



## ISSUING RELIANCE LETTERS: IS THERE A STANDARD PRACTICE?

Many questions have been raised by environmental professionals lately about the standard industry practice for providing letters of reliance that allow one party to use a Phase I ESA report prepared for another party. How much do consultants charge, if anything? Is it common for reliance letters to include time limits? When is it advisable to “just say no” to a reliance letter request? The following feature is based on the result of outreach to the industry to answer these questions and suggest measures that may protect environmental consulting firms from potential liability.

It is not uncommon for clients or third parties looking to save time and money on a deal to request the ability to rely on a pre-existing Phase I ESA report rather than commissioning a new one. To be sure, the issue of reliance can spell risky business for environmental consulting firms, which is why these requests should not be taken lightly. Anecdotal evidence suggests that many firms have been falling into the habit of issuing reliance letters, often at no cost, without fully taking into account the potential ramifications of this practice or without consulting their attorneys.

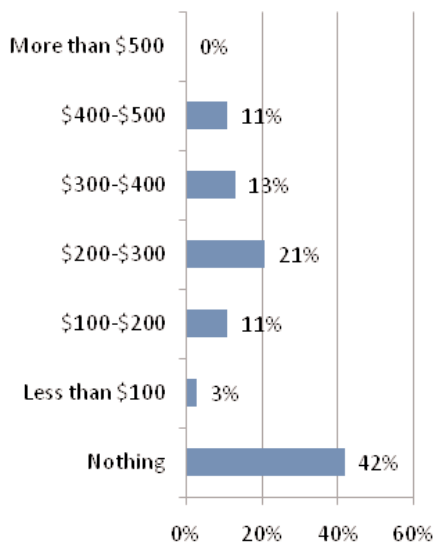
### Fee or Free?

When a client asks for a reliance letter, how much do consultants typically charge, if anything? A current poll being conducted on the *commonground* community ([commonground.edrnet.com](http://commonground.edrnet.com)) indicates that nearly half of respondents do not typically charge a fee for reliance letters. Of those who *do* charge, fees can vary, but the most common range is between \$200 and \$300. Not one respondent reported their firm earns more than \$500 for a reliance letter (see Fig 1).

Consultants often make pricing decisions on reliance letters based on whether it is for a long-time, valued client or an unknown party. “Fees for reliance at our firm run between \$300 and \$500, depending on the client,” noted LaNeicia Stone,

Director of Operations at EMG Inc. In other cases, the date of the report may be a determining factor. Mary Busby, Director of Due Diligence Services at Partners Environmental Consulting, shared that her firm “will typically extend reliance on a report to one additional party affiliated with a current transaction at no additional cost. If reliance is required by more entities—or is requested at a date greater than six months since the date of the report—we will charge an average of \$150.” Other factors also come into play. Issues like “the term of reliance language, limits of liability, terms and risk profile all impact the price charged for reliance,” according to Michael Wolf, Environmental Division Manager at ATC Associates. “Fees can range from no cost under some Master Service Agreements to as much as \$500, and in some cases beyond that.” One way ATC is able to keep costs of reliance letters down is by dictating the terms of the reliance language, whereas letters with “high liability or less favorable terms may be priced higher,” Wolf added.

**Fig. 1: What does your firm typically charge for a reliance letter on a Phase I ESA?**



Source: commonground poll conducted from June 12, 2008 through June 30, 2008

### Viability and Shelf Life Issues

So what happens when a client requests a letter of reliance on a Phase I report that is more than one year old? The shelf life provision within the AAI rule (§312.20) has made reliance on reports older than 180 days risky. In order to qualify a party for CERCLA protection under the terms spelled out in the AAI rule and in ASTM E1527, certain components of the Phase I must be completed within 180 days of the purchase date of the property. For a Phase I conducted more than one year prior to the purchase date to be considered current, all elements must have been updated

