

A Short History Lesson & Update on the SOP 5010 5 (K) Concerning Environmental Due Diligence

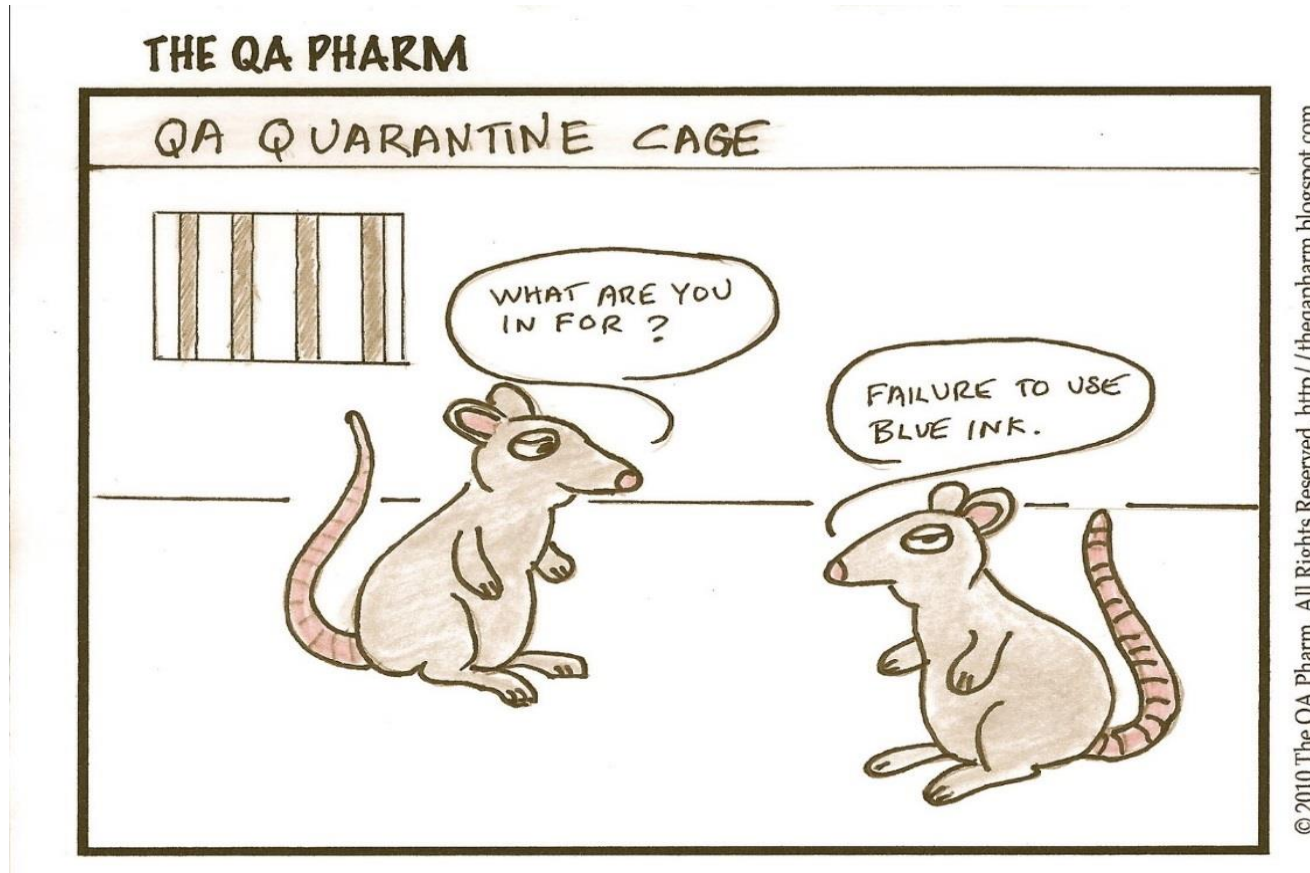
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Last Years Take Away Slide...

What Rules You don't Know Can Hurt You!



