

# Due Diligence and CERCLA Liability: Process and Pitfalls of Phase I ESAs and AAI

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# Process and Pitfalls of Phase I ESAs and AAI



- What is a Phase I ESA
- What the goal of the Phase I?
- Who performs the Phase I?
- What's in the report?
- What are my responsibilities?
- What makes it successful?

# What is a Phase I ESA?

- “Non-invasive” Environmental Due Diligence Inspection
- Driven need for CERCLA liability protection, by lender requirements, and/or business risk analysis
- Intended to identify conditions or issues which may pose current or future environmental risk: *Recognized Environmental Conditions (RECs)*
- Performed on behalf of the *User*, typically the buyer or lessee

# Phase I ESA Standardization

- ASTM International E1527-13- Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process
- US EPA All Appropriate Inquiries Final Rule (40 CFR Part 312)
- Performance under the responsible charge of an *Environmental Professional (EP)*

# Who is an Environmental Professional?

- PE/PG with 3 years relevant experience performing assessments
- B.A./B.S. degree or higher in relevant discipline (engineering, environmental science, or earth science) with 5 years experience
- BA./B.S degree or higher with 10 years experience

Essentially requires hiring an environmental consulting firm

# What is a REC?

“means the presence or likely presence of any ***hazardous substances or petroleum products*** in, on, or at a *property*:

(1) due to any *release* to the *environment*;

(2) under conditions indicative of a *release* to the *environment*; or

(3) under conditions that pose a *material threat* of a future *release* to the *environment*.”

- *It is NOT*: asbestos, wetlands, lead based paint, compliance issues, non-CERCLA hazardous substances (emerging contaminants) etc.- these concerns must be addressed separately

# Components of the Phase I ESA



## 1. Records Review

- Federal, State and Tribal Environmental Records
- City, County, and State Records Review
  - Building Department
  - County Environmental Health Department
  - City Fire Department
- Historical Records Review
  - Aerial Photographs
  - Fire Insurance Maps (Sanborn)
  - Topographic Maps
  - City directories
  - Former Reports



# Components of the Phase I ESA

## 2. Site Reconnaissance

- Current Property Use
- Presence of Hazardous Materials and Petroleum Products
- Indications of Historical Use
- Adjacent Site Observations

## 3. Interviews

- Current owners and occupants
- Past owners and occupants, if available

## 4. Report

- Compile all data obtained and review
- Identify Findings and Document Opinion on RECs





# What is the role of the Consultant/EP?

- Understanding your needs and risk tolerance
- Conduct Site Inspection and Interviews
- Review Historical Records
- Compile Report and Identify RECs
- Explain relevance and guide the next steps as necessary

# What is the role of the User?

- Satisfy User Responsibilities (E1527-13 Section 6)
  - User Questionnaire- as provided by Consultant
  - *Review Title and Judicial Records for Environmental Liens and Activity and Use Limitations (AULs)*
  - *Specialized Knowledge or Experience*
  - *Actual Knowledge or Experience*
  - *Purchase Price*
  - *Commonly Known Information*
  
- Understand the Process- What is likely to be found and what's next?

# What drives a successful Phase I ESA?

- Knowledgeable and Careful Consultant:
  - Understands the ASTM/AAI requirements
  - Understands the needs of the User
  - Understands the next steps and their context
  
- User involvement:
  - Understanding *Who is the User?*
  - Understanding the responsibilities of the User
  
- Involved and cooperative parties:
  - Knowledgeable site contacts
  - Inclusion of previous reports and known issues

# ***Thank You***

Michael Butler  
mbutler@trccompanies.com  
773.368.6141