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to within one year of the purchase date. It is critical for consultants being asked for a reliance letter, particularly in cases where CERCLA liability protection is concerned, to consider the report's shelf life under AAI. Brendan Lowrey, an environmental attorney with Thompson & Knight LLP, stresses that "The viability of a Phase I ESA report is based on when the components of a Phase I were performed, not on the date a report or reliance letter was issued. For new users relying on existing Phase Is, the timeframe in which a Phase I remains viable can be very short." It is advisable to also add language regarding viability. For instance, Lowrey noted that, "The reliance letter is a good place for a consultant to document that he or she made the new user aware of the limitation on viability." Lowrey also emphasized that the reliance letter should not be the first place that a client learns about the potentially short lifespan of reliance on a particular Phase I. Having a conversation upfront is extremely important to avoid any confusion down the road. It is also advisable to get in the habit of including language within the Phase I report that reliance on it is only good for one year, therefore avoiding any push-back from clients who may request reliance down the road. Stone noted that EMG "tries not to issue reliance letters for E 1527-05 Phase I reports that are more than 180 days old. If we do, we discuss the fact that there are elements of the report that are over 180 days old that are required to be updated." Busby agrees, noting that Partners is also "reluctant to grant reliance when a report is out of date."

Interestingly, Stone told *ESA Report* that the AAI rule's shelf life language has actually increased her company's Phase I business. "Now," Stone said, "when a client asks for a reliance letter on a report that is over 180 days old, it gives us an opportunity to tell them about the shelf life language, and upsell them on ordering a new Phase I as opposed to just giving them a reliance letter with exclusion language." Wolf concurs, noting that, "In instances when a client requests a reliance letter for reports more than six months old, we suggest the client engage our firm

to do an update of the original report per AAI." Busby reports that her firm has "seen a recent increase in requests for reliance letters." Along with this has come a greater scrutiny from the parties seeking reliance. Busby surmises that this is likely due to a combination of the AAI rule's impact, "current market conditions and the risk-averse nature of clients when it comes to real estate financing."

### Risky Business

While issuing a reliance letter to a past client or a third party may not require very much work on the part of the consultant, it is important to keep in mind that by issuing reliance, consultants may expose themselves and their firm to additional liability. For that reason, many attorneys advise consultants to be extremely cautious in issuing reliance letters.



One way to lessen liability is to incorporate well-written limitation language. According to Wolf, in addition to including limits of liability and the specific names of the parties who are being granted reliance on the report, his firm also references "the original scope of work in order to help the relying party recognize what is, and is not, limited." Wolf notes that his firm also "refers to specific qualifications and technical limitations included in the original report." This information will help the new end user to understand what can be relied upon and what cannot, such as non-scope considerations. Lowrey also sees this type of liability language as invaluable. He advises that "a reliance letter...include, either in the text or as an attachment, the additional information sought and gathered, and an evaluation of the effect of this new information (or the lack thereof) on ultimate con-

clusions regarding the existence of recognized environmental conditions or data gaps."

The AAI rule created an impetus for some consultants to revisit their policies for issuing reliance letters. For example, EMG responded to AAI, according to Stone, by "making sure to inform the client that the new user of the reliance letter must also meet the user requirements listed in E 1527 and AAI." EMG has also taken this one step further by stating in their Phase I contract that reliance to third parties is dependent on the completion of a new user questionnaire. Lowrey agrees, noting that "the existence of the user responsibilities also significantly affects the practice of issuing reliance letters." He observes, "A prudent consultant will, for example, work with the new user to determine any commonly known or reasonably ascertainable information and any relevant specialized knowledge." Furthermore, he adds that "the fair market value of the property uncontaminated should be compared to the purchase price in the proposed sale to the new user."

New environmental protocol recently announced by the SBA (SOP 50(10)) will likely cause consulting firms to make changes to their reliance practices when dealing with SBA lenders. Under the revised protocol, set to become effective August 1, 2008, "All Transaction Screens, Phase I and Phase II ESAs *must* be performed by an Environmental Professional and be accompanied by the Reliance Letter ..." provided in an appendix to the guidance. The SOP requires that the environmental consultant authorize the borrower, lender and the SBA to rely upon any of the environmental investigations conducted as part of an SBA transaction. Appendix 3 of the SOP now contains a standardized template for reliance letters that must be signed by the environmental professional. In addition, consultants must include evidence that they have a minimum of \$1 million E&O insurance per claim, including coverage for third-party reliance. (More information, including a link to the protocol is available at [www.edrnet.com/sba](http://www.edrnet.com/sba))

