

National Engineering & Environmental Due Diligence Association's Environmental Site Assessment (ESA) User Guide

Phase I Environmental Site Assessments (ESAs) are conducted on a commercial property as part of a sale/purchase or commercial financing by a broker or other lending institution. These assessments are intended to protect a prospective buyer, property owner, or lending institution from aspects of the property that could affect the value, use, or salability of the property. The ASTM has developed guidelines for conducting these assessments (ASTM E1527 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, available [here](#)). A report which meets the ASTM guidance may be included in the "due diligence" process of a real estate or financial transaction. A Phase I ESA which meets the ASTM standard will satisfy the EPA's All Appropriate Inquiries Final Rule (40CFR Part 312) and provide landowner liability protection under certain federal and state environmental laws.

The purpose of the Phase I ESA is to assess the presence or likely presence of hazardous substances or petroleum products (current or historical) in, on, or at a property and/or surrounding properties. The Phase I ESA must include the following four components: records review, reconnaissance of the property and surrounding area, interviews, and preparation of a report. The process must be conducted by or under the responsible charge of an Environmental Professional (EP), whose judgment and experience are necessary to the evaluation.

A Phase I ESA is site-specific and can be part of the due diligence process that provides certain legal liability protections to the designated User of the report. Some components of the Phase I ESA have a "shelf life" of 180 days prior to the acquisition of the property or the date of the transaction. The User is an entity defined within the ASTM standard and has specific responsibilities to provide information which may assist the EP in evaluating environmental conditions. If other Users are extended reliance upon a report, they must also meet the ASTM User requirements.

A number of additional issues may be assessed in connection with a Phase I ESA. Although they are not required to meet the ASTM standard, they are useful to commercial business considerations. Some common examples include the presence of asbestos-containing materials, lead-based paint, radon, and mold. Items beyond the ASTM standard which are to be evaluated are identified in the specific scope of work for an assessment which is part of your contract with a consultant.

Client Responsibilities

Safe Access to the entire property must be provided by the client. Areas of specific interest are those used for the storage, use and/or disposal of hazardous substances and petroleum products.

Known Information – If the report User has relevant knowledge that may impact the results of the assessment, the information should be provided to the consultant. The information can be provided by those entities who are most knowledgeable about the current and historical use of the property. For example, current and historical operations/tenants, known environmental conditions, features used for the storage and/or disposal of hazardous substances/petroleum products, prior reports, etc. Many consultants will also request that a questionnaire (provided by the consultant) be completed by the report User.

Knowledgeable Site Contacts must be provided so questions regarding known information and the familiarity with on-site operations can be satisfactorily answered and relied upon in the assessment.

Property Information must be provided to confirm the collateral to be included in the assessment. Helpful information includes site plans, assessor's parcel numbers (APNs) and parcel maps, legal descriptions, title reports, and offering memoranda.

Identified Purpose of the assessment should be discussed with the consultant. The reason for completing the assessment may affect the scope of work and the recommendations. ESAs are typically completed to determine the level of environmental risk associated with the property. They may be completed to support the acquisition of or investment in real property, used as a risk management tool for lending institutions for a new loan or refinance, and/or rehabilitation or redevelopment purposes. It is critical to work with your consultant to make sure the work performed meets your needs. The intended use and users should be documented in the agreement and report, and reports should never be used by unintended users or for unintended purposes.

Fundamental Principles of the ASTM ESA Standard

Not exhaustive and uncertainty is not eliminated – No Phase I ESA will identify every environmental problem at a

property due to time constraints, site specific impediments, and cost. The report cannot be viewed as an all-inclusive review of all possible environmental conditions related to the property.

Some conditions may not be identified – The scope of the project limits the conditions that should be identified. For a commercial real estate transaction, additional conditions may warrant investigation and should be agreed upon. Conditions that aren't easily observable during the site walkthrough, require additional testing beyond what was agreed upon, are hidden by finishes, equipment, systems, vehicles, stored materials, etc., or that are simply not made accessible to the consultant, will not be identified unless disclosed to the consultant or testing has been approved.

Level of Inquiry is Variable – Not every property will warrant the same level of assessment. The level of inquiry is guided by the type of property, the expertise and risk tolerance of the user, and the information developed in the course of the inquiry.

Representative Components – Every report, at a minimum, should include the findings of a site visit, with at least 10 percent of the occupant spaces (or a representative sample) and all common areas, etc., to be inspected, the completion of a questionnaire by the client/User of the report, the review and discussion of appropriate historical documents, and the review of regulatory databases and relevant agency file records for the property and for the surrounding area.