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Love Canal

- ▶ **Love Canal** is a neighborhood within [Niagara Falls, New York](#). The neighborhood is infamously known as the location of a 70-acre landfill which became the epicenter of a massive environmental pollution disaster harming the health of hundreds of residents, culminating in an extensive [Superfund](#) cleanup operation.
- ▶ It was to become a “Model Development” for industry and families in 1890 by William T. Love that never came to fruition because of economic and technological changes.
- ▶ After 1892, Love's plan incorporated a shipping lane “canal” that would bypass the Niagara Falls.
- ▶ The [Panic of 1907](#) proved economically disastrous as Love had to abandon the project. The deathblow came with the development of the transmission of electrical power economically over great distances by means of an alternating current. No longer was it necessary for the industry to locate near the source of electrical power.
- ▶ With the project abandoned, the canal gradually filled with water. The local children swam there in the summer and skated during the winter. In the 1920's, the canal became a [dump site](#) for the City of Niagara Falls, with the city regularly unloading its municipal refuse into the landfill.



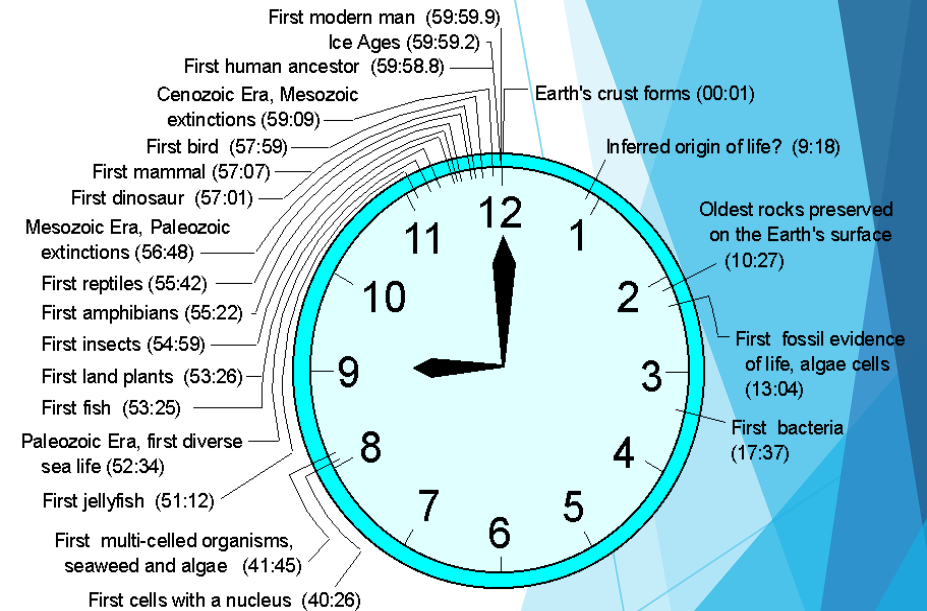
Love Canal Development

- ▶ The Niagara Power and Development Company granted permission to Hooker Chemical Company in 1942 to dump wastes into the canal. The canal was drained and lined with thick clay. Into this site, Hooker began placing 55-US-gallon [metal or fiber barrels](#). In 1947, Hooker bought the canal and the 70-foot-wide banks on either side of the canal. It subsequently converted it into a 16-acre landfill.
- ▶ In 1953, the Niagara Falls City School district bought the land knowing it was a chemical dump area but needed the land for school development which then followed with more family housing developments and more schools.
- ▶ Even after an architect's warning to not build in that area, development continued and in 1955 a twenty-five-foot area crumbled exposing toxic chemical drums, which then filled with water during rainstorms. This created large puddles that children enjoyed playing in. Health effects from chemical exposure became more and more evident and often from the on going development and exposure pathways created by the development breaching the initial clay landfill liners.
- ▶ On August 7, 1978, United States President [Jimmy Carter](#) announced a federal health emergency, called for the allocation of federal funds, and ordered the Federal Disaster Assistance Agency to assist the City of Niagara Falls to remedy the Love Canal site.
- ▶ In 2004, federal officials announced that the Superfund cleanup has ended, although the actual cleanup ended years earlier. The entire process took 21 years and \$400 million. About 260 homes north of the canal have been renovated and sold to new owners, and about 150 acres east of the canal have been sold to commercial developers for light industrial uses. In total, 950 families had been evacuated. The site was removed from the Superfund list.



1980 (only 39 years ago)...

- ▶ Congress passes the Comprehensive Environmental Response, Compensation, and Liability Act (**CERCLA or Superfund**) to address the dangers of abandoned or uncontrolled hazardous waste dumps by developing a nationwide program for: emergency response; information gathering and analysis; liability for responsible parties; and site cleanup. CERCLA also creates a Trust Fund (or 'Superfund') to finance emergency responses and cleanups.
- ▶ In 1993, after four years of intense effort, the first ASTM E 1527, Practice for Phase I Environmental Site Assessment, was published and was widely accepted as a baseline process for conducting environmental due diligence prior to acquisition of real estate.



