

Phase I Environmental Site Assessment: Legal Protections, CERCLA Defenses, and Developer Benefits



By [Christina D. Bonanni](#), [Amy L. Reichhart](#), [Ian A. Shavitz](#), [Madelyn M. VanDorpe](#)

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Many developers know that performing a Phase I Environmental Site Assessment (ESA) prior to purchasing real property is a smart idea. But what exactly is a Phase I ESA? What protections does it provide? And how can it save developers money in the long run? This article endeavors to briefly answer these questions.

What is a Phase I ESA?

A Phase I ESA is an assessment of current and historical property uses that could pose a threat to environmental and human health. Its purpose is to determine whether the property contains a Recognized Environmental Condition, or REC. Generally, if an REC is identified, further steps are necessary to fully understand the nature of the condition and whether any additional actions are warranted.

What legal protections does a Phase I ESA Provide?

- Innocent Landowner and Bona Fide Prospective Purchaser (BFPP) Defenses: The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, is the federal law that governs the cleanup of hazardous waste sites. Prospective purchasers must comply with one element of the Innocent Landowner and/or BFPP Defenses by undertaking “All Appropriate Inquiries” (AAI) prior to purchasing a property, which includes a Phase I ESA.
- Brownfields Program Grants: The EPA’s Brownfields Program is a government initiative that provides technical and financial assistance for the cleanup and reuse of contaminated properties. Performing a Phase I ESA is often a prerequisite for program grants.
- Lender Requirements: Many banks or other financial institutions require a Phase I ESA from developers/prospective owners before approving loans for property purchases.

Why should developers care?

Not only is a Phase I ESA functionally mandatory for many transactions, but it also provides information that can allow for deal terms that reduce financial risk. The average Phase I ESA costs around \$2,500, but the factual information and legal protection it provides can avoid significant sums if an issue is identified.

For questions regarding this Client Alert, please contact Lippes Mathias’ Environment & Energy Practice Team Leader Ian Shavitz at ishavitz@lippes.com, Amy L. Reichhart at areichhart@lippes.com, Christina Bonanni at cbonanni@lippes.com, or Madelyn VanDorpe at mvandorpe@lippes.com.

Portions of this alert were drafted and researched by Kyle Lowe (2025 Summer Associate, Washington, D.C. Office) under the review and supervision of partners on Lippes Mathias’ Environment & Energy Practice Team.