

# CHANGES IN PHASE I ENVIRONMENTAL SITE ASSESSMENT STANDARDS IMPACT LANDOWNER LIABILITY PROTECTION

By Tom Lewis, PG, CFEA, LEP



Phase I Environmental Site Assessments (Phase I's) are the most commonly used form of environmental due diligence, both for lending institutions and their borrowers. The concept of the Phase I arose in 1986 when The Superfund Amendments and Reauthorization Act (SARA) amended the [Comprehensive Environmental Response, Compensation, and Liability Act](#) (CERCLA) to provide landowner liability protection to those who conducted "all appropriate inquiry consistent with good commercial practice". The purpose of the Phase I was therefore a tool used to permit the user to satisfy one of the requirements needed to qualify for this defense to CERCLA liability, now known as *innocent landowner defense*.

A Phase I consists of both a historical review and a present environmental qualitative evaluation of a property (without soil or groundwater sampling or analysis). Essentially, it is a snapshot in time without known analytical data. The five principle components of a Phase I are: (1) a review of public and private records relating to the property and surrounding properties; (2) a site visit to the property and surrounding properties; (3) interviews with the property's current owners and operators; (4) a review of historical sources of information related to the property and surrounding properties; and (5) compilation of all gathered information into a written report prepared by someone experienced in developing opinions and conclusions regarding conditions indicative of releases or threatened releases.

Subsequent amendments in 1996 to CERCLA clarified and affirmed a limited exemption from liability for commercial lenders under defined circumstances having to do with the lender's pre-loan *due diligence* and post-foreclosure activities. A key component of these requirements is that some form of comprehensive environmental due diligence be conducted prior to the closing of a real-estate-backed commercial lending transaction and to determine if any past or present environmental exposure exists. Because of this, there are two principal users of the Phase I: 1) the lending institutions, seeking true property valuation and due diligence protection; and 2) the purchaser, seeking environmental landowner liability protection.

ASTM (formerly known as the American Society of Testing and Materials), along with environmental professionals who specialized in the area of site assessments, began developing draft documents as far back as 1990 to provide standard operating practices for conducting Phase I's. The purpose of the resulting ASTM E 1527 Standards was to define "customary and good" practice for conducting a Phase I on a commercial real estate parcel within the scope of CERCLA and, therefore, permit the purchaser (user) to properly satisfy one of the requirements needed for the *innocent landowner* defense to CERCLA liability.

In 2002, the United States Congress passed the *Small Business Liability Relief and Brownfield Revitalization Act* (now commonly referred to as the "Brownfield Amendments") and, once again, amended CERCLA. As part of this Act, the EPA was required to finally establish a set of standards for the conduct of All Appropriate Inquiry (AAI). Prior to this, the federal government was strangely silent on the actual definition of AAI and the standards being used to comply with AAI. As a result of the 2002 amendment, the EPA released a new rule on November 1, 2005, defining the AAI that a prospective purchaser must undertake to qualify for landowner liability statutory defenses. This rule went into effect on November 1, 2006, and defers to the ASTM International Standard E1527-05 "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process" as the **only** industry standard to be used for compliance. Therefore, in simpler terms, as of November 1, 2006, all Phase I's must be conducted following the EPA's new requirements for AAI and using ASTM E 1527-05 in order to qualify for landowner liability protections available to CERCLA liability.

Though AAI must be made at the time of the transaction, it will control whether a potentially responsible party can later avoid CERCLA liability based on the diligent adherence to the ASTM E 1527-05 Standard and the actual inspection of the property. The largest change to the process is that an "environmental professional" must perform AAI. The final rule defines an environmental professional as one who "possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, or to a property." In addition, the environmental professional must also have one of the following:

- A professional license or certification in engineering, geology or environmental inquiries from a federal, state, or tribal government *and* three years of full time relevant experience;
- A baccalaureate or higher degree from an accredited institution in engineering or science *and* five years of full-time relevant experience;
- The equivalent of ten years of full-time relevant experience.

Though other individuals can assist with AAI, an environmental professional must supervise their activities.

Other changes to the scope of AAI include:

- mandatory interviews with current owners and past owners;
- increasing the historical review to when the property was first obviously developed or 1941 (whichever is earlier);
- documenting data gaps that prevent the environmental professional from fully rendering his or her opinion;
- documenting the purchase price and fair market value of the property;
- assessment of any specialized knowledge or experience of the user or landowner purchaser;
- an inquiry into the commonly known or reasonably ascertainable information about the property;
- documenting the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect contamination;
- conducting title searches for federal, state, tribal or local environmental clean-up liens against the property.

One final important change is that, under the new standards for conducting AAI, two new landowner liability protections are available to the purchaser in addition to the traditional *innocent landowner* defense.

The first new defense, *contiguous property owners*, is available for property owners who own property contiguous or otherwise similarly situated to a facility that is the only source of contamination found on the property. Such persons must demonstrate through the AAI process that they had “no reason to know”, prior to purchasing the property, that any hazardous substances were released or disposed of on, in, or at the property.

The second new landowner liability protection is known as the *bona fide prospective purchaser* defense. Under this defense, prospective purchasers may buy property with knowledge of contamination if they purchased the property after January 11, 2002, and obtain landowner liability protection if they meet certain criteria set forth in CERCLA.

For both the lending institution seeking to secure the loan, and for the purchaser of commercial property seeking landowner liability protection, the November 1, 2006 changes to the Phase I process present both opportunity, when performed correctly, and danger, when conducted improperly. Consequently, both the purchaser and the financial institution should always ask if the Phase I is being conducted in accordance with ASTM E1527-05 and then clarify the qualifications and actual role of the environmental professional conducting the AAI.

*Tom Lewis is a Senior Hydrogeologist in Chastain-Skillman's Tallahassee Office. His work focuses on environmental site assessment, environmental site rehabilitation and geologic/hydrogeologic projects. Tom received a Bachelor of Science Degree in Geology from The College of William and Mary in 1994, and a Master of Business Administration from Bellevue University in 2000. He can be reached at (850) 942-9883 or [tlewis@chastainskillman.com](mailto:tlewis@chastainskillman.com).*