4.6 billion years in one hour

Why Conduct Environmental Investigations for SBA?

- ▶ SBA requires an Environmental Investigation of all commercial Property upon which a security interest such as a mortgage, deed of trust, or leasehold deed of trust is offered as security for a loan or debenture.
- ▶ Failure to comply with the provisions may result in a denial of SBA's guaranty



Since you were last at MALC 2018...

- ▶ The SBA updated their SOP 50 10 5 once since last years MALC.
- ▶ This is the 11th update since the original SOP 50 10 5 was issued in 2008.
- ▶ The SBA did include a few revisions to the environmental section in the last round of updates now included in the current SOP 50 10 5(K) effective April 1, 2019.



SBA Changes Applicable to the Environmental Process SOP 50 10 5 (K)

- ▶ Chapter 3, paragraph III.H.1-3 & Chapter 4, paragraphs V.H.1-3:

Added guidance for specific additional environmental assessments that must be performed for child-occupied facilities, drycleaners, and gasoline stations.

- ▶ Chapter 3, paragraph III.E.4: & Chapter 4, paragraph V.E.4:

Added guidance that if an Environmental Professional recommends proceeding directly from the Transaction Screen to a Phase II (bypassing the Phase I), and the Lender / CDC concurs, the Lender / CDC must seek in advance an exception to policy from the SBA Environmental Committee.

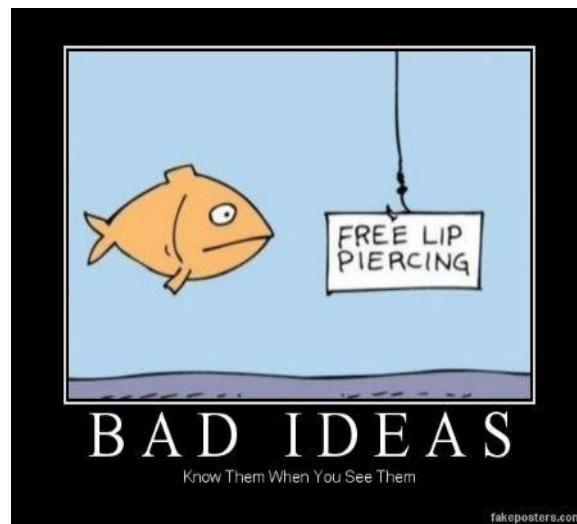
Child Occupied Facilities



- ▶ Prudent lending practices dictate that specific additional environmental assessments be performed for Child-Occupied Facilities. Such facilities must undergo a lead risk assessment and also testing for lead in drinking water at all taps and fountains potentially used as a drinking water source for children. All lead assessments must be conducted in conformance with U.S. Environmental Protection Agency (EPA) regulations at 40 CFR 745 and U.S. Department of Housing and Urban Development (HUD) Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing Second Edition, July 2012. The results of these assessments must be submitted to the SBA. Disbursement will not be authorized unless the risk of lead exposure to infants and small children has been sufficiently minimized.

By-Passing A Phase I to a Phase II after conducting a Transaction Screen

- ▶ If the Environmental Professional conducting the Transaction Screen concludes that further investigation is warranted, the Lender / CDC must obtain a Phase I ESA. If an Environmental Professional recommends proceeding directly from the Transaction Screen to a Phase II (thus bypassing the Phase I), and the Lender / CDC concurs, the Lender / CDC must seek in advance an exception to policy from the SBA Environmental Committee, which may be granted on a case-by-case basis.



EPA

All Appropriate Inquiries Rule:

WHAT IS “ALL APPROPRIATE INQUIRIES”?

“All appropriate inquiries” is a process of evaluating a property’s environmental conditions and assessing potential liability for any contamination. All appropriate inquiries must be conducted to obtain certain protections from liability under the federal Superfund Law (CERCLA).

WHY DID EPA ESTABLISHING STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES?

The 2002 Brownfields Amendments to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) require EPA to promulgate regulations establishing standards and practices for conducting all appropriate inquiries.



EPA

All Appropriate Inquiries (AAI) Rule: *Reporting Requirements and Suggestions on Report Content*



WHAT ARE THE DOCUMENTATION REQUIREMENTS FOR ALL APPROPRIATE INQUIRIES?

