

## The Phase I Environmental Site Assessment: Unexpected COVID-19 Victim?

April 10, 2020

### Key Points

- The COVID-19 crisis has left consultants, lenders, servicers, investors and other users struggling to assess environmental conditions of assets as they question the ability to conduct, and the utility of, phase I environmental site assessments (“ESAs”) in this environment.
- A number of states still allow ESAs to take place during the pandemic, assuming consultants follow applicable orders and take commonsense steps to protect themselves and others, though the resulting ESA reports may be limited in scope and/or identify “data gaps.”
- The usefulness of such an ESA depends on its intended purpose, but counsel and consultants can help to quantify and manage risk and navigate the flexibility existing in, and being added to, the regulatory framework.

A number of commentators note the impacts of the COVID-19 crisis on the commercial and residential real estate markets. Some are obvious: falling interest rates, bargain hunting by investors (and some lenders) and a very different foreclosure environment.<sup>1</sup> Recently, a less obvious impact emerged, as these lenders/servicers, investors and purchasers struggle with how to assess the environmental condition of the underlying assets. This brief alert provides answers to some frequently asked questions about phase I ESAs in the COVID-19 era.

### Can I still do an ESA?

A number of states and some localities promulgated stay-at-home orders prohibiting all but “essential activities” for the next few weeks, if not months (and perhaps longer). Though each state is different, and must be analyzed as such, a number of the restrictions provide lists of industries or activities that are “essential” and therefore exempt from shelter-in-place mandates. For example, an initial Virginia executive order allows professional services firms to remain open, provided that they adhere to social distancing recommendations, enhance sanitizing practices on common services and apply relevant workplace guidance from state and federal authorities.<sup>2</sup> Other states, like Illinois, delineate essential categories, including real estate and legal

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services, as “essential.”<sup>3</sup> These approaches at least implicitly seem to allow for the conduct of ESAs (and ESAs are still taking place). Many states allow consultants to apply for an explicit authorization if squeamish about moving forward. (Note that while some states allow for environmental investigation as part of remediation activities, this may not encompass the typical phase I ESA).<sup>4</sup>

Beyond these states permitting consulting or related services directly, other states may allow for a phase I ESA where it “supports” a different service deemed “essential,” such as financing, particularly for a transaction that supports the agriculture, energy, manufacturing, hazardous materials and waste sectors.<sup>5</sup> Still other states omit ESAs from stay-at-home orders entirely, raising complicated questions of interpretation.

### **If I can do an ESA, what will it look like?**

If your state or locality allows for an ESA, that does not mean it is business-as-usual. As with other services in the COVID-19 era, commonsense efforts should be taken to minimize personal contact before, during and after site assessments. These measures may include adherence to social distancing guidelines; driving (not flying) to sites when possible; proper use of personal protective equipment; and wireless or pre-arranged access to tenant suites or interior building areas. Interviews should be conducted remotely, where feasible. To the extent possible, spaces to be viewed by the consultant should be “cleared” of people for three or more days prior to arrival. If, as will often be the case, this is not possible, then the consultant may seek to restrict her “walk-through” to vacant or limited areas of the facility.<sup>6</sup>

### **With all these restrictions, is the ESA “legal”?**

While they likely did not have a pandemic in mind, the existing federal regulations and the industry standard governing ESAs already provide for deviations to normal operating procedures. Specifically, the phase I standards include a mechanism through which consultants identify “data gaps” encountered during environmental investigations.<sup>7</sup> Historically, data gaps include inadequate records detailing adjacent sites, unreturned interview questionnaires and missing information about physical objects identified at the site (e.g., pipes, vents, tanks). Given the COVID-19 disruption, we expect to see a number of additions to these traditional data gaps, such as: limited or no access to interior areas; inability to locate and interview key personnel; and inability to access regulatory records or obtain Freedom of Information Act responses from government agencies due to staffing reductions and office closures. Much like the interruptions caused by governmental delays and flight cancellations experienced in aftermath of the September 11, 2001, terror attacks and office closures seen during the Great Recession, external forces are likely to hamper even the most diligent and experienced consultants.

The fact that these data gaps exist does not render the phase I invalid (necessarily). As always, it is up to the environmental professional to determine whether any identified data gaps are “significant,” such that they affect “the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances, and as applicable, pollutants and contaminants, petroleum or petroleum products, or controlled substances, on, at, in, or to the subject property.”<sup>8</sup> Often, experienced consultants can identify other sources of information to resolve any data gaps, such as owner/user interviews or government and third-party environmental databases. Regardless of the significance of identified data gaps,

however, consultants must be sure to document and evaluate any data gaps within the text of the ESA report.

