

# Using a Phase I Environmental Site Assessment to Document Compliance with HUD Environmental Standards at 24 CFR 58.5(i)(2) or 50.3(i)

## **Introduction**

HUD policy requires that “all properties that are being proposed for use in HUD programs be free of hazardous materials, contamination, toxic chemicals and gases, and radioactive substances, where a hazard could affect the health and safety of occupants or conflict with the intended utilization of the property.”<sup>1</sup> Site contamination hazards must be analyzed using “current techniques by qualified professionals.”<sup>2</sup> The investigation and source documentation required to satisfy this standard will vary depending on the type of HUD-assisted activity, and its level of environmental review. HUD’s memorandum, “Site Investigation Screening - Guidance for complying with 24 CFR 58.5(i)(2) and 50.3(i),” provides guidance on determining the appropriate investigation and source documentation for each project type.

The following guidance is focused on the investigation and source documentation addressing potential site contamination in HUD environmental review for acquisition and/or development of multifamily housing with five or more units or non-residential property. According to HUD regulations, environmental review for these project types must include the evaluation of previous uses of the site or other evidence of contamination on or near the site.<sup>3</sup> The American Society for Testing and Materials (ASTM) E1527 Phase I Environmental Site Assessment (hereafter “Phase I”) is commonly used in HUD environmental review to undertake this analysis. This memorandum is intended to 1) describe the purpose and scope of the Phase I in HUD environmental review, 2) describe the treatment of non-scope “business environmental risk” issues in such Phase I assessments, 3) explain the responsibilities of the Phase I user and preparer, and 4) discuss potential further action based on the determinations of the Phase I.

## **I. Purpose and Scope of Phase I in HUD environmental Review**

### ***Background of Phase I Environmental Site Assessment***

The Phase I represents the industry standard for determining whether a past release of hazardous substances or petroleum products has occurred or there is a material threat of a future such release, on a property proposed for use in a commercial transaction or development proposal.

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<sup>1</sup> 24 CFR 58.5(i)(2)(i); 24 CFR 50.3(i)(1).

<sup>2</sup> 24 CFR 58.5(i)(2)(iv); 24 CFR 50.3(i)(4).

<sup>3</sup> 24 CFR 58.5(i)(2)(ii); 24 CFR 50.3(i)(2).

The US Environmental Protection Agency (EPA) has determined that the Phase I standard satisfies EPA's All Appropriate Inquiries (AAI) rule.<sup>4</sup> Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>5</sup>, as amended, satisfying AAI is one of the requirements of eligibility for CERCLA Landowner Liability Protections (LLPs), such as bona fide prospective purchaser (BFPP), contiguous property owner (CPO), or innocent landowner defenses to CERCLA liability for cleanup of contamination related to past or ongoing releases of hazardous substances on a given property.<sup>6</sup>

For this reason, purchasers or developers of property proposed for use in HUD programs may obtain a Phase I in order to qualify for CERCLA liability protections, irrespective of any considerations related to HUD environmental review standards. As mentioned above, HUD regulations require investigation into previous uses of a site for activities on multifamily and nonresidential properties.<sup>7</sup> Because the Phase I standard, which includes an investigation into past uses of the site, represents industry best practice for determining the potential for contamination on a site, it is the recommended resource for documenting compliance with HUD contamination regulations.

It is important to recognize that the goal of the Phase I as routinely prepared in order to satisfy the AAI rule is limited to identification of "recognized environmental conditions"(RECs)<sup>8</sup> related to past or future releases of CERCLA hazardous substances and petroleum products. However, HUD utilizes the standard to identify the presence of any toxic or radioactive substance that may pose a threat to site occupants. HUD is interested in the potential presence of such materials regardless of whether they are manmade or naturally occurring (e.g., radon), or whether they are likely to have been "released" into the environment or are contained within a structure (e.g., intact asbestos-containing materials or lead-based paint in a structure).