- ▶ The final rule requires that the results of an all appropriate inquiries investigation be documented in a written report. The specific reporting requirements for all appropriate inquiries are provided in 40 CFR §312.21 (*Results of Inquiry by an Environmental Professional*) and §312.31 of the final rule

IS THERE A REQUIRED FORMAT FOR REPORTING RESULTS OF ALL APPROPRIATE INQUIRIES?

- ▶ The final rule requires no specific format, length, or structure of the written report. However, EPA offers suggestions regarding the potential content of a written report. The suggestions are generally consistent with recommendations published in ASTM E1527-13, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*.
- ▶ *Not the ASTM Transaction Screen!*

How does AAI apply to lenders?

- ▶ The AAI rule primarily applies to borrowers who want to claim protection from CERCLA liability as innocent landowners, bona fide prospective purchasers or contiguous property owners. The rule does not change the CERCLA liability exemption for banks that hold mortgages on property as secured lenders. The secured lender exemption is not conditioned by a bank or lender undertaking AAI before issuing a mortgage or before the borrower purchases the property.



Secured Creditor Exemption

- ▶ **Although banks and lenders have protection from CERCLA liability through the secured creditor exemption, banks may choose to further protect themselves from loss (due to decreases in the value of the property or collateral) by requiring that borrowers qualify for liability protections.** Banks, therefore, may want to encourage their borrowers to comply with the provisions established for BFPPs and ensure that borrowers properly conduct AAI before acquiring a property.



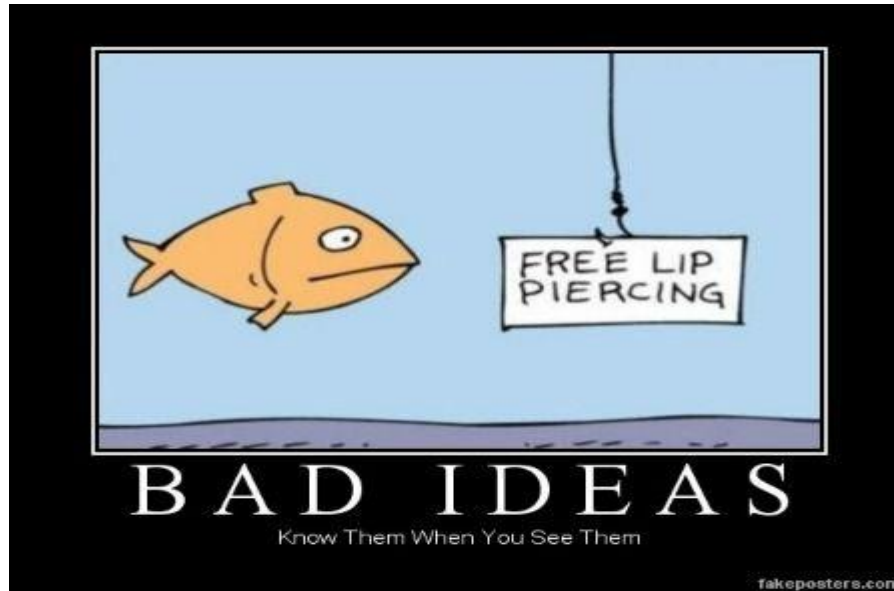
Lenders Are Still At Risk

- ▶ It is important to note that it is still possible for a bank or lender to be liable for contamination on or at a property if the bank or lender is found to be acting as either an owner or operator of a contaminated property.
- ▶ See EPA's explanation of the secured creditor exemption and the definition of "participation in the management" of a property. Also, even if a financial institution qualifies for the secured creditor exemption from CERCLA liability, it is still possible that the state has stricter laws governing lender liability for contaminated properties.



SBA Environmental Shelf Life Requirements

- ▶ Environmental Questionnaire, RSRA and Transaction Screen reports are accepted for up to one year prior to submission.
- ▶ SBA Phase I shelf life does not coincide with the EPA AAI Phase I report shelf life rule for up to 180 days pre acquisition to help qualify a purchaser for “Innocent Landowner Defense”.
- ▶ This SBA change does not comply with AAI requirements for Innocent landowner protection for the purchaser unless the purchaser already had done one previously and this is a refinance and the lender is using it for business risk purposes only.



Can we go straight to a Phase II if we know
it's a been a Gas Station or a Dry Cleaners?



