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EPA approves the newest Phase I ESA standard: What it means for you - by Victor DeTroy

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Many seasoned CRE investors and brokers are aware of Phase I Environmental Site Assessment (ESA) reports that are ordered during a property transaction. You may have heard rumblings about how the standard has recently changed. Here's a quick peek behind the curtain and a summary of the changes in plain English.

Phase I ESAs are written to comply with ASTM International standard E1527. Every eight years the standard must be updated or renewed as is. Given the evolving nature of the industry and the never-ending desire of environmental risk managers and consultants to make their lives more difficult, there is always some degree of additional rigor added each time the standard is updated.

In November of 2021, ASTM International issued the newest Phase I ESA standard, however, the EPA still had to approve the new standard as compliant with All Appropriate Inquiries (AAI). While that might sound like technical nonsense, it's a very important point. AAI is what affords an innocent prospective purchaser legal liability protection (under the federal CERCLA statute). As an investor, you don't want to ruin your ROI by paying for somebody else's contamination. So, getting that liability protection is very important (hence why lenders force you to order these annoying reports)!

In February, the EPA finally approved the new ASTM standard as compliant with AAI. So now there are no longer any excuses. It's time to give the new ASTM standard a big old hug and embrace the changes.

So, what has changed?

Semantics – a large chunk of the changes can be boiled down to clarifying and updating some of the wording/guidance from prior standards.

Historical Research – Adjoining sites next to the subject property must now include additional historical research to better identify red flag issues.

Forever Chemicals – Since PFAS (also known as “forever chemicals”) are still not technically considered “hazardous substances” by the EPA (under CERCLA), then a Phase I ESA is not required to address them. In other words, a Phase I ESA does not have to research or discuss these forever chemicals. If you want your report to screen out this risk, you will need to ask your consultant directly to include this. Typically, this will be added for no cost. By the summer of 2023, the EPA is planning on naming two of the most well known forever chemicals (PFOS and PFOA) as hazardous substances, however, there will likely be some push back from certain industries and stakeholders.

Environmental Lien Searches – Title commitment reports typically find any defects, liens, and limitations on the property title. As an alternative approach to satisfy AAI, specialized searches can be ordered to find any activity use limitations, environmental deed restrictions, and/or environmental liens. These specialized searches are now required to research from at least 1980 to the present. If

title commitment reports are ordered for title insurance, then typically these specialized environmental lien searches are not required.

Report Expiration Dates – A Phase I ESA report is viable for 180 days from the earliest date of research (or other applicable factors). So for instance, if your consultant starts researching records for a site on January 1st, then your report will essentially “expire” after June 30th. It doesn’t matter if the site wasn’t inspected until May and date on the cover page on the report says June 1st. A report will need to be viable at the time of closing for a borrower to have liability protections under CERCLA.

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