### ***Statement of HUD Purpose within the Phase I ESA is required***

HUD's interest in determining potential sources of risk to future site occupants will likely necessitate an expansion in the scope of the standard Phase I inquiry. It is important to clarify the document's scope and purpose among the users and preparers of the Phase I prior to site assessment. HUD recommends that RE or HUD users<sup>9</sup> and their Environmental Professionals (EPs)<sup>10</sup> ensure that the

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<sup>4</sup> 40 CFR 312.11.

<sup>5</sup> 42 U.S.C. § 9601.

<sup>6</sup> Innocent Landowner defense 42 USC § 9601(35); contiguous property owner defense 42 USC § 9607(q); BFPP defense 42 CFR § 9607(r)(1) and § 9601(40). For a more accessible introduction to the concept of CERCLA liability protections, see the EPA publication "EPA Brownfields Grants CERCLA Liability and All Appropriate Inquiries," available at <http://www.epa.gov/brownfields/aai/aaicerclafs.pdf>.

<sup>7</sup> 24 CFR 58.5(i)(2)(ii); 24 CFR 50.3(i)(2).

<sup>8</sup> The definition of a REC is provided at section 3.2.78 of E1527.

<sup>9</sup> Unless specifically limited, the term "user" throughout the rest of this document refers both 1) to HUD staff who prepare and approve environmental review records for HUD-assisted activities according to regulations at 24 CFR

statement of purpose in the Phase I Introduction section<sup>11</sup> clearly explains that, in addition to satisfying AAI, a purpose of the Phase I is to document compliance with 24 CFR 58.5(i)(2) or 50.3(i). Likewise, the Evaluation section's<sup>12</sup> discussion of Phase I findings and conclusions should state whether any further investigation or corrective action is needed in order to ensure that the property meets requirements at 58.5(i)(2) or 50.3(i) for the proposed HUD-assisted use. This is in addition to the standard Phase I determination whether any RECs have been identified in connection with the site.

Where HUD assistance in an activity is not contemplated until after a Phase I ESA has been prepared, the Phase I may be updated to include analysis of compliance with 58.5(i)(2) and 50.3(i), in accordance with update guidelines at Section 4.6 of the Phase I standard.

### ***Timing***

As with other aspects of the environmental review process, the time required to obtain a Phase I ESA and evaluate its findings should be fully accounted in planning a HUD-assisted development activity. The environmental review process is designed to serve as an early decision-making tool. Therefore, the process of addressing 24 CFR 58.5(i)(2) or 50.3(i) requirements should be initiated as early in the development timeline as possible.

Obtaining and reviewing a Phase I ESA may take at least one month. After review of the draft Phase I by the user, revisions may be needed in order to better adhere to the Phase I standard, to HUD requirements, or to meet other informational needs of the user.

If further investigation is needed, the process of documenting compliance with 58.5(i)(2) or 50.3(i) can take much longer. Where further investigation indicates that contamination may be present or precautionary measures are needed, there must be time to complete the following steps prior to finalizing the environmental review and committing HUD assistance to the development: adequate characterization of confirmed or potential site contamination, determination of necessary corrective action and institutional or engineering control measures, and the completion of the appropriate

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Part 50, and 2) to Responsible Entity staff who prepare and approve environmental reviews for HUD-assisted activities under regulations at 24 CFR Part 58.

<sup>10</sup> The experience and education requirements for a Phase I Environmental Professional are described in E1527 Appendix X2, pursuant to 40 CFR 312.10. In addition to verifying that the EP meets these requirements, users may wish to request a list of recently completed work and to verify that the EP holds professional insurance.

<sup>11</sup> The Introduction section is described in E1527 Appendix X4, "RECOMMENDED TABLE OF CONTENTS AND REPORT FORMAT": "X4.2 *Introduction*—This section identifies the property (location and legal description) and the purpose of the Phase I Environmental Site Assessment. This section also provides a place to discuss contractual details (including scope of work) as well as limiting conditions, deviations, exceptions, significant assumptions, and special terms and conditions."