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## NY Legislature Passes TCE Bills

Two bills addressing TCE contamination recently passed in both the New York State Assembly and Senate, and are now in the hands of the governor for consideration. TCE is listed among typical chemicals of concern for the vapor intrusion pathway in ASTM's new vapor intrusion assessment standard (E2600-08). Growing attention on vapor intrusion in New York provided the impetus for both bills. Details on each are as follows:

- Commonly known as the 'renter notification law', Bill A10952/S8634 would require landlords to disclose test results on indoor air contamination in tenant-occupied units. Test results refers to the results of any tests conducted on indoor air, subslab air, ambient air, subslab groundwater samples and subslab soil samples. If chemical levels exceed state guidelines, landlords must also disclose the presence of contamination to prospective tenants and insert language about the contaminants into lease agreements.
- The second bill (A1143-B/S1592-B) would establish a comprehensive mapping program to identify cancer clusters across the state. Specifically, the bill would create a program whereby the state Department of Health and Department of Environmental Conservation maintain detailed computerized databases that track key factors which may contribute to cancer. These databases will ultimately have the ability to generate maps at the census block level, providing critical data on the correlation between cancer clusters and the social, environmental and other factors that may be causing them. The legislation grew out of concerns that TCE was first detected in the ground underneath residential and commercial property in 2003 near a former Canada Dry bottling plant. To date, TCE vapors have affected more than 700 properties, mostly in Endicott and the town of Union near a former IBM Corp. manufacturing site.

At press time, both bills were pending signature by New York Governor David Paterson.

## ASTM UPDATE

### Revised Forestland Standard

In May, ASTM released an updated version of E2247: *Standard Practice for Environmental Site Assessments for Forestland or Rural Property*. The announcement came almost three years after EPA's promulgation of the All Appropriate Inquiries (AAI) rule made portions of the standard obsolete in terms of qualifying a property owner for CERCLA liability protection. For the past few years, the ASTM Task Group for the forestland standard worked with the U.S. EPA to make the standard at least as stringent as the AAI rule, similar to what was done with the E1527 standard after the AAI rule was finalized in November 2005. Among the changes made to E2247 was the adoption of EPA's qualifications for environmental professionals and shelf life provisions that match the AAI rule.

The standard, which was previously revised in 2003, applies specifically to conducting a Phase I environmental site assessment at a "property 120 acres or greater of forestland or rural property or with a developed use of only managed forestland and/or agriculture." The methodology for conducting Phase Is on such large properties varies in many respects from the process laid out in the E1527 standard. For example, conducting a visual inspection of rural and forested lands can be a major challenge. E2247 allows for the use of remote sensing methods, such as aerial imagery and flyovers, to efficiently identify locations that may warrant on-the-ground inspection. The task group expects that EPA will consider the revisions to the standard and will amend the federal AAI rule to reference E2247-08 as being consistent as the AAI rule, as it did with E1527-05. To purchase a copy of the standard, visit [www.astm.org](http://www.astm.org).



## Feature Story

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Different firms handle reliance letter requests differently. For every firm willing to issue a free reliance letter to another party, there's a firm with a policy of only issuing reliance letters to contractual parties. There are also particular circumstances when consultants simply do not feel comfortable granting a reliance letter request. Stone said one such type of request that raises a red flag are those from condo associations. She told *ESA Report* that she has heard "there have been a lot of lawsuits resulting from condo conversion projects. Though these have been mainly on the Property Condition Assessment side, our legal counsel was just told about one on a Phase I, too." Wolf noted that there are cases when his firm will not issue a reliance letter, such as when the original client for whom the report was prepared refuses to approve reliance. Busby is particularly concerned about a recent trend of clients requesting indemnification clauses within their reliance letters. "Our firm is not comfortable with this dual purpose, as it does not seem an appropriate connection. We prefer to let the reliance letter serve its purpose, and if a separate indemnity is needed, then we'd like to evaluate and negotiate that separately."

From a liability standpoint, it is important to remember that every time a reliance letter is issued, it opens up a consulting firm to greater liability. For that reason, firms that are in the habit of offering reliance should carefully review their O&M insurance policies and consult with their firm's attorney to ensure they are fully protected. ■

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