

Issue No. 15 | Spring 2020 Is It a REC? Special Edition - Environmental Site Assessments (ESAs) during the COVID-19 Pandemic

Should we be concerned with recognized environmental conditions (RECs) during a pandemic such as COVID-19? In order to keep real estate deals flowing, Phase I environmental site assessments (ESAs) performed under ASTM 1527-13 or similar guidance will remain a part of the transaction process. There will be challenges to site access, travel, and personal safety. But there is also technology and process changes that we can employ to keep the deals moving and not have environmental issues become a weak link in the chain for property transactions and mergers and acquisitions (M&A).

Begin with the Virtual Data Room – Environmental professionals (EP) performing Phase I ESAs should ask for access to existing reports and other seller-provided or user-provided information. All such data should be available virtually, along with current and expired environmental permits, previous Phase Is, regulatory notices and related information. This will be a first step in determining if further environmental due diligence investigation is necessary.

Proceed Virtually – There is a wealth of publicly-available data on line that is an important part of any Phase I. These include:

- Federal databases including EPA Envirofacts and Enforcement and Compliance History Online (ECHO)
- State databases that have similar on line records, but these vary by state – see side bar below
- Local databases – as recommended in ASTM 1527-13, the EP should access local records from Department of Health, Fire Department, Planning/Zoning, Building Permits/Inspection Departments, and local electric utility (for PCB records). Also, many states have a local or regional Pollution Control Agency or a Water Quality Agency that may monitor environmental quality, offer technical assistance, and enforce regulations. Such agencies can provide a wealth of information from a phone call or online contact.

Third Party Data - Environmental data vendors have formed a backbone of Phase I data collection since the early days of due diligence and are no less relevant today. These firms conduct searches of standard federal, state and tribal environmental records pertaining to your subject property and the properties within a search radius as specified by ASTM and the All Appropriate Inquiry (AAI) rule. Some of the major providers are Environmental Data Resources (now known as EDR Lightbox); ERIS (Environmental Risk Information Services); EnviroSite Corporation; GeoSearch; and others. A single search request will typically provide the following data for a point and corresponding radius, corridor or other defined geography:

- Physical setting such as US Geological Survey topographic maps and geology/soils information
- Current and historic aerial photos
- Fire Insurance Maps
- Local street directories
- Building and zoning department records
- Title and deed search, including recorded activity and use limitations (AULs) if not provided by the user

A Note on State Databases

Freedom of Information Act (FOIA) and Right to Know Law (RTKL) Requests allow electronic copies of environmental files and data to be requested from state regulatory agencies. These requests should be made early in the due diligence process as they will take time to process. If regulators are extra busy, they can ask for extensions of deadlines to provide data. Know the process, as a particular state can have some, all, or no electronic data available. For example some states such as North Carolina and Indiana have online virtual file rooms or recent data, and scans of older reports, available for the taking on their web sites. Other states, like Pennsylvania and Virginia, have compliance and enforcement information records available on their websites, but a formal FOIA or RTKL request is necessary to get actual copies of reports.

Allow extra time for requests, as public resources and agencies may be strained or shorthanded during the COVID crisis and perhaps even during its unknown aftermath. Extra planning and an overall supportive attitude will help everyone to be more successful in completing projects.

Should we stop here? – The information from the above sources will often be enough to provide a limited Phase I, and some users will rely upon this as a “desk top review.” These are often sufficient for a user and their lender to make a go/no go decision for low risk properties and portfolios. If the virtual review identifies potential RECs, then the EP can recommend that a site visit be performed at some time in the future.

The Site Visit – if it is agreed that a site visit is necessary to fully complete the Phase I ESA, then two primary concerns must be addressed:

1. The safety of people at the property or facility to be visited; and
2. The safety (and liability) of the inspector.

The facility or key site manager may already have established COVID procedures such as a Business Continuity Plan and Exposure Action Plan which spells out requirements that any site visit personnel must meet. These requirements should be reviewed and understood before the visit. It will also be incumbent upon the EP to abide by basic limitations such as avoiding contact with or from any employees who test positive or who may be symptomatic for COVID-19; social distancing; handwashing/hygiene; and proper personal protective equipment (PPE). Conduct your own job site analysis and risk assessment if the facility does not have one.

The risk factor of the facility also must be considered before the visit. For example, OSHA classifies some workplaces and facilities as Very High Risk or High Risk for COVID-19 exposure such as health care facilities, laboratories and mortuary facilities dealing with COVID cases. As a result such facilities may be legally off limits for Phase I site visits.

If a site inspection is mutually agreeable, some additional considerations should apply:

- Conduct visits on alternate shifts or during vacant times to enhance social distancing.
- Keep note of human contacts on project sites as well as while in transit in the event it becomes necessary to assist public health officials with Contact Tracing when appropriate.
- Include infectious disease among the hazards in your health and safety plan (HASP) and apply practices as appropriate to the type of facility, along with a Hazard Communication Program and workplace controls when needed.
- Follow-up work such as sampling, monitoring or other Phase II activities should be planned in advance as appropriate.

The Construction Industry Safety Coalition (CISC) and the Associated General Contractors of America (AGC), with significant input from OSHA and the CDC, have produced a *Sample Plan for COVID-19 Exposure Prevention, Preparedness, and Response* that provides some good practices for site visits, available [here](#).

Guidance is being developed and updated continually, so check with the various players like OSHA and CDC frequently.



Stay safe!

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