Conclusions and Recommendations – Every report must state whether or not recognized environmental conditions* (RECs) have been identified for the property, which includes the potential for vapor migration to impact the property. Based on the conclusions, the consultant *may* provide an opinion about whether additional investigation would be appropriate to address the REC. If other considerations are part of the scope of work, then a summary should be provided in the conclusions. Recommendations are not required to be included within the Phase I ESA unless requested otherwise.

Report Ownership – Phase I ESAs are performed for clients with specific purposes. If you rely on reports done for others, the scope of work and recommendations may not reflect your objectives or specific needs. Even if you obtain permission from the original client and consultant to rely on a report, it is recommended that you work with the consultant to understand the scope of work, determine whether additional work is needed, and develop

independent recommendations that satisfy your objectives.

***What is a REC?** – The term REC, means the presence or likely presence of hazardous substances or petroleum products in, on, or at a property:

- (1) due to a release to the environment (such as a previously identified release that has not yet been addressed, or a visible spill of petroleum products or hazardous materials observed during the ESA site reconnaissance);
- (2) under conditions indicative of a release to the environment (such as petroleum or chemical odors noted during the ESA site reconnaissance or a discrepancy when reconciling underground storage tank inventory control measures, which have not been investigated to determine whether or not a reportable release has occurred); or
- (3) under conditions that pose a material threat of a future release to the environment (such as aboveground storage tanks or drums that show damage or evidence of over-pressurization, which indicate an elevated likelihood of release).

In addition to the original definition of a REC presented above, the ASTM Standard also requires the consultant to evaluate the existence of Historical RECs (HREC) and Controlled RECs (CREC).

- An HREC is a past release of hazardous substances or petroleum products that has been addressed to unrestricted use criteria.
- A CREC is a past release of hazardous substances or petroleum products that has been addressed to a risk-based standard, which means that hazardous substances or petroleum products were allowed to remain in place subject to the implementation of required controls.

The definition of a REC is very broad and the word “likely” is subjective. As such, this definition is sometimes interpreted differently by different EPs. This can result in varying conclusions regarding the presence or absence of a REC, HREC, or CREC.

Limitations/Out of Scope Considerations

Consultant Qualifications – ESAs must be performed by an EP meeting the following requirements: holds a current professional geologist or professional engineer license with

3 years full-time relevant experience; licensed or certified by the federal government, a state, tribe, or U.S. territory to perform environmental inquiries and have three years full-time experience; holds a Baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and five years full-time experience; or have 10 years full-time relevant experience. ASTM makes it clear that the work can be completed by others under the direction of an EP.

Physical Obstructions/Constraints – Conditions prohibiting a clear view of the property such as parked cars, weather conditions (rain, snow), excessive storage, locked rooms, excessive/tall vegetation, etc. may reduce the ability of the EP to identify features or conditions at a property and will typically be noted as limitations in the report.

Site Access – A site visit is a required component of a Phase I and should be conducted earlier in the process if possible. Tenants should be made aware and available to answer questions regarding site conditions/operations. Delays in site access can inevitably hinder delivery of the report.

Not all properties require 100% unit inspection based on type of use and size; however, all common areas, accessible maintenance and repair areas, and 10% of all tenant spaces (or a representative sample), and high risk tenants are typically assessed during the single site visit.

Interviews – The owner, key site manager, and major occupants of the property should be available to answer questions regarding current and historical operations on the property. Former owners and occupants may be interviewed as needed.

Regulatory records – Regulatory agency records are critical to identify, and in some cases, rule out RECs. If no other supporting documentation is discovered during the report process, lack of these records can delay delivery of the report. The responsiveness of regulatory agencies in providing access to publicly-available information should be considered when estimating the turnaround time of a Phase I ESA.

Reliance – Phase I reports are prepared for a specific entity and cannot be used by other parties without a contract/agreement in place to extend reliance to additional parties. It should be noted that anyone seeking reliance on a Phase I report is agreeing to the scope of work conducted, the limitations in the report, the consultant's terms and conditions, as well as presume the

responsibilities of the User. Reliance on a report typically includes an additional fee at a minimum.