<sup>12</sup> The Evaluation section is another recommended sectional division of the Phase I report, also described in Appendix X4 (see previous footnote): "X4.7 *Evaluation*—This section documents the findings, opinions and conclusions of the Phase I Environmental Site Assessment as stated in Section 12. This section also includes additional investigations, data gaps, deletions."

oversight agency approval processes. As a result, project delays can occur if sufficient environmental review time is not built into the development schedule.

Phase I ESAs have a shelf life specified in the standard at section 4.6, “Continued Viability of the Site Assessment.” In order to satisfy AAI with reference to a specific property transfer, the Phase I must be prepared within six months of the transaction. This period can be extended for a period up to one year after its initial preparation by updating the Phase I.

If a Phase I was prepared more than one year prior to completion of the HUD environmental review, the report may still prove useful. According to Section 4.7 of the standard, previous reports can be used as source documentation in preparing a Phase I. In many cases, referencing an expired Phase I for a portion of the necessary base data can significantly expedite the work of the environmental professional. The fact that a previous Phase I is available should be incorporated in the EP’s cost estimate and scope of work when the Phase I contract is negotiated.

<b>Summary Table: Continued Validity and Use of Prior Phase I ESAs (E1527 Section 4.6-4.7)</b>	
Less than 180 days since Phase I preparation	Presumed valid
Between 180 days and 1 year	Update the following components: <ul style="list-style-type: none"> <li>• Interviews</li> <li>• Searches for environmental liens</li> <li>• Government records review</li> <li>• Site reconnaissance</li> <li>• Report and EP declaration</li> <li>• Must also satisfy user responsibilities (user-provided information)</li> </ul>
More than one year	<ul style="list-style-type: none"> <li>• All Phase I components to be completed</li> <li>• Prior report can be used as a reference</li> </ul>

Note that activities utilizing mortgage insurance through the Federal Housing Administration (FHA) should follow requirements of the relevant FHA guidance, e.g., Multifamily Accelerated Processing (MAP) Guide, or Section 232 Handbook.

**Format**

A Phase I ESA should be prepared in accordance with the requirements of ASTM E-1527 “Standard Practice for Environmental Site Assessments, Phase I Environmental Site Assessment Process.” Additionally, HUD strongly recommends that Responsible Entities request that the Environmental Professional draft the report using ASTM E-1527 Appendix X4’s “Recommended Table of Contents and Report Format.” The use of Appendix X4 is beneficial as an organizational tool to ensure all requirements are included in the report and to facilitate an efficient substantive review.

## II. Treatment of non-scope “Business Environmental Risk”

### ***Non-Scope Items Related to Site Contamination, Health and Safety***

As a standard that is closely aligned to issues of CERCLA liability, the Phase I primarily addresses releases of “hazardous substances”<sup>13</sup>; “pollutant[s] or contaminant[s],”<sup>14</sup> or petroleum products and their constituents. Some additional hazards that could affect human health and safety based upon the proposed end use of the property may be considered non-scope items for purposes of the standard practice, because they do not necessarily raise CERCLA liability concerns. These substances may include pesticides used in accordance with the label, asbestos and lead-based paint that are part of an existing structure, mold, and radon, among others.

On the other hand, the ASTM E1527 standard acknowledges that some users may have “business environmental risk” concerns that require investigation of environmental issues beyond the standard scope of the practice. “Business environmental risk” is defined in E1527 at Section 3.2.11:

“business environmental risk—a risk which can have a material environmental or environmentally-driven impact on the business associated with the current or planned use of a parcel of commercial real estate, not necessarily limited to those environmental issues required to be investigated in this practice. Consideration of business environmental risk issues may involve addressing one or more non-scope considerations, some of which are identified in Section 13.”

HUD uses the Phase I for an initial determination as part of the Department’s overall environmental responsibilities pursuant to 24 CFR 50.3(i) and 58.5(i)(2). Therefore, HUD is concerned with the business environmental risk that site contamination – whether or not considered a release of hazardous substances under CERCLA or EPA guidance – may pose a health risk to future site occupants or conflict with the intended use of the property. For this reason, findings or opinions regarding potential non-scope sources of contamination – including but not limited to those listed in Section 13 of the Phase I standard and developed further in Appendix X5, “Summary of Common Non-Scope Issues” – should be discussed in the Phase I assessment.

