



# When to Consider “Non-Scope Considerations” in Environmental Due Diligence

Prepared by:  
Gary L. Pasheilich  
Squire Patton Boggs (US) LLP



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# When to Consider “Non-Scope Considerations” in Environmental Due Diligence

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Performing thorough environmental due diligence for commercial and industrial property acquisitions requires consideration of diverse risks to a prospective purchaser. Such diligence generally includes a Phase I environmental site assessment performed under *ASTM Standard Practice E1527-13* (ASTM E1527-13), which is designed to investigate the possibility of hazardous substance or petroleum product releases at a commercial property—the presence of which can serve as a basis for strict, joint-and-several liability to current and past property owners under the federal ***Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)***.

While CERCLA liability is a primary concern to any prospective purchaser of commercial and industrial property, there are a host of other issues that may create liability ranging from exposure risks from building materials and naturally-occurring substances (both exempt from CERCLA), to regulatory non-compliance, to potential tort liability for hazardous conditions. ASTM E1527-13 identifies these issues as “non-scope considerations” that may create a “business environmental risk”—a term the ASTM standard defines as “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.”

ASTM E1527-13 outlines a non-exhaustive list of “non-scope considerations” that includes: asbestos-containing building materials, biological agents, cultural and historical resources, ecological resources, endangered species,

health and safety, indoor air quality (*unrelated* to hazardous substances or petroleum products, which would be part of the standard Phase I assessment), industrial hygiene, lead-based paint, lead in drinking water, mold, radon, regulatory compliance, and wetlands. The environmental professional is not *required* to investigate “non-scope considerations” in a standard Phase I assessment, but many of these issues may be investigated as part of the Phase I upon request and for an additional cost.

Whether to investigate these issues can depend on a wide range of factors. For example, if the geographical setting contains hydrological features, a prospective purchaser may need to consider a wetlands investigation and/or jurisdictional determination. Also, radon may present a higher risk depending on its location. Radon levels on average are higher in the northern United States. US EPA [classifies](#) radon risks within three zones on a per-county basis. Consequently, if your project is located within a “Zone 1” area, there is an increased likelihood that radon levels may exceed 4.0 pCi/L—the action level set by US EPA that requires mitigation.

Additionally, investigation of “non-scope considerations” may be required to receive federal financing. The US Department of Housing and Urban Development (HUD) requires that many of the above issues be addressed in the environmental report prepared by lenders to satisfy National Environmental Policy Act requirements. In fact, HUD expands upon ASTM E1527-13’s list to include a variety of other issues, such as floodplain management, noise analysis, explosive/flammable hazards, coastal barrier resources, coastal zone management, sole source aquifers, airport clear zones, and environmental justice considerations. State loan programs may impose similar considerations.

For issues such as asbestos and lead-based paint, federal or state regulations may require more than non-invasive investigation (as performed

under a Phase I assessment), and instead require sampling and testing to confirm the presence of materials that may be impacted by planned development. Where materials are confirmed, abatement or encapsulation by a licensed professional may be necessary to address releases, and development of a management plan may be necessary for materials that remain on-site to reduce exposure risks.

Patchwork state regulation may also result in substantially varied requirements. For example, as to investigation of radon risks, for the many states that “default” to HUD’s [Radon Policy](#), a baseline of 25% of randomly selected ground level units in multi-family developments are to be tested. However, Ohio mandates substantially more investigation, requiring testing of 100% of ground level units and 10% of upper level dwelling units.

ASTM E1527-13 notes that the decision of whether to investigate “non-scope considerations” is “within the discretion of the user based on its own risk tolerance ... [and] ... the particular requirements of a specific transaction.” This evaluation can be fact-intensive, complex and requires a thorough understanding of the relevant property, its improvements and surroundings, the scope of any planned development, and applicable legal requirements. Discovering late in a project that what was once thought to be little more than a “checkbox” issue will demand considerably more effort to address can fundamentally undermine a project’s goals, creating costly delays for retroactive investigation and inviting regulatory scrutiny.

Conversely, early strategic cooperation between project principals, environmental consultants and legal counsel can identify strategies to minimize impacts to time and budget while ensuring any relevant obligations are managed responsibly. Even a small investment up front can yield significant rewards down the line and ensure that project goals are met.