Exclusions

The ASTM Standard identifies specific tasks to be included in Phase I ESAs. The reports are not intended to be exhaustive or all-inclusive. **We recommend discussing your expectations with your consultant before engaging the work to be sure your concerns are addressed.** The following is a partial list of items which are excluded from the ASTM Scope of Work unless expressly agreed in the contract:

Testing and Measuring of building materials, soil, groundwater, indoor air, and/or soil vapor;

Destructive Observation – Performing any procedure, that may damage or impair the physical integrity of the property, any system, or component;

Access to Confined Space – Entering or opening any crawl space, plenum, manholes, utility pits, drums, or other confined space; or entering or accessing any area deemed to potentially pose a threat of dangerous or adverse conditions with respect to the field observer's health or safety;

Concealed Conditions – Observation and evaluation of concealed elements of system and components, removing, relocating, or repositioning of materials, ceiling, wall, or equipment panels, furniture, storage containers, personal effects, debris material or finishes; dismantling or operating of equipment or appliances; disturbing personal items or property that obstruct access or visibility; subterranean and concealed conditions;

Roof Access – Roof reconnaissance is not required within the scope of a Phase I. In certain circumstances, roofs can be viewed during the site walk; however, walking on pitched roofs or any roof areas that appear to be unsafe should not occur;

Special Systems – Evaluating systems or components that require specialized knowledge or equipment; examination of piping connections, interiors of underground tank systems, boiler stacks, or tenant owned or maintained equipment, elevator cables, controllers, motors, inspection tags, or entering elevator/ escalator pits or shafts;

Recommendations – The Phase I ESA objective is to identify RECs; however, a REC depends on a number of factors such as the severity and status of the release,

controls in place, or desired use of the property. Because EPs may encounter the same scenarios and evaluate them differently, not every recommendation will be the same from EP to EP despite having a set of standards as guidance. In addition, the ASTM standard does not require the EP to provide recommendations in the report. Be sure to have a conversation upfront to discuss if and how you would like recommendations presented: not included at all; included within the report; verbally communicated; or provided in another written manner, typically a separate cover letter.

Other Matters – The identification and evaluation of the presence of any environmental issues such as asbestos-containing building materials, biological agents, cultural and historical resources, ecological resources, endangered species, health and safety, indoor air quality unrelated to releases of hazardous substances or petroleum products into the environment, industrial hygiene, lead-based paint, lead in drinking water, mold, radon, wetlands, along with other matters are not expressly included in the scope of assessment unless agreed upon.

A Phase I report is not a Compliance Audit, which is typically a separate service. If a User is also acquiring the business on the property, or if the operations of the current occupant represent a concern, a Compliance Audit may be warranted as a separate assessment.

Frequently Asked Questions

Q: Why do I need an ESA? Is it required by law in a real estate transaction?

A: A Phase I ESA is not required by law but a lender/financial institution may require the Phase I ESA as a risk management tool given that it may affect the property value (the purchase price and future resale value). In addition, environmental liability follows the property and is the responsibility of the property owner, regardless of when the “release” incident occurred.

Q: We already have a recent ESA. Why is my lender requiring a new ESA?

A: The ESA may be out of date by the time the transaction is complete (see “shelf life” below), or a lender may determine that the prior report was poorly done. In addition, many lenders have their own scope of work or have a preferred list of vendors. Also refer to the reliance section as detailed above.

Q: The owner of the real estate that I plan on purchasing provided me with a Phase I ESA. Do I still need a Phase I ESA completed?

Buyer beware if all you do is review the Phase I ESA that was prepared for the current owner of the property when the owner previously purchased it. Aside from the fact that the report will likely have exceeded its shelf-life (see “shelf life” below) and new risks may be present, the Phase I ESA was prepared for a different User and you will not be able to qualify for the defenses to liability. Simply put, if the report is prepared for another User, certain updates and actions need to be taken if you want to rely on the report, and the report should specifically identify the landowner seeking protections.

If a buyer elects to use a Phase I prepared for a seller, the buyer should evaluate the quality of the Phase I, and be certain that it is entitled to rely upon the findings in the ESA (see Reliance and Report Ownership discussions above). It may be possible for the buyer to obtain a “reliance letter” from the EP allowing them to rely upon the ESA as if it had been addressed to them. In addition to obtaining the reliance letter, the buyer must also complete a User questionnaire and meet other obligations of All Appropriate Inquiry.

Q: Will the property owner receive a copy of the ESA report?

A: ESA reports are routinely provided to the contracting entity (client), and copies may be provided to others only with permission of the EP’s client. If the client intends to use or rely on the report in any way, a separate agreement with the report preparer will be needed.

Q: What is the “shelf life” of an ESA Report?

A: The following components of the Phase I ESA are good for 180 days from the earliest of the following: the date of the site visit, date of the earliest interview, or date of the regulatory database. The report only represents conditions at the time of the inspection or when referenced resources were obtained. Information included within the regulatory database is obtained from local/state/federally maintained databases which are updated on a regular basis (i.e. every six weeks to every three months). A facility that was not previously listed may show up given that it was recently added. The initial ESA can be “updated” with the shelf-life extended as long as a new site visit is completed, the local

government authority is contacted and a new database report is obtained.

Q: What's involved in the ESA?