For example, non-scope considerations in X5 that should be addressed in a Phase I prepared for HUD environmental review purposes include asbestos, radon, lead-based paint, regulatory health and safety compliance; continuing obligations or ongoing responsibilities, state and local compliance responsibilities related to toxic or hazardous substances, or corrective action relating to past noncompliance on the property; indoor air quality; and mold. In addition to the listed examples, other non-scope factors that should be discussed as relevant to the proposed activity and site include the

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<sup>13</sup> 42 USC § 9601(14).

<sup>14</sup> 42 USC § 9601(33).

potential for residual contamination from agricultural activities, such as the use of arsenical pesticides, even where such substances were used in accordance with the label.

### ***Non-Scope Items Unrelated to Site Contamination***

Other considerations listed in X5, such as wetlands and endangered species, are *not* recommended for inclusion in the Phase I assessment. The purpose of the Phase I in HUD environmental review, as noted above, is to address the requirements of 24 CFR 58.5(i)(2) and 50.3(i). Users seek the expertise of an EP to analyze factors that are related to toxic, hazardous, and radiological contamination on the site that may pose a risk to occupants.

Various other factors that must be addressed in a HUD environmental assessment, such as wetland protection under Executive Order 11990, Floodplain Management under Executive Order 11988, Historic Preservation under Section 106 of the National Historic Preservation Act, other authorities listed at 24 CFR 58.5 and 58.6, and various NEPA development factors described in HUD guidance available at <https://hudexchange.info/environmental-review> should be addressed in the appropriate HUD environmental assessment recommended format by an environmental review preparer who has the capacity and expertise to prepare such documents.

In part, this is recommended because the Phase I preparer may be unfamiliar with the treatment of these factors in HUD environmental review. For example, when wetlands are addressed as a non-scope item in Phase I ESAs for commercial property transactions not involving HUD or other federal funding, analysis may be focused on determining the presence of federal jurisdictional wetlands on the property that might trigger compliance with Clean Water Act Section 404 permit requirements in order to avoid related civil and criminal penalties. However, HUD's compliance with Executive Order 11990, Protection of Wetlands, encompasses a broader definition of wetlands and follows strict parameters that are laid out in regulations at 24 CFR Part 55 and in HUD guidance.

Of course, some Phase I preparers may have HUD-specific experience and may be contracted to assemble both the HUD Environmental Review Record (ERR) and the Phase I ESA. However, even when the same expert is relied on to complete both documents, the Phase I should be limited to analysis of issues related to site contamination, and non-contamination issues should be addressed separately in the ERR.

In summary, a HUD environmental assessment must be prepared by an experienced person with knowledge of HUD environmental review requirements. This person may contract with an EP to obtain a Phase I that addresses HUD requirements at 24 CFR 58.5(i)(2) and 50.3(i), but the EP should limit the scope of the Phase I to a contamination-related analysis.

### **III. Phase I “User” and “Preparer” Responsibilities**

#### ***The Role of the User in Phase I ESA Preparation***

The Phase I standard contemplates active participation by the HUD or RE user, both during contracting and defining the scope of the assessment, and during actual preparation of the assessment by the EP. The user’s responsibilities include:

- During scoping, informing the EP that the Phase I must address HUD standards at 58.5(i)(2) or 50.3(i), including relevant non-scope contamination issues.
- Supplying the EP with a copy of any previously prepared Phase I ESA for the property.
- Supplying the EP with any information from previous title or record searches related to environmental liens, activity/use limitations, or institutional or engineering controls (e.g., deed restrictions, caps, slurry walls, etc.) in place on the property.
- Completing the user questionnaire.
- Arranging for the cooperation of the owner, seller, or property manager to ensure that the EP has full access to the site and the opportunity to interview parties with knowledge of the site.
- Communicating with the EP regarding the scope of investigation as new information comes to light.

