

Reliance Letters, “Users”, and Commercial Loans

Contract terms and conditions that are used to limit the liability of the environmental professional in performing a scope of services typically limit reliance on the report to the “Client” with whom the project was contracted with and is identified in the report. If reliance on the report must be extended to another party such as a lender, the right to rely on the report must be secured through a “Reliance Letter”. Simply addressing the third party by name on the cover of the report doesn’t necessarily extend all of the benefits and protection extended to the Client who originally contracted with the environmental professional unless the third party agrees to the same terms and conditions that the Client did.

Lenders, borrowers, and other “Users” may have different objectives, and this could lead to potential conflicts of interest with respect to the use of the report. For this reason, environmental site assessments done to secure a commercial loan are typically done for the sole benefit and protection of the lender who contracted for the services. The lender is primarily interested in the property condition at the time of the financial transaction. If the loan is not approved, the lender may choose to provide the borrower with a copy of the report, but that does not allow the borrower to rely on it unless the environmental professional has agreed to that arrangement via a Reliance Letter. Importantly, the subsequent “User” of the report needs to understand that adherence to the ASTM Methods puts a time limit of report validity to 180 days.

This brings up the question of who the “User” is of the report. The preparation of a standard Questionnaire form is often part of the site assessment process, and is a requirement to fulfill the All Appropriate Inquiry (“AAI”) liability protection offered under CERCLA 40 CFR 312.20 for innocent landowners, bona fide purchasers, contiguous property owners and others. The questionnaire form used for the ASTM Limited Due-Diligence Environmental transaction Screen process is specific as to who fills out the questions on the form; the Preparer, the Owner, the Operator or the User. However, the ASTM Phase I E1527-13 method questionnaire is limited to the User. This often presents a problem if the User of the report is a lender who knows nothing about the site history or use. Consequently, the form is prepared by the person most knowledgeable about site history, the owner or operator. Often the answers to the questions are simply provided by whoever is representing the owner or operator during the site inspection.

Of course, all of this comes down to how the report is used and how the reliance letter is written. Lord Environmental is proud to stand by our work and is happy to extend reliance on it so long as subsequent users understand the assumptions and limitations of the scope of services provided and agree to the same terms and conditions as the original client.