Dry Cleaning Facilities Regardless of Years in Operation

- ▶ Prudent lending practices dictate and SBA requires that any Property with on-site dry cleaners, whether currently in operation or operated historically at the site, that did, do or likely used chlorinated and/or petroleum-based solvents undergo a **Phase II Environmental Site Assessment in addition to a Phase I which would be required due to the NAICS code match**. Any soil and groundwater contamination and soil vapor intrusion must be addressed. A Phase II performed in connection with an on-site dry cleaning facility must be conducted by an independent Environmental Professional *who holds a current Professional Engineer's or Professional Geologist's license and has the equivalent of three (3) years of full time relevant experience.*



Gas Stations

- ▶ The Environmental Investigation performed by the Environmental Professional must include a determination whether or not the gas station is in compliance with all regulatory requirements, if any, pertaining to tank and equipment testing. A loan may not be disbursed until full compliance is achieved. Further, any leaking or otherwise defective equipment, systems, containment devices, etc., must be replaced or repaired prior to disbursement.
- ▶ Any Phase II performed in connection with a Gas Station Loan must be conducted by an independent Environmental Professional *who holds a current Professional Engineer's or Professional Geologist's license and has the equivalent of three (3) years of full time relevant experience.*; and (5) if the Property is Contaminated, include a detailed description of and cost estimate for the recommended Remediation



Reliance Letters - Don't Even Think About Altering Them!

- ▶ “Reliance Letter” means SBA’s standard reliance letter pertaining to Environmental Investigation Reports, a copy of which is located in Appendix 3. **The language in SBA’s standard reliance letter may not be modified.** Additionally, **Lenders and CDCs should not enter into any agreement that alters the terms of SBA’s standard reliance letter.**
- ▶ Transaction Screens, Phase I and Phase II ESAs *must* be performed by an Environmental Professional and be accompanied by the Reliance Letter. RSRA’s are not required to have a Reliance Letter.



Phase I Recommendations by the Consultant...However, You Do Not Agree



- ▶ In the **rare instance** where an **exception to policy may be warranted**, Lenders must provide the SBA Environmental Committee with justification for not wanting to follow the Environmental Professional's recommendations and obtain committee approval.



APPENDIX 4: *NAICS CODES OF ENVIRONMENTALLY SENSITIVE INDUSTRIES with more Clarification - Examples:

- ▶ 311 FOOD MANUFACTURING *(if underground fuel tanks present)*
- ▶ 314 TEXTILE PRODUCT MILLS *(not required if sewing, weaving, or hemming only)*
- ▶ 316 LEATHER & ALLIED PRODUCT MANUFACTURING *(not required if assembly only)*
- ▶ 321 WOOD PRODUCT MANUFACTURING *(if finishing occurs on site)*
- ▶ 337 FURNITURE & RELATED MANUFACTURING *(if finishing occurs on site)*
- ▶ 339 MISCELLANEOUS MANUFACTURING *(only required if hazardous materials are involved)*
- ▶ 42311 AUTOMOBILE & OTHER MOTOR VEHICLE MERCHANT WHOLESALERS *(if service bays present)*
- ▶ 713990 OTHER RECREATIONAL INDUSTRIES *(indoor and outdoor shooting ranges only)*

** Relying on this complete list alone may result in data gaps of potentially environmentally sensitive past and present uses at the subject site and a Phase I is recommended at a minimum to assess for potential Recognized Environmental Conditions.*