Taking care to adequately fulfill this role can help to avoid data gaps<sup>15</sup> in the Phase I, which will result in a more useful and relevant report for the user.

#### ***Reading and Evaluating a Phase I ESA***

Once the EP completes the Phase I, the RE or HUD user should review the report and discuss it with the preparer as soon as possible. When possible, the contract should require that the EP provide the user with a draft copy of the report for the user to make comments or suggestions to the EP prior to issuance of the final Phase I report. Including this step in the Phase I process has several advantages. It helps to ensure that the report serves the needs of the user, identifies any areas of the report that require clarification, and creates another opportunity for the user to provide the EP with additional information which may help to close data gaps in the Phase I.

When reviewing the draft or final Phase I, the user should consider the report as a whole, rather than limiting review to only those portions of the Summary or Evaluation sections where RECs are briefly listed. In general, the Phase I user should expect the report to provide a clear narrative discussion revealing the analysis and expert opinion that links investigative findings to conclusions about the presence of RECs and the status of 58.5(i)(2) or 50.3(i) compliance.

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<sup>15</sup> The term “Data Gap” is defined at section 12.7 of E1527, which requires that the Phase I include discussion of “significant” data gaps. A data gap example described in this section is the EP’s inability to access a key portion of the site, underscoring the need for coordination by the user to ensure adequate EP access to the property.

The fact that a Phase I does not identify a REC is not necessarily a definitive determination that no further investigation or action should be considered. An EP may identify site conditions that are notable or initially concerning, but may determine that these conditions are not indicative of a “release” or material threat of release of toxic substances and therefore do not constitute a REC.<sup>16</sup> When this occurs, the EP must indicate the considerations underlying the determination that a condition does or does not constitute a REC in the Evaluation section of the Phase I.

If the user has any questions about findings described in the report that the EP determines do not constitute RECs, these should be discussed carefully with the EP. The user may determine that a finding merits further investigation in order to comply with HUD standards, even though the Phase I concludes that the finding does not constitute a REC. When this is the case, the EP should be able to suggest options for further investigation when requested by the HUD or RE user. Following are two examples of scenarios in which the user might determine that further investigation is necessary even though the Phase I identified no RECs.

*Example 1: Vapor Condition That Cannot Be Ruled Out*

The Phase I identifies a potential source of release of a chlorinated solvent into groundwater in proximity to the site, but at cross-gradient or down-gradient to the proposed site based on surface topography. Without additional information, the Phase I preparer cannot determine that a vapor encroachment condition is likely to exist on the subject property. At the same time, due to the variability of groundwater flow direction and the potential for unpredictable vapor migration through subsurface pathways such as utility corridors that have not been fully characterized, a vapor condition cannot be ruled out. The EP would be expected to complete file review of any records regarding the release that may be on file with the relevant oversight agency, but if these records do not provide enough information to fully characterize a potential groundwater plume or vapor migration zone, under ASTM 1527 it is at the EP’s discretion to determine whether or not the known facts constitute a REC. However, even if the EP determines that there is not a REC, the user reviewing the findings and noting uncertainty with regard to vapor encroachment may request the EP’s suggestions for further investigation, including vapor intrusion testing,<sup>17</sup> that would more definitively resolve the issue for purposes of 24 CFR 58.5(i)(2) or 50.3(i) compliance. In this example, the fact that the relevant oversight agency has or has not identified an adjacent property owner as responsible party for the release should not influence the RE or HUD user’s determination as to whether further investigation is needed. This is because in HUD environmental review the purpose of the Phase I is not limited to addressing liability concerns; an equally important purpose is to ensure that residents of the proposed development are protected from toxic hazards including vapor intrusion.

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<sup>16</sup> The definition of “release” is provided at section 3.8.82 of the Phase I standard. The definition refers the reader to the definition of release in the CERCLA statute at 42 U.S.C. § 9601(22). Therefore, the determination of what constitutes a REC is rooted in the concept of CERCLA liability, which, as discussed extensively above, may be a narrower scope than that required by 58.5(i)(2) and 50.3(i).

