

Disclosure requirements exist for spills in excess of the Reportable Quantities and must be reported to the Nevada Division of Environmental Protection as soon as possible but no later than the end of the first working day of the discovered release. For example, the reportable quantity for petroleum products such as gasoline, diesel, and hydraulic fluid is 25 gallons or 3 cubic yards of contaminated material, or the presence on or in groundwater. A spill of any quantity that affects a water way within the State of Nevada must be reported, regardless of the quantity.

The reportable quantity for hazardous waste is based on the Federal EPA guidelines established under Title III list of Lists (40 C.F.R. Part 302).

Items Not Typically Covered by a Phase I ESA

- Wetlands
- Endangered species
- Cultural and historic resources
- Regulatory compliance
- Industrial hygiene
- Health & Safety
- Asbestos
- Radon
- Lead-based paint
- Lead in Drinking Water
- Indoor air quality
- Biological Agents
- Mold

Cost of a Phase 1 ESAs

It might seem logical to buy a Phase I ESA as a pre-defined and itemized package to achieve a cost saving. However the investigator using a pre-defined, tightly budgeted process, one not tied to the specific property through a **pre-screening process** or geographic area, can't afford to pursue the unique aspects of the property. Buyers and lenders can be lulled into a false sense of security where generic procedures run significant risk of not meeting the standards and practices defined by the final AAI Rule. Average cost of a Phase I ESA nationwide as determined by the EPA should be approximately \$2,190.

Without a Phase I ESA, most purchasers of property can not know with certainty what lies beneath the surface. However, with a proper assessment, the new owner and any financial backer can gain a substantial amount of protection at a relatively small price.



Shelf Life

“All appropriate inquiry” must be conducted within one year prior to the date on which a person acquires a property. If any inquiry was completed more than 180 days prior to the date of acquisition of the property, certain components, including interviews with past and present owners, operators and occupants, searches for environmental liens, and visual inspections of the property and adjoining properties must be updated.

Recognized Environmental Conditions (REC)

The goal of the processes established by the ESA is to identify *recognized environmental conditions*. This means 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 of any hazardous substances or petroleum products into structures on the property or into the ground, ground water, or surface water of the property.

A release can be described as any pollutant, hazardous waste or contaminant that has been spilled, leaked, pumped, poured, emitted, emptied, discharged, injected, escaped, leached, dumped or otherwise disposed into the environment. This would then be deemed a spill.

The term **REC** is not intended to include de minimis conditions that generally do not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.

with the final AAI Rule. In Nevada, the environmental professional must be a Certified Environmental Manager (CEM)

Phase I ESAs must cover the following criteria:

- Interviews with past and present owners, operators, occupants and the prospective purchaser; for abandoned properties, owners or occupants of neighboring parcels is mandatory
- Reviews of historical sources back to the first obvious use of the property or 1940 whichever is earlier
- An inquiry by the purchaser of the property for any environmental cleanup liens filed against the property
- Review of government records (20 plus databases)
- Systematic evaluation of the property and adjacent properties by the Environmental Professional to determine contamination/other conditions that can create liability, remedial obligations, development restrictions or any other “recognized environmental conditions”
- Whether the user has any specialized knowledge or experience material to RECs must be communicated to the CEM
- The relationship of the purchase price to the fair market value of the property, if the property was not contaminated
- An evaluation of commonly known or reasonably attainable information
- Identify the degree of obviousness of the presence of releases and the ability to discover by investigation such contamination

Even though the investigations are performed by certified and qualified specialists, a cookie cutter approach is occasionally used without regard to the specific property or geographic area. By hiring environmental consultants that use this approach, property owners run the risk of not meeting the standards and practices defined by the EPA All Appropriate Rule.



Progress leaves a mark. Construction material, long removed, leaves a potential hazard behind.

There is **no protection** under CERCLA for a current property owner if hazardous substances are released after purchasing the property.

2006: On November 1, the Environmental Protection Agency (EPA) finalized the ruling that defines the standards for conducting “All Appropriate Inquiry” (AAI), a new level of rigorous examination under which environmental consultants are required to gather more extensive information prior to property transfers.

All Appropriate Inquiries Rule and the Phase I ESA ASTM E1527-05 Standard

The AAI Rule is a performance-based standard allowing flexibility for site-specific circumstances. The new regulations require a broader scope of environmental inquiry and an extensive reliance on the Environmental Professional’s judgment. Any and all data gaps must be identified and explained and the reliability of the gathered data must be justified.

The ASTM Standard is a prescriptive approach, intended to synthesize and standardize the reporting format. Just as important, it is accepted by the EPA as being consistent with the statutory criteria of AAI.

What Must be Done to be Protected?

The property owner must supply certification that the inquiry into the property and the resulting report was prepared by (or under the responsible charge of) a qualified “Environmental Professional” with requisite experience in accordance

established ASTM standards. Residential property purchasers need only conduct a site inspection and chain of title survey.

2002: Congress passed the Federal “**Brownfields Amendments,**” amending CERCLA which required EPA to develop standards and practices for conducting “all appropriate inquiries” as the ASTM standards were found to be inconsistent with applicable law because they did not meet the statutory criteria but were accepted as the interim standard.