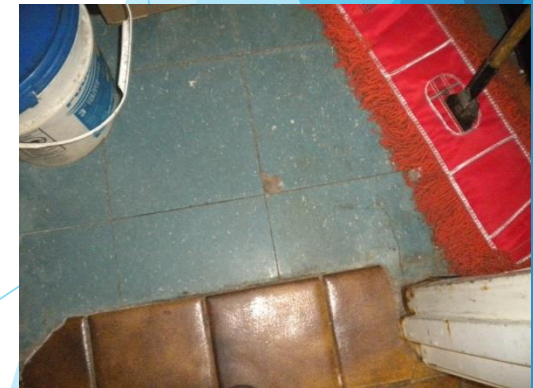
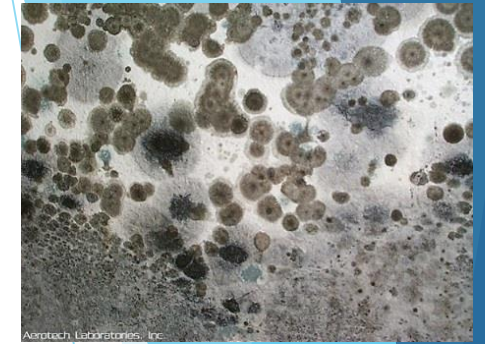
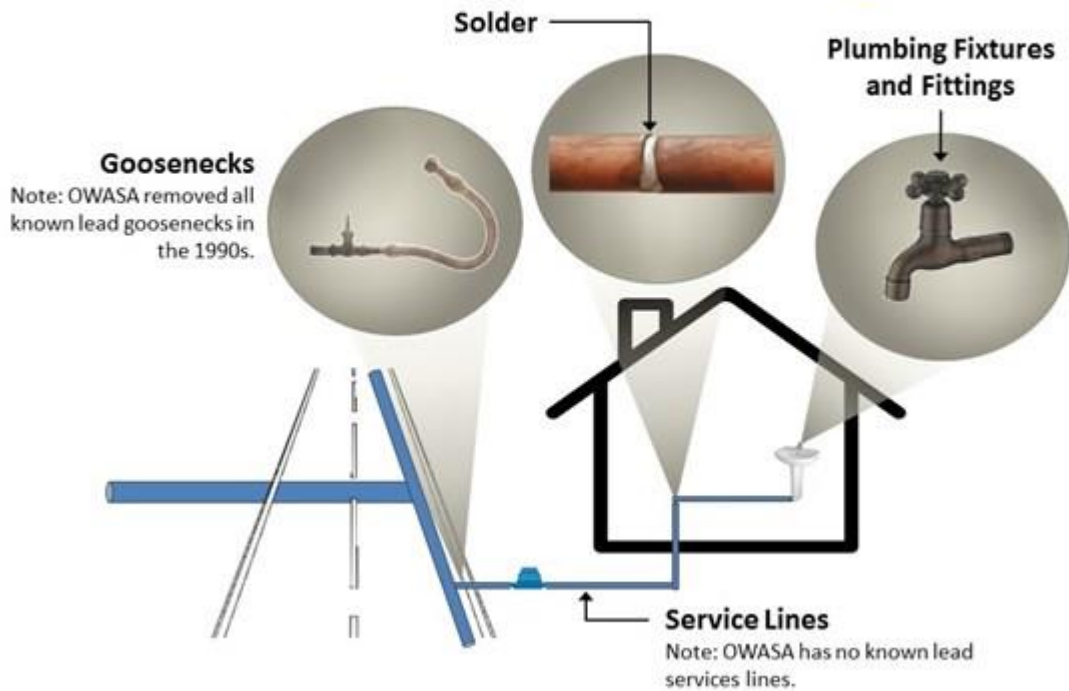
Insurance Coverage

- ▶ Insurance Coverage. Environmental Professional (and/or Environmental Professional's firm, where applicable) certifies that he or she or the firm was covered as of the date of the Environmental Investigation by errors and omissions liability insurance with a minimum coverage of \$1,000,000 per claim (or occurrence) and that evidence of this insurance is attached. As to the Lender and SBA, **Environmental Professional (and Environmental Professional's firm, where applicable) specifically waive(s) any dollar amount limitations on liability up to \$1,000,000 as well as any time limitations on liability.**

