

# **Lord Associates, Inc.**

*Environmental Consulting & Licensed Site Professional Services*

1506 Providence Highway - Suite 30  
Norwood, MA 02062-4647

Voice: 781.255.5554  
Fax: 781.255.5535  
www.lordenv.com

## **What is a 21E?**

By Ralph J. Tella, LSP & Nathaniel Finsness, LSP

The term “21E” has become used to refer to an Environmental Site Assessment, usually performed during a real estate transfer. Massachusetts General Law Chapter 21E was originally designed to regulate and promote cleanup of oil and hazardous materials in soil and groundwater in the Commonwealth of Massachusetts.

Environmental Site Assessments (ESA) have become a prerequisite in commercial and industrial property transfers. They are performed with the objective of identifying potential adverse environmental conditions at a particular property. In summary, there is no hard and fast rule that governs what level of due-diligence is appropriate. Consistent with the overall loan process, it is up to the individual lender to decide what level of risk is acceptable. However, a certain industry practice has developed in the last 20 years.

Originally, ESAs were done to protect title insurance companies from the threat of a “Superlien” being imposed under state (MGL chapter 21E) or federal (CERCLA) law. After case law established that environmental liabilities were less of a title issue and more of an owner/operator liability, it became standard practice for lenders to require ESA’s as part of the commercial loan application process. Today, we find that if the loan amount is significant, ESA’s are required even for certain residential properties not subject to 21E or CERCLA. ESA’s are also required by many governmental funding agencies such as HUD and MFHA.

The industry standard of care has been set for property transfer assessments by a private organization “ASTM”, i.e. the American Society for Testing and Materials Standards. Recognized across all state lines, the ASTM standards have established a uniform process to complete the minimum level of due-diligence necessary to establish protection under CERCLA liability.

In truth, the vast majority of properties being transacted are far from falling subject to CERCLA liability. However, lenders still need to know if there are any unidentified environmental liabilities that could interfere with taking title to a property through foreclosure, or what impact a cleanup may have on cash flow to the point that the borrower may default on a loan.

ASTM has published two levels of ESA standards. There are others (“Phase II”) that standardize procedures for additional testing and evaluation once a problem has been identified. Note that these standards are not to be confused with the Massachusetts Department of Environmental Protection phases of investigation which have different requirements.

The ASTM standards are:

- ASTM E-1527-00-“Phase I Site Assessment Process”
- ASTM E-1528-00-“Environmental Transaction Screen”

Both of these standards were recently updated and expanded to include the US EPA’s “All Appropriate Inquiry” standard for liability protection.

While both standards can provide liability protection, the level of effort varies between the two primarily in the area of agency checks and supporting documentation. Therefore it is up to the lender to decide what level of effort is appropriate for the loan. This decision is typically based on a dollar value or site history involving the actual or suspected use of oil and/or hazardous materials.

The Transaction Screen was originally designed as an “in-house” self evaluation via a check-list approach. It has been adapted by many lenders as a tool to screen for potential problems with properties that represent either a low-risk or low dollar-value loan. It shares many of the same elements of investigation as the Phase I but the research and documentation is not as extensive. Problems may be identified, but not researched further. As a consequence, many times additional work is required to complete an ESA after a Transaction Screen has identified specific areas of question.

For example, a Transaction Screen may identify an adjacent property as a state-listed site, but offer no further evaluation as to what the problem may be or if it presents a material threat of harm to the subject property. Under a Phase I, a full file review might be conducted at the DEP to ascertain the level of risk.