release...into structures on the property or into the ground, ground water, or surface water of the property.”

In other words, is there good evidence to suggest a past, present, or future release of contamination? The Phase 1 report will conclude with three important parts:

- Findings – What concerns were found concerning the property?
- Opinion – Does a particular finding constitute a REC or not?
- Conclusions – If there is a REC, how significant is it?

There are some other logistics that need to be laid out concerning what the Phase 1 process covers and doesn't cover.

The Phase 1 Process Does Not:

- **Consider non-hazardous and non-petroleum products such as Radon, Lead, Mold, Asbestos (with some exceptions), Wetlands, or Pesticides and Herbicides.**
- **Require sampling of any kind. It is up to the Environmental Professional (EP) to decide if sampling should be done in order to fill in data gaps in the research.**
- **Require the EP to recommend any further inquiry or sampling regardless of whether or not REC's are found.**

Some of the above inquiries can be requested by the client to be included in the scope of work. However, every additional request not only adds to the cost of the Phase 1, but involves more logistics into the process. An example would be outsourcing certain sampling requests due to the fact the EP does not have the expertise or certification for such sampling. Non-scope considerations as above should be discussed thoroughly with the EP prior to implementation.

More on CERCLA liability protection:

Prior to the current rules being in place (2002), a landowner had one defense under CERCLA; Innocent Landowner, which is outlined as follows:

- Did not know and had no reason to know about contamination

- Government initiated eminent domain or condemnation
- Acquisition through inheritance or bequest
- Act of God
- Act of War

In 2002, laws were passed to clarify protections under CERCLA. Currently, three such defenses exist:

- Innocent Landowner (same as before)
- Bona-fide prospective purchaser
 - Acquired ownership after January 11, 2002, where all disposals of hazardous substances occurred before acquisition.
- Contiguous Property Owner
 - Own land contaminated solely by a release from contiguous, or similarly situated property owned by someone else.

The above defenses are valid as long as:

- AAI was conducted at time of acquisition
- No affiliation with liable parties exists
- Did not cause the release
- Take steps to stop/prevent any release
- Provides full cooperation
- Complies with land use restrictions

In addition, the Innocent Landowner and Contiguous Property Owner must have no prior knowledge of REC's.

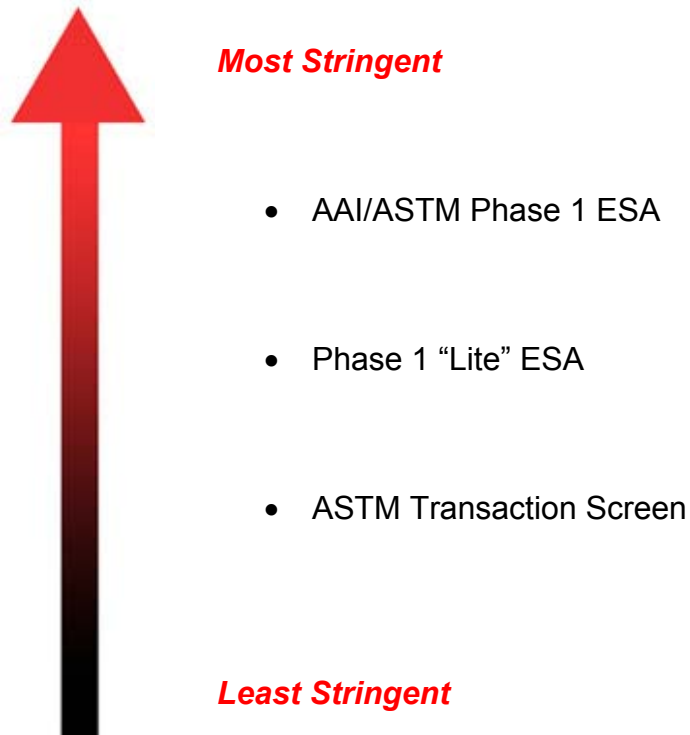
The Role of the Client in the Phase 1 Process:

It cannot be stressed enough how important it is for the client to play an active, participating role in the Phase 1 process. Before the Environmental Professional (EP) can proceed with the assessment, the client needs to provide certain information. This includes property address, location, boundary drawings and description, contact name and numbers, parcel number, and other pertinent information. Other helpful documents include abstracts or chain-in-titles. It is also beneficial for everyone involved to know the reason for the Phase 1. Not only does this give context to the project, but it is important for the EP to know if there are any confidentiality or other special issues involved.

III. Overview of Services

Kloster Commercial Resources offers three levels of environmental assessments. We will assist clients with determining which is right for them. However, it is always prudent to check with a legal representative to determine what, if any, protections are being sought, and therefore the appropriate level of services needed.