<sup>17</sup> Generalized guidance on vapor intrusion is provided in ASTM E2600-10, Appendix X7.



### *Example 2: Non-Scope Historical Pesticide Use*

The Phase I includes a finding related to a non-scope consideration such as historical use of pesticides on a site, which have been used in accordance with their labeling instructions. A proposed project might involve acquisition of agricultural land that was used for several decades in orchard cultivation, for conversion to residential multifamily property. Historically, orchard cultivation has been associated with the use of arsenical pesticides, and orchard properties may have soil arsenic levels above state remediation levels. Pesticides used in accordance with labeling instructions are generally not considered a release of a hazardous substance and would be identified as a non-scope consideration under the Phase I standard. However, the RE or HUD Phase I user would have communicated to the EP that such contamination-related non-scope considerations should be analyzed in the Phase I with reference to HUD requirements at 24 CFR 58.5(i)(2) or 50.3(i). The EP should therefore describe the historical use of the property as an orchard, and note the potential for residual arsenical pesticide soil contamination. Nevertheless, as a non-scope issue, it is at the discretion of the EP to determine whether or not to classify this historical use as a REC. Whether or not it is classified as a REC, upon reviewing the Phase I's findings and learning about the potential for arsenic in soil on the property, it is the responsibility of the RE or HUD user to discuss with the EP options for Phase II soil testing to determine whether arsenic levels exceed state action levels for residential development.

#### *Verifying Appropriate Documentation of HRECs:*

Sometimes a Phase I may document that a past release of a hazardous substance has occurred in connection with a property, but determine that the release has been addressed to the satisfaction of the applicable regulatory authority such that the property is not subject to any ongoing controls or use restrictions. In this case, the verified past release may be determined not to constitute a REC, but instead to constitute a "historical recognized environmental condition," or HREC. In such a case, the user should review the Phase I to ensure that the determination that the past release constitutes an HREC is supported by documentation that the process of remediation and closure of the release by the applicable regulatory would meet *current* standards for unrestricted use. If this is not clear from the Phase I's discussion of the HREC, the user should discuss the finding with the EP to determine whether further investigation is needed.

## **IV. Potential Action Following Phase I Determinations**

### ***Exploring Options and Obtaining Recommendations for Further Testing***

When a Phase I identifies a REC the user should consult with the EP regarding options for further investigation or remediation to address the REC. Unless requested to do so, EPs may choose not include these recommendations for further testing and remediation within the Phase I, and ASTM E1527 does not require them to do so. Since they are not required, recommendations are often omitted from the Phase I in order to avoid limiting user options. Therefore, it is the responsibility of the user to determine how to address RECs that are identified, and the first step in this determination is seeking the input of

the EP who prepared the Phase I. This discussion of options for further investigation, remediation, or other action can take place outside of the Phase I ESA document, but the RE or HUD preparer should document this discussion and its conclusions in the HUD Environmental Review Record for the activity.

RE or HUD users should also note that the scope of post-Phase I investigation differs from that of the Phase I itself. The Phase I ESA provides a standard practice for initial investigation that, while tailored by the EP to specific site conditions, is more or less general in applicability. By contrast, methods for further investigation, remediation or other action to address RECs or unresolved findings will be unique to the site and the issue that is identified.

For example, if a Phase I identifies a REC related to potential migration of groundwater contamination from an adjacent site where a release has occurred, a Phase II involving sampling and testing will have a scope and methodology that is defined by the contaminant of concern, soil and groundwater conditions, topography, and the nature and design of the proposed site development. When a Phase II is needed, REs are strongly encouraged to review the scope of work and discuss any questions or necessary revisions with the EP prior to authorizing the EP to move forward with the site investigation.

*“Controlled recognized environmental conditions”* (CRECs) are past releases of hazardous substances that have been addressed to the satisfaction of the applicable regulatory agency.<sup>18</sup> CRECs (which are RECs) will often be conditioned upon continued enforcement of institutional and engineering controls on the site. Where HUD-assisted development will occur on a site with a CREC, the development will need to involve the relevant local, state, tribal or federal oversight authority in approving the new design, including any modification to existing institutional or engineering controls. Therefore, when the Phase I identifies a CREC the user should seek the EP’s guidance regarding next steps for coordinating development with the relevant oversight agency. This process must be documented as part of 58.5(i)(2) or 50.3(i) compliance prior to completing HUD environmental review.

