



# Challenges and Risks in Phase I ESAs



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# Problem Statement

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The common practice in commercial property transfers is to treat the Phase I Environmental Site Assessment (ESA) as a commodity to be purchased at the lowest possible price. However:

- If the resulting Phase I ESA **does not** meet the requirements of All Appropriate Inquiry (40 CFR Part 312) the User will not qualify for limitations on CERCLA liability and the Consultant may also be liable.
- If the Phase I ESA **does** meet those requirements, the User may still be subject to other costs associated with legal fees, unnecessary field investigations, delays in property development, and other business environmental risks due to incomplete evaluation of property environmental conditions.

# Challenges for Discussion: User

- Understanding and defining objectives
- Selecting a consultant
- Developing appropriate contract terms
- Recognizing and communicating User responsibilities



# Challenges for Discussion: Consultant

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- Determining the “standard of professional care”
- Evaluating the significance of data gaps/data failure
- Evaluating the extent of reliance on presumed groundwater flow direction
- Determining when to review additional agency files
- Selecting historical sources and defining search parameters
- Evaluating efforts to interview past owners/occupants

# User: Objectives

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According to ASTM E1527-13, the practice is intended to permit a User to satisfy one of the requirements to qualify for the innocent purchaser limitations on CERCLA liability. However, other things to consider:

- Lender requirements
- Risk tolerance
- Potential impact on the property deal
- Potential impact on future development plans
- Business environmental risks

# User: Selecting a Consultant

- User/Lender risk tolerance
- Complexity of the site
- User time constraints
- Consultant free from a conflict of interest
- Consultant familiarity with state and local agencies
- Consultant experience and personnel performing the ESA



# User: Contract Terms/SOW

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- Conflict of interest statement
- Reliance provisions and other lender requirements
- Limitation of liability (dollars and time periods)
- Insurance certificates (additional insured)
- Environmental lien and AUL search responsibilities defined
- Schedule requirements

# User: Responsibilities

In addition to ASTM E1527-13 Section 6 requirements there is other information that the User needs to communicate to the Consultant to obtain a cost-effective and timely ESA:

- Clearly defined property
- Planned future use
- Reliance terms
- Schedule for closing
- Contact information for the site owner(s) for access and interviews
- Prior reports





# Consultant: Standard of Professional Care

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- “Level of inquiry is variable”: Consistent with **good commercial and customary practice**, the appropriate level of *environmental site assessment* will be guided by the **type of property** subject to assessment, the expertise and **risk tolerance of the User**, and the **information developed in the course of the inquiry** (ASTM 1537-13, Section 4.5.3).
- “Not exhaustive”: there is a point at which the **cost** of information obtained or the **time** required to gather it **outweighs the usefulness** of the information and, in fact, may be a material detriment to the orderly completion of transactions.

# Standard of Professional Care (cont)

- “Practically reviewable”: information that is provided by the source in a manner and in a form that, upon examination, yields information relevant to the *property* without the need for **extraordinary analysis of irrelevant data**, and that can be retrieved by reference to the location of the property (ASTM 1537-13, Section 3.2.69.)



# Standard of Professional Care (cont)

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- “Reasonably ascertainable”: information that is (1) *publicly available*, (2) obtainable from its source within reasonable time and cost constraints, and (3) *practically reviewable* (ASTM 1537-13, Section 3.2.77.)
- “Reasonable time and cost”: information will be provided by the source within 20 calendar days of receiving a written, telephone, or in-person request at no more than a **nominal cost** intended to cover the source’s cost of retrieving and duplicating the information (ASTM 1537-13, Section 8.1.5).

# Consultant: Significance of Data Gaps

A *data gap* is only significant if other information and/or **professional experience** raises reasonable concerns involving the *data gap* (ASTM E1527-13 Section 12.7.)



# Significance of Data Gaps (cont)

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Examples of data gaps frequently not identified or not considered significant:

- Failure to obtain historical information back to first developed use in five year intervals.
- Failure to receive information from local agencies within the report time constraints.
- Failure to obtain regulatory agency reports within the report time constraints.
- Failure to access certain areas, particularly in buildings.
- Absence of User information.
- Failure to interview former owners and occupants

# Consultant: Groundwater Flow

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Typical disclaimer: “Without the benefit of on-site wells or piezometers, Consultant assumes the local subsurface water migration from the Site is to the \*\*\*, generally following the topography of the vicinity’s land surface. However, an accurate flow direction cannot be based solely on surface examination. Subsurface and localized geological and man-made conditions can alter groundwater flow direction.”

# Groundwater Flow (cont)

Nevertheless, the presumed direction of groundwater flow is consistently used in eliminating potential off-site sources as environmental concerns.

In many cases, this may be acceptable, but applicability contingent on:

- Soil type
- Depth to groundwater
- Depth to bedrock
- Contaminant type
- Distance to potential source
- Actual groundwater flow direction

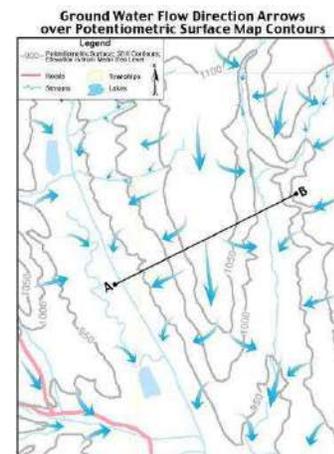


Figure 2.

# Consultant: Agency File Review

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If the *property* or any of the *adjoining properties* is identified on one or more of the standard environmental record sources, pertinent regulatory files should be reviewed or the justification for not reviewing should be identified (ASTM 1527-13 Section 8.2.2.1).

➤ Contingent on:

- User objectives
- Professional judgement regarding other information sources, significance
- “Practically ascertainable”

# Consultant: Historical Sources

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ASTM requirements:

- Review as many standard historical sources as are **necessary, reasonably ascertainable, and likely to be useful** to evaluate uses back first developed use or 1940 (ASTM E1527-13 Section 8.3.2)
- Surrounding properties only need to be evaluated to the extent the information is revealed in the course of researching the property itself (ASTM E1527-13 Section 8.3.3)

# Historical Sources (continued)

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## Challenges:

- Value of historical sources depend on property location
- Property parcels and addresses may change over time
- Adjacent properties may have contained significant historical sources
- Agricultural use is considered to be developed use

# Consultant: Interviews

## Challenges:

- Frequently hard to contact previous owners, multiple occupants
- Tend to be time-consuming
- Relatively easy to justify excluding
- Often not identified as data gaps



# Potential Consequences of Inadequate ESA

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- CERCLA liability for User and Consultant
- Lender may not approve funding
- Property devaluation as a result of contamination
- Lack of ability to recover costs from seller because of failure to identify contamination during due diligence
- Project cost and schedule impacted due to contamination identified during development
- Project cost and schedule impacted by unanticipated business risks

# Conclusion and Recommendations

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## User:

- Consider objectives and site conditions in scoping work and selecting a consultant
- Develop appropriate contract terms
- Make sure you address all User's responsibilities and provide the Consultant with the information needed to perform the ESA
- Consider engaging an environmental attorney in the process, particularly for high-risk sites
- Consider engaging an independent environmental consultant to provide technical review, particularly for high-risk sites

# Conclusion and Recommendations

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## Consultant:

- Be cognizant of user objectives
- Utilize experienced personnel to provide the appropriate standard of care
- Coordinate closely with User on User- Provided components
- Consult with User when additional effort is required to characterize environmental conditions

# Thank You

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## Questions?



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