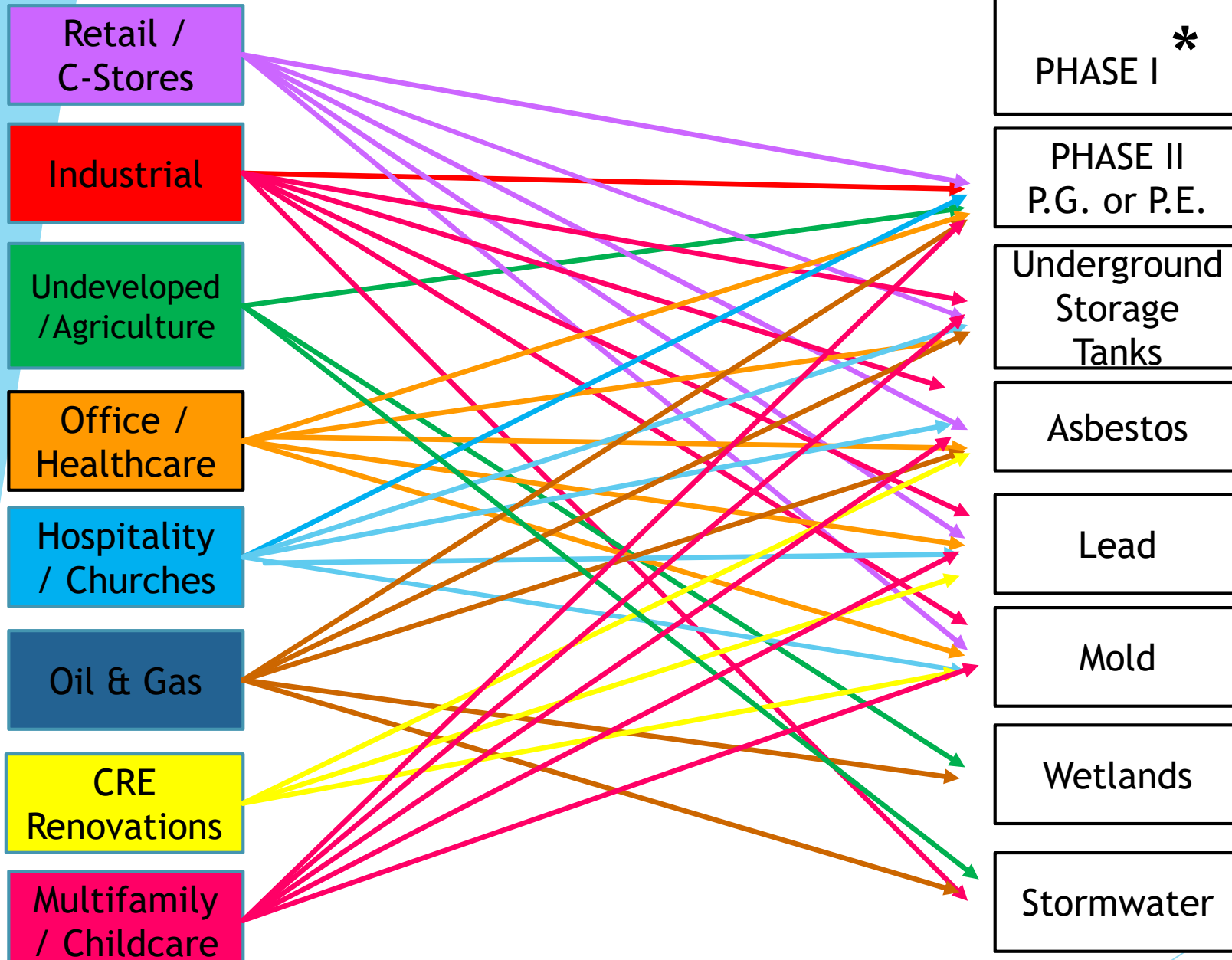


What are Non Scope Considerations and should I even be concerned with them?

Potential Sources of Lead in Drinking Water



ENVIRONMENTAL DUE DILIGENCE & LICENSE/CERTIFICATION REQUIREMENTS



PHASE I *

PHASE II
P.G. or P.E.

Underground
Storage
Tanks

Asbestos

Lead

Mold

Wetlands

Stormwater

* No Federal or State License or Certification required to perform a Phase I



DO YOU REALLY WANT TO START THE ENVIRONMENTAL PROCESS WITH A NON QUALIFIED CONSULTANT?

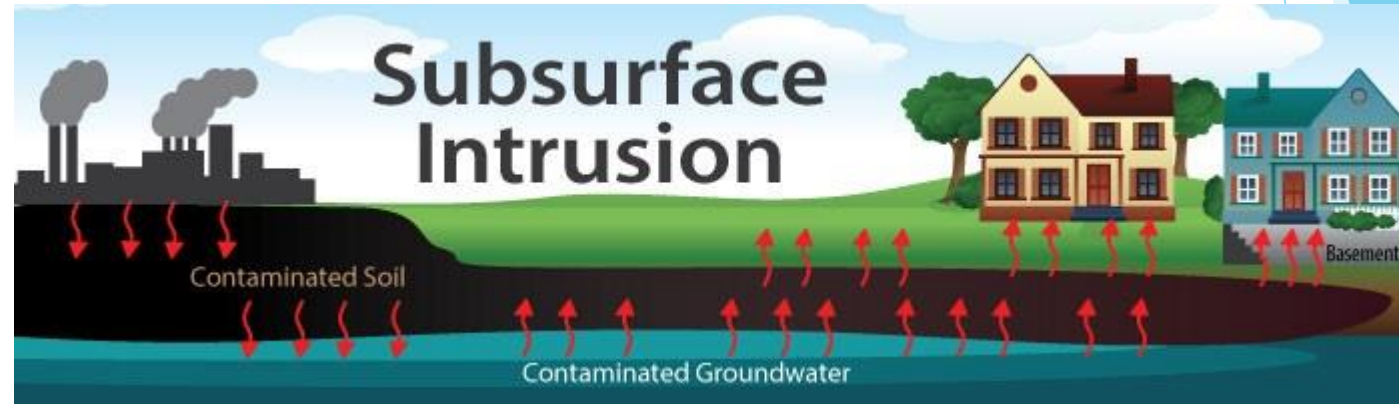
Owner / User Questionnaires...
who fills these out and why are they
necessary?