Responsibilities for complying with land use restrictions and not impeding the effectiveness of existing institutional or engineering controls fall under the spectrum of “continuing obligations” that must be satisfied, in addition to AAI, in order to qualify for CERCLA liability protections<sup>19</sup>. It is important to note that the purchaser must complete pre-acquisition due diligence through the ASTM 1527 and post-acquisition “continuing obligations,” including but not limited to compliance with use restrictions and property controls, in order to maintain CERCLA LLP status.<sup>20</sup>

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<sup>18</sup> CREC is defined at section 3.2.18 of E1527.

<sup>19</sup> “EPA notes that ... persons conducting all appropriate inquiries in compliance with today’s final rule are not entitled to the CERCLA liability protections provided for innocent landowners, bona fide prospective purchasers, and contiguous property owners, unless they also comply with all of the continuing obligations established under the statute.” 70 Fed. Reg. at 66073.

<sup>20</sup> ASTM now provides a standard which can be used specifically to determine continuing obligations associated with a property: ASTM E2790-11, Standard Guide for Identifying and Complying with Continuing Obligations. This voluntary standard goes beyond the Phase I’s initial identification of use restrictions or institutional/engineering controls, and develops a plan for performing, documenting, and monitoring Continuing Obligations.

## Conclusion

The Phase I ESA is an essential tool to demonstrate HUD 24 CFR 58.5(i)(2) and 50.3(i) compliance and complete a sufficient HUD environmental review for multifamily and non-residential acquisition and development activities. HUD or RE users should clearly communicate the HUD environmental review purpose to the EP early in the Phase I development process to maximize the usability and value of the document. To document this purpose, it is most helpful to reference the HUD standard in the Introduction section of the Phase I and discuss compliance with the HUD standard in the Evaluation section.

Determination of compliance with the HUD standards may overlap with issues defined in the Phase I standard as “*business environmental risk*” and discussed in Appendix X5, “Summary of Common Non-Scope Issues.” HUD recommends that non-scope *contamination-related* issues be included in the Phase I, such as the likely presence of a potentially harmful substance that does not constitute a “*release*” under the standard, whether because the substance is naturally occurring (e.g., radon), because it was used in accordance with labeling (historical pesticide use), because it is currently secured in an intact structure (e.g., lead or asbestos), or for some other reason. However, HUD does not recommend including in the Phase I analysis of non-scope *non-contamination* environmental issues such as protection of wetlands, management of floodplains, impact on endangered species, or other environmental impact analyses such as those required by the National Environmental Policy Act. These issues are best addressed separately using the appropriate HUD recommended format.

Phase I reports should use the most current ASTM standard (E1527), and should utilize the recommended table of contents and report format (Appendix X4).

Like other aspects of the environmental review process, the analysis for potential site contamination should be completed as early as possible in the development process. Adequate time for preparing the Phase I should be incorporated in development timelines. Site conditions revealed through the Phase I assessment may indicate a need for further investigation, and adequate time for scoping and completing this further investigation – and site remediation if necessary – should also be built into the planning process.

The HUD or RE user has an important and active role to play during preparation of the Phase I by providing information and assistance (e.g., title search, records of property use, coordinating with owner for access to the property). This includes working with HUD to clarify any aspects of the HUD standards at 58.5(i)(2) or 50.3(i) with which the EP is unfamiliar. Once results of the assessment are available, the user has a responsibility to review the report fully and discuss any questions or concerns with the EP, including options for further investigation.

By following the recommendations in this memorandum, RE or HUD users of Phase I assessments can increase the value of the Phase I in the process of environmental review and project planning, avoid unnecessary delays, and most importantly, protect the health and safety of occupants of HUD-assisted developments.