A: The ESA involves a walk-through survey of the interior and exterior of the property, review of key available documents, limited interview of key site personnel and review of regulatory/historical records. Observations are visual in nature and do not include destructive methods or access to/evaluation of conditions hidden by interior/exterior finishes or contained within any enclosed construction materials/equipment. Access needs to be provided to chemical storage areas, a representative sample of interior spaces, and areas/equipment that store or utilize chemicals. Any copies of previous environmental assessments, manifests, and Operation and Maintenance Plans that can be provided are also very helpful for reference during the ESA.

Q: How long will it take to get my ESA report?

A: Time to complete the assessment can vary depending on the agreed scope of work, size and nature of the property, scheduling of the site visit, availability of important documents, etc. The typical time to complete the ESA is 2 to 3 weeks. It is sometimes possible to complete the work more quickly, but it is always best to allow as much time as possible. Complex assessments may require 4 – 6 weeks. You should discuss the timing and your needs with your EP upfront so there is an understanding of expectations.

Q: How long will the site inspection take?

A: The size of the property and the scope of the ESA have a great deal to do with the length of time that is needed to conduct the field observations for an ESA. The majority of ESA site inspections can be performed in less than five hours with some requiring one to two days for the inspection. You should discuss the timing and your needs with your ESA professional up front so there is an understanding of expectations.

Q: What parts of the building and site do you need access to?

A: This can vary depending on the requirements of the client. Representative observations are typically conducted, which generally include, all common areas, all exteriors areas, maintenance and equipment areas, along with a portion of interiors or tenant-occupied areas. For

apartment complexes, the inspector generally needs access to at least 10% of the apartment units.

Q: How many of your people will be conducting the ESA on my building?

A: The number of professionals visiting the property vary depending on your objectives and the agreed scope of the investigations. Unless otherwise agreed, the ESA is typically performed by one field observer who is familiar with a wide range of properties. If a more in-depth scope of work has been requested, specialists may also be on the site to conduct their portions of the observations (for instance, licensed asbestos/lead or radon inspectors).

Q: What steps should I complete before the Phase I ESA site visit?

A: Previous environmental reports that have been prepared for the property should be provided to the consultant prior to the inspection. The owner of the property should ensure that keys to access all areas of the building are readily available and that the person who is most familiar with activities at the property is available for interview.

Q: What is the User Questionnaire and do I have to complete it?

A: The User Questionnaire is a tool used by the EP to obtain information from the report User, who may have specialized knowledge about the property that may impact the results of the assessment. The questions come directly from the ASTM Standard and the federal regulations that require the User of the report (i.e., the party who contracted for the Phase I ESA) to consider their own knowledge in connection with the inquiry concerning the property. Failure to provide this information to the best of their knowledge can preclude the User from certain federal liability protections.

Q: After the report was completed, I found some concerns. How could you have missed it?

A: Issues that are found following completion of the report or observed by others may be due to the one of the following:

- The inspector may have not access to all areas of the property, e.g., rooms/areas may have been

locked/inaccessible, hidden areas may be present, areas that were considered unsafe for access.

- Representative observations at the property did not include the damaged area.
- Areas of the property may have been physically inaccessible which prevented inspection of the entire ground surface of the property, e.g. portions of the property may not be accessible due to thick undergrowth, the presence of snow or equipment.
- Not all the data was available at the time of the completion of the report, or the information obtained is only as good as the information that was provided.
- The person that was available for interview did not provide adequate information.
- Damage or deterioration may have occurred after completion of the inspection.

Q: Are asbestos, mold, lead-based paint and lead in water investigations included as part of the Phase I ESA? Is there sampling involved in the Phase I ESA process?

- A: The Phase I follows a relatively rigid standard adopted by ASTM that is designed to provide a fairly comprehensive snapshot of the environmental condition of the property, but it does not cover everything. For example, wetlands, asbestos-containing material, lead-based paint, and other matters, including any type of sampling, are not within the ordinary scope of a Phase I ESA. Prior to initiating the scope of work, discuss such potential issues with the consultant to determine if they should be included as part of the Phase I ESA. In an effort to save time and money, sampling of building materials (i.e., for asbestos, lead based paint) may be conducted concurrently with the Phase I ESA.

About the National Engineering & Due Diligence Association (NEEDDA)

The National Engineering and Environmental Due Diligence Association or “NEEDDA” is a 501(c)(6) non-profit organization formed to promote the common interests of engineering and environmental consulting firms who provide due diligence for real estate transactions. One of NEEDDA’s primary goals is to promote greater consistency and quality in the practices of due diligence consultants through establishing voluntary best practices. Other NEEDDA activities include providing education, publications, conferences, research, and accreditation and certification programs.