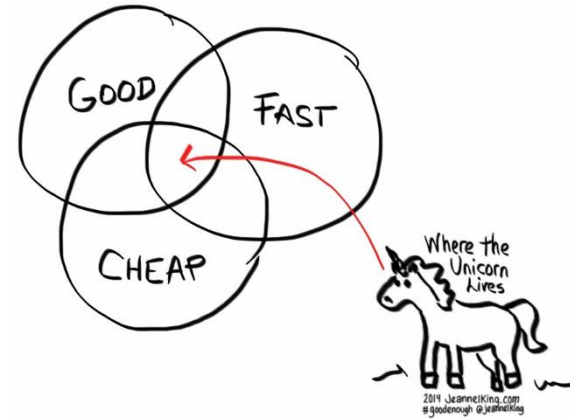
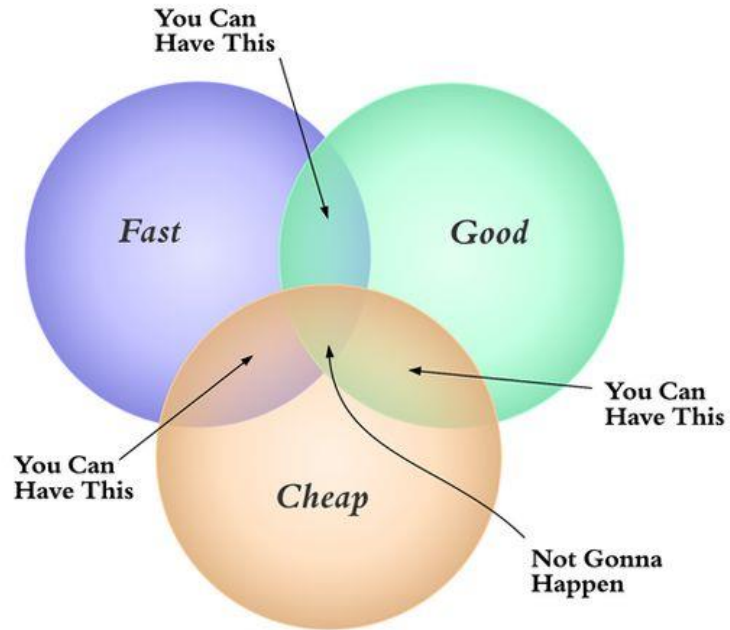
We have Underground Storage Tank closure letters from the 90's, that means we are good to go, Right?



Adjacent Property Release and Vapor Intrusion/Encroachment, do I need to be concerned?



Cost and Timing?

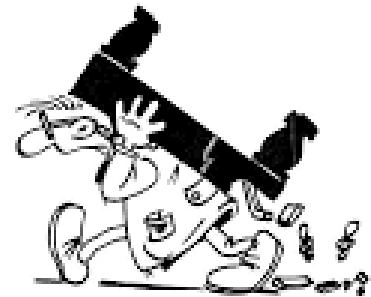


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It Will Not Be Fast.

If It Is Good and Fast
It Will Not Be Cheap.

If It Is Fast and Cheap
It Will Not Be Good.



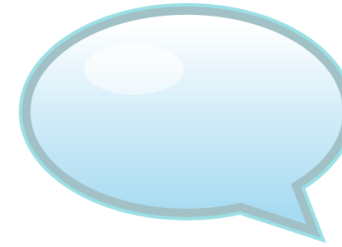
When in doubt....

Help Is Here to Review Third Party Reports!





QUESTIONS / COMMENTS



Thank You For Your Time!

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