Continuum of Due Diligence Services



Comparison of Services Offered

	AAI/ASTM Phase 1	Phase 1 "Lite"	Transaction Screen
Interviews			
Owners, Occupants, and Local Officials	x	x	
Owners & Occupants only			x
Site Inspection			
Site Reconnaissance	x	x	
Site Visit			x
Records Search			
Standardized and Historical	x	x	
Standardized and limited Historical			x
AUL's, EC's, and IC's	x		
Personnel			
Completed by Environmental Professional (EP)	x	x	
Completed by Anyone			x
Documentation			
Findings, Opinions, and Conclusions by EP	x	x	
Completed Questionnaire			x
User-Involvement Component			
Asking Price Relationship	x		
Specialized Knowledge	x		
Search for Liens	x		

IV. Transaction Screen

What it is:

The Transaction Screen conforms to ASTM E-1528-06 protocol. It is meant as a very basic process to find out what environmental conditions may exist on the subject property. The process consists of a site *visit* (as opposed to a site *reconnaissance*), which is very cursory and limited. It also entails interviewing owners and occupants, and pulling standard database records in addition to some historical components. All of this is laid out in questionnaire form, and can legally be completed by anybody (although the more knowledge and experience the person has, the more thorough the findings).

What it isn't:

The Transaction Screen is not meant to satisfy any legal requirements, at least not in the eyes of CERCLA. It is **not a Phase1** of any sort, nor is it meant to be used in place of one.

When it should be used:

The Transaction Screen should be used when the client is not seeking any kind of CERCLA liability protection. It should be used when it is believed, for good reason, that there should be no contamination on the property (low-risk properties). Another time when this may be appropriate is when it satisfies an internal due diligence requirement for the client's company.

V. Phase 1 "Lite" ESA

What it is:

A Phase 1 "Lite" is still based on ASTM E-1527-05 protocols. In many respects, it is identical to an AAI/ASTM Phase 1. The same level of scrutiny is made during the records search, site reconnaissance, interviews, and conclusions. However, it does not delve into conforming to the AAI rule. This means that the user may not be asked for information regarding fair market value vs. asking price, any specialized knowledge pertaining to the property, and no search is done on Activity and Use Limitations (AUL's), or Environmental and Institutional Controls (EC's and IC's). It should be noted that the EP may still ask these questions in order to better understand the history and current state of the property. The difference lies in the fact that AUL's, EC's, and IC's are not included, and therefore a "Lite" ESA does not meet AAI guidelines.

What it isn't:

The Phase 1 "Lite" is not meant to satisfy CERCLA liability requirements, or to meet AAI rule guidelines.

When it should be used:

The Phase 1 "Lite" should be used when a Transaction Screen does not meet minimum due diligence requirements of the client, yet CERCLA liability protection

is not being sought after. Another time this may be used is when internal due diligence standards are higher than the information provided by a Transaction Screen, yet the highest possible standards (set forth in the AAI/ASTM Phase 1) are higher than needed.

VI. AAI/ASTM Phase 1 ESA

What it is:

The AAI/ASTM Phase 1 is meant to satisfy the EPA's AAI rule into environmental due diligence concerning a property. It is the same as a Phase 1 "Lite", but for the fact that more records research is conducted concerning use limitations and controls on the property, as well as a heavy component of user involvement.

What it isn't:

An AAI/ASTM Phase 1 does not eliminate risk, nor guarantee that the findings are all-inclusive. It is simply the most in-depth, widely accepted methodology for determining the present and past environmental condition of a property.

When it should be used:

An AAI/ASTM Phase 1 should be used when either CERCLA liability is being sought, and/or the client wants the highest level of scrutiny possible into the history and current condition of the property. This may be because the property is considered high risk, is legally required, or if internal environmental due diligence standards call for such standards.

VII. Conclusion

Environmental Due Diligence is a smart, effective, and risk-oriented approach of making informed decisions concerning commercial property. The potential liabilities for clean-up costs, not to mention bad public relations and image, are enormous. Phase 1 Site Assessments and Transaction Screens are basic tools to arrive at a sound real estate decision.

The process and technicalities may seem cumbersome, but are ultimately quite simple. Hopefully this primer has provided the reader enough background and information to decide which service is appropriate to their needs.

Please don't hesitate to contact Kloster Commercial Resources with any questions, concerns, or comments.



VIII. Glossary of Acronyms

If there is one thing scientists and government seem to both love, it is acronyms. For those professionals involved in the industry, they save a lot of time in terms of both typing and discussion. However, for someone new to the process, the acronyms can become quite confusing:

AAI	All Appropriate Inquiry; A process outlining standards to meet in order to gain liability protection under CERCLA
ASTM	American Society for Testing and Materials; An organization made up of working professionals that develop uniform standards for thousands of processes and services, including methodologies for testing concrete, disposal of lab chemicals, and conforming to EPA's AAI guidelines
AUL	Activity and Use Limitation; Legal or physical restrictions/limitations on a site reduce exposure of hazardous substances. Institutional and Engineering controls (EC's and IC's) are types of AUL's
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act; Federal law passed in 1980 in response to the Love Canal disaster
EC	Engineering Control; A type of AUL, (ex. capped well or slurry wall)
EP	Environmental Professional; as defined in ASTM E-1527-05
EPA	Environmental Protection Agency; Alongside ASTM, developed minimum due diligence standards for meeting AAI guidelines
ESA	Environmental Site Assessment; Commonly used interchangeably with "Phase 1", it generally describes what a Phase 1 is
HREC	Historical Recognized Environmental Condition; A past condition that was or could have been a REC, but which currently is not
IC	Institutional Control; A type of AUL, (ex. monitoring requirement, land-use restriction)
REC	Recognized Environmental Condition; A past, present, or future threat of a contaminant release to a property
SARA	Superfund Amendments and Reauthorization Act; further clarified and updated CERCLA