

## REAL ESTATE DUE DILIGENCE IN NEW JERSEY: WHY DO I NEED BOTH A PHASE I AND A PRELIMINARY ASSESSMENT?

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I'm buying a commercial or industrial property in New Jersey, and I've been told I need an ASTM Phase I Environmental Site Assessment (Phase I ESA). However, I've also been told I need a NJDEP Preliminary Assessment Report (PAR) as well? Do I really need both? Won't the Phase I ESA provide me adequate innocent purchaser protection?

### SHORT ANSWER: NO. HERE'S WHY:

Chances are, you're conducting a Phase I ESA to satisfy one of the requirements to qualify for the innocent landowner, contiguous property owner, or bona fide prospective purchaser limitations on CERCLA liability (Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §9601)), and the Environmental Protection Agency (EPA) All Appropriate Inquiry (AAI) Rule, Subsection 312.10 of 40 Code of Federal Regulations 312 (40 CFR §312). However, CERCLA is a federal law, and provides landowner liability protections under that particular law. What a Phase I ESA does not necessarily do, however, and as is made clear in the Phase I standard itself (ASTM E 1527-13, section 1.1.4), is address requirements of state or local laws; users of a Phase I ESA are cautioned that federal, state, and local laws may impose environmental assessment obligations that are beyond the scope of [the Phase I standard itself].

Like many other states, New Jersey has enacted its own innocent purchaser defense that requires a property owner to demonstrate that, at the time they acquired the property, they did not know and had no reason to know that any hazardous substance had been discharged at the property, by performing an "all appropriate inquiry" prior to purchase of the property. As stated in the New Jersey Spill Compensation and Control Act (Spill Act), any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred [N.J.S.A. 58:10-23.11g(c)(3)].

However, contrary to most states, New Jersey has not adopted the federal All Appropriate Inquiries rule (which can be satisfied by performing a Phase I ESA) but instead has its own unique definition for satisfying "all appropriate inquiry." Under N.J.S.A. 58:10-23.11g(d)(2), an "all appropriate inquiry" is defined as the performance of a preliminary assessment, and site investigation, if the preliminary assessment indicated that a site investigation is necessary.

As was again made very clear during a January 14, 2016 court ruling, a party buying property in New Jersey after 1993 must obtain a PAR in accordance with NJDEP rules in order to have a chance of obtaining

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innocent purchaser protection in the state of New Jersey. The decision was affirmed regarding environmental contamination at the Accutherm mercury thermometer manufacturing property in Salem County, that later became a Kiddie Kollege daycare. DEP v. Navillus Group, App. Div. Dkt. No. A-4726-13T3. In this case, despite advice of counsel, the defendants merely relied on various environmental reports, instead of performing a PAR; thus, no innocent purchaser protection was afforded them under the Spill Act, and they were liable for the contamination identified at their property.

## IN SUMMARY:

If you're performing real estate due diligence in New Jersey and want to qualify for both federal and state innocent purchaser liability protections, you need to perform both an ASTM Phase I ESA, as well as a NJDEP PAR.

Here at Whitman, in addition to standalone Phase I and Preliminary Assessment reports, we also provide our clients a single, combined PA/Phase I report that concurrently satisfies both federal and state innocent purchaser protections.

If you have any questions regarding real estate due diligence in New Jersey, or would like a quote for any of Whitman's wide selection of the due diligence services, please contact Chemmie Sokolic, Whitman's Director of Due Diligence Services, at 732-390-5858 or [csokolic@whitmanco.com](mailto:csokolic@whitmanco.com).

## FOR MORE INFORMATION CONTACT:



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*On April 24, 2018, Chemmie, together with Benjamin Alter of GZA and Jeff Casaletto of Norris McLaughlin & Marcus, P.A. (NM&M), is once again pleased to offer instruction at a one-day "Due Diligence in New Jersey" course at NM&M's offices at 400 Crossing Boulevard in Bridgewater, NJ. The course is presented by the Licensed Site Remediation Professional Association (Course No. 2015-028). To register and for more information, please visit [www.lsrpa.org/events](http://www.lsrpa.org/events).*

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