

Introduction

A Phase I Environmental Site Assessment (ESA) is the most common environmental due diligence report utilized in the commercial lending market for the purposes of assessing current and historical environmental conditions that could affect a commercial real estate transaction. In addition to assessing potential environmental risks, a compliant Phase I ESA completed in adherence to the current ASTM E1527 standard affords report users liability protection by providing defenses to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). However, numerous factors must be taken into account when determining if a given user can qualify for defenses to CERCLA by relying on a Phase I ESA. This White Paper will focus on user reliance based on the shelf-life of an ESA, or the *Continued Viability* of a Phase I ESA as defined within ASTM E1527 and 40 CFR Part 312 (also known as the *All Appropriate Inquiries Rule*).

Phase I ESA Shelf-Life and Its Effect on User Reliance

A commonly misunderstood aspect of Phase I Environmental Site Assessments is the time period for which they can provide defenses to CERCLA. A Phase I ESA has an effective shelf-life of 180 days after the completion date of the assessment. Once this deadline is passed, an update must be completed in order to provide CERCLA protection for third party users who were not named on the original report. However, transaction closing and the ESA updates must both take place less than one year after the completion date of the initial Phase I report in order to provide protection for the third party user.

Practical Application of Continued Viability for Lenders

A Phase I ESA report that pre-dates closing by more than 180 days will have to be updated to qualify for protection. If the analysis and report are more than one year old it's back to the drawing board.

A common lender practice is to request a reliance letter from the authoring firm who completed the Phase I ESA for a given property. It is important to note that a third party (the lender in this example) not named as a user on the original report who is to be added as a newly named user of a Phase I ESA in such a scenario will still be held to the same timeline standards when determining if defenses to CERCLA can be afforded. The 180-day and one year conditions remain in effect for these users.

If you have questions or would like additional information regarding Phase I ESA viability, user reliance, or other factors affecting CERCLA protection, please feel free to contact GEM at 855-277-5307.