The Brownfields Amendments added potential liability protections for “contiguous property owners” and “bona fide purchasers”. **For the first time since the enactment of CERCLA, a person may purchase property with the knowledge that the property is contaminated without being held potentially liable for the cleanup of the contamination.** The advantage for lenders is that these landowner exemptions protect the borrower and the collateral in commercial real estate loans.

For the **Bona Fide Purchaser Defense:**

- Purchaser completes the “all appropriate inquiry” requirements.
- Acquires ownership after January 11, 2002
- Hazardous substances must have been released before purchase
- No potential liability or connection with Potentially Responsible Party other than through purchase agreement
- Continuing obligation to control hazardous substances by compliance with land use restrictions, institutional controls (non-engineered) and, prevent exposure etc...
- Cooperates with regulatory agency’s mandated remedial work, contractors, etc.

For the **Contiguous Landowner Defense:**

- Protects parties that are essentially victims of pollution incidents caused by their neighbor’s actions
- Landowner did not cause, contribute, or consent to release or threatened release
- After completion of the AAI, did not know and had no reason to know of release or threatened release at the time of purchase
- No potential liability or connection with neighboring Potentially Responsible Party
- Contamination comes from property contiguous to or “similarly situated with respect to”
- Full cooperation and letting authorities full access to the property
- Continuing obligation to take reasonable steps to stop/prevent release and exposure

The Desert looks pristine from a distance, but not everything is as it seems.

Historical Background

As early as the 1970s, sophisticated purchasers of property in the US undertook studies to assess the risk of ownership of commercial properties. These investigations were centered around land with a high degree of contamination from prior toxic chemical use or disposal. The primary goal of the research was to assess the nature of the clean up costs to redevelop or change the use of the property.

1980: Demand increased dramatically in the US for this type of study when congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund to investigate and remediate the worst contaminated sites in the country. This investigative process was known as “Preliminary Environmental Site Assessment” or “environmental due diligence” and was the precursor to the Phase I ESA.

CERCLA contained a concept called “strict liability” or, in other words, liability without regards to fault. This meant that an “innocent purchaser” of a property could be held liable for environmental contamination based solely on property ownership without regard to fault or negligence.

1986: Congress passed the “Superfund Amendment Reauthorization Act (SARA). In this act Congress created the “innocent landowner defense” to liability. One of the shortfalls of this Act was that the term “all appropriate inquiry” (AAI) was poorly defined.

Innocent Landowner Defense components

- Property acquired by inheritance, bequest, involuntary transfer or acquisition, or through exercise of eminent domain authority by purchase or condemnation
- Did not cause or contribute to hazardous substances
- After completing an “all appropriate inquiry”, the land owner did not know and had no reason to know of the release or threatened release at the time of acquisition
- Take “reasonable steps” to control any continuing releases if discovered

1993: American Society for Testing and Materials (now known as ASTM International) published ASTM E-1527 Standard Practice for **Phase I Environmental Site Assessments**. These were approved through the ASTM consensus process and were generally accepted as the minimum levels of environmental due diligence within the environmental consulting, legal, and financial services industries.

1998: Congress passed the Superfund Cleanup Acceleration Act which requires purchasers of commercial property to perform a Phase I ESA study meeting the

3. An organization seeking protection from liability for historical releases of hazardous substances.
4. Lending institutions minimizing risks

In each instance, the organization benefits by gaining an understanding of the risks associated with the property. All Small Business Administration loans used for the purchase of property require a Phase I ESA, as do most lenders. The assessment reduces the probability of discovering the property is worth less than originally believed due to environmental impairment, or worse, to be found liable for cleanup cost from a previously unknown release.

There are occasions when a person or organization can gain title to a piece of property and not be required to perform a Phase I ESA, but may still benefit from the process. In most cases these situations center around the unexpected change in ownership such as:

1. Property acquired through inheritance or bequest
2. State and local governments acquiring ownership through condemnation or eminent domain authority

In addition, land acquired privately without the need to secure commercial or federal funding or the desire to seek liability risk reduction from unknown contamination issues.

All ESAs are not alike, and any individual or organization considering having an ESA prepared should be aware of the many variations and consider their needs and the type of property before beginning the assessment.



It's a litigious world we work in. Every day law suits are filed with amazingly outlandish claims. Fast food companies are sued because their products make people fat. A local casino was sued because they wouldn't allow a customer to gamble more than \$1 million while he was intoxicated.

This zaniness has led most companies to put as many protections in place as possible. Employees are now screened before hiring and vendors are investigated before signing important contracts. The safety nets seem endless. However, land was historically overlooked in the background check process.

The winds of change began to blow in 1980 when congress gave the Environmental Protection Agency (EPA) power to investigate and remediate the most contaminated sites in the country. Since then the federal government has put in place a number of protections for land purchasers as well as standards for property investigation. What is their chief tool in determining the state of property? It is the investigation into that property's past, or an environmental due diligence investigation often referred to as a "Phase I Environmental Site Assessment (Phase I ESA)." By looking into the history of a piece of land, liability is reduced and/or corrective action can be taken to mitigate hazardous conditions.

The basis of the requisite investigation remains **risk reduction**.



Who could benefit from compliance with Phase I ESA Standards?

1. An organization purchasing commercial property
2. An organization with property to be used for commercial or public purposes

Environmental Due Diligence

Phase I Environmental Site Assessments

A Background Check of Your Property



AGES
Advantage

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