



The Biggest Phase I ESA Mistake You Can Make

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If your company is planning to buy commercial or industrial real estate, it's probably your standard practice to have a Phase I Environmental Site Assessment ("Phase I") performed. When you do so, it's important to ensure the Phase I report you receive from your environmental consultant fully complies with ASTM Standard E1527-13. Why? Because your company cannot qualify as a Bona Fide Prospective Purchaser ("BFPP") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and, in some instances, state law unless the Phase I complies with the ASTM Standard. Qualifying as a BFPP provides your company with a defense to CERCLA liability for existing contamination on the property, even if it is common knowledge the property is contaminated.

We review Phase I reports for clients regularly to ensure the reports comply with the ASTM Standard. What's the biggest mistake we see? It's failure by the environmental consultant to issue the report to the entity that will take title to the property. Frankly, though, it's not always the consultant's fault. Here's how this often unfolds: A development company enters into a contract to purchase real estate. An environmental consulting firm is engaged to perform a Phase I for the developer, and the firm sends the developer a user questionnaire. The developer completes the user questionnaire, sends it back to the consultant, and the consultant issues the report to the developer. A couple of weeks before closing, the developer forms a special purpose entity to take title, such as an LLC, and assigns the contract to the LLC. The LLC then closes on the property. Result? The LLC cannot qualify as a BFPP. Why? Because the Phase I was issued to the developer, not to the LLC that took title. In most instances, the developer never told the consultant that it planned to form an LLC to take title.

This seems like an easy mistake to avoid, but we see it happen over and over. Smart real estate purchasers will advise their consultants that they intend to form an LLC to take title, and smart consultants will advise their clients to let them know if an entity different than the client will take title. Securing the BFPP defense is cheap insurance against environmental liability, but this common mistake will leave the buyer unprotected.

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