## OK, it's "legal." But is it useful?

Assuming you get an ESA with a number of data gaps, questions will arise as to its utility in evaluating environmental risk. Your counsel and consultants can identify site-specific approaches to find alternative sources of information to "fill" data gaps or at least "put a box around" the potential liability resulting therefrom. Beyond that, the usefulness of the assessment will depend on the use for which it is intended.

If you are trying to determine or allocate risk to close a deal, the above strategies may suffice (or at least may allow for the procurement of insurance to close the deal). If you are looking for financing, it likely will depend on the specific bank. Some may require complete or even more fulsome information than usual as they struggle to measure and manage risk in a pandemic-impacted world. Others may feel comfortable moving forward given the "cost" of money currently, even if they may include more detailed "update" provisions or requirements allowing them to get a clearer picture down the road. If you are looking for protection from Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) liability, that path is still developing. While EPA **announced** in March that it may exercise discretion in enforcing specific instances of noncompliance with some environmental laws, this policy explicitly does not apply to "activities that are carried out under Superfund and RCRA Corrective Action enforcement instruments."<sup>9</sup> At this time, it is not yet clear what, if any, relief will be provided through CERCLA's innocent landowner and lender liability requirements.

<sup>1</sup> Christopher Rugaber, *Federal Reserve Cuts Interest Rate to Near Zero in Response to COVID-19 Outbreak*, TIME, Mar. 15, 2020, <https://time.com/5803563/federal-reserve-interest-rate-cut-zero/>; Katy O'Donnell, *HUD, Fannie, Freddie suspend foreclosures, evictions during outbreak*, POLITICO, Mar. 18, 2020, <https://www.politico.com/news/2020/03/18/hud-suspends-foreclosures-evictions-coronavirus-135783>.

<sup>2</sup> Virg. Exec. Order No. 53 (March 23, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf). Similarly, Washington state published lists of "critical" sectors and examples of essential personnel permitted to work during the crisis. Wash. Proclamation 20-25 (March 23, 2020), <https://www.governor.wa.gov/sites/default/files/WA%20Essential%20Critical%20Infrastructure%20Workers%20%28Final%29.pdf>.

<sup>3</sup> See, e.g., Ill. Exec. Order No. 2020-10 (March 20, 2020), <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf> (deeming "professional services" essential, including legal and real estate services).

<sup>4</sup> See, e.g., "COVID-19: Essential Services," Office of Governor Charlie Baker and Lt. Governor Karyn Polito, <https://www.mass.gov/info-details/covid-19-essential-services#health-care/-public-health/-human-services> (deeming essential "[l]icensed site clean-up professionals and other workers addressing hazardous spills, waste sites, and remediation").

<sup>5</sup> Wash. Proclamation 20-25, *supra* note 3.

<sup>6</sup> Still, many components of the phase I ESA report, such as historical use and satellite reviews, environmental database searches, lien and title searches, phone interviews, and electronic questionnaires, should remain unaffected.

<sup>7</sup> According to the U.S. Environmental Protection Agency's (EPA) "all appropriate inquiries" (AAI) rule and ASTM Practice E-1527-13, a data gap is "a lack of or inability" to obtain required information "despite good faith efforts." 40 C.F.R. § 312.10; ASTM E-1527-13 § 12.7.

<sup>8</sup> U.S. ENVTL. PROTECTION AGENCY, ALL APPROPRIATE INQUIRIES RULE: REPORTING REQUIREMENTS CHECKLIST FOR ASSESSMENT GRANT RECIPIENTS (2014), <https://www.epa.gov/sites/production/files/2014-08/documents/aai-reporting-fact-sheet-and-checklist-062111-final.pdf>.

<sup>9</sup> Memorandum from Susan Parker Bodine, U.S. Env'tl. Protection Agency, to All Governmental and Private Sector Partners (Mar. 26, 2020), <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>, at 2. Similarly, some states, such as Texas, also announced their intention to provide limited enforcement relief during this crisis. See "TCEQ Reporting Requirements for Regulated Entities," Texas Commission on Environmental Quality (last visited Apr. 9, 2020), <https://www.tceq.texas.gov/response/covid-19/regulated-entities-reporting-requirements> (announcing the Commission's exercise of "administrative relief and enforcement discretion for various reporting requirements by regulated entities" during the COVID-19 pandemic).

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