

INDIAN AFFAIRS MANUAL

- 1.1 Purpose.** This chapter establishes Indian Affairs' (IA) policy and procedure for evaluating environmental risk prior to acquiring interests in real property or other administrative land transfers to IA jurisdictions. This includes identifying potential fiscal or legal liabilities, as well as potential costs of property cleanup and remediation related to the release/threatened release of hazardous substances (e.g., oil or related petroleum products) and other environmental conditions potentially impacting property acquired by IA.

This chapter also documents IA's process for acquiring real property using a Phase I Environmental Site Assessment (Phase I ESA) to satisfy the requirements for conducting all appropriate inquiries (AAI) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, and using the Limited Environmental Due Diligence: Transaction Screen Process (LEDD/TSP) in limited situations when acquiring real property.

- 1.2 Scope.** This policy applies to all proposed discretionary acquisitions, including interests in real property to be acquired by IA from states, Tribes, individual owners, Federal Government agencies, or other non-federal entities through acts or operations of law, condemnation, escheat, right-of-entry, land exchange, lapses, reversions, purchase, donation, leases, or transfers that will be under the jurisdiction or control of IA for any period of time, except as specified in section 1.7 B. of this policy; withdrawn public domain land being returned or reverted to the Department of the Interior (DOI)/IA's jurisdiction; and transfers of administrative jurisdiction from other government agencies.

This policy applies to all IA programs and offices under the authority of the Assistant Secretary – Indian Affairs (AS-IA) that are involved in carrying out the functions documented herein. This policy may also apply to entities carrying out activities on behalf of IA under contracts or other agreements if expressly agreed to in the contracts or agreements, or if the requirement to abide by such policy is otherwise required by law; these entities may include contractors or Tribes operating through contracts issued pursuant to Public Law (P.L.) 93-638.

- 1.3 Policy.** It is IA's policy to minimize the exposure of IA to liabilities and potential remediation costs by avoiding the acquisition of real property that is determined to be contaminated, unless otherwise specifically directed by Congress, court mandate, or as determined by the Secretary or the Secretary's authorized representative; and to facilitate compliance with all applicable real estate services' regulations, requirements, and standards.

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1.4 Authority.

A. Statutes and Regulations.

- 1) 33 U.S.C. §§ 2701, et seq., Oil Pollution Act (OPA), as amended
- 2) 42 U.S.C. §§ 9601, et seq., CERCLA, as amended
- 3) 33 CFR Part 137, Oil Spill Liability: Standards for Conducting All Appropriate Inquiries Under the Innocent Landowner Defense
- 4) 40 CFR Part 312, Innocent Landowners, Standards for Conducting All Appropriate Inquiries (AAI)

B. Guidance.

- 1) 602 Departmental Manual (DM) 2, Real Property Pre-Acquisition Environmental Site Assessments
- 2) American Society for Testing and Materials (ASTM) E1527-21, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process
- 3) ASTM E1528-22, Limited Environmental Due Diligence
- 4) ASTM E1903-19, Standard Practice for Environmental Site Assessments: Phase II Environmental Site Assessment Process
- 5) ASTM E2247-16, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property
- 6) Federal Accounting Standards Advisory Board's Statement of Federal Financial Accounting Standards (SFFAS) Number 5, Accounting for Liabilities of the Federal Government

1.5 Responsibilities.

- A. **AS-IA** is ultimately responsible for overseeing the acquisition of real property by IA offices. The AS-IA also makes decisions on all recommendations to acquire real property that could result in IA incurring associated liabilities or potential remediation costs exceeding \$500,000.

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B. Director, Bureau of Indian Affairs (DBIA) is responsible for:

- 1) ensuring that appropriate organizational arrangements, resources, and personnel are available to implement and maintain the Office of Trust Service (OTS) programs, including the Division of Real Estate Services (DRES) program;
- 2) overseeing real property acquisitions and the development of guidance and instructions to implement the policy requirements;
- 3) ensuring that a Phase I ESA or LEDD/TSP is performed in accordance with the requirements of this policy and limiting any associated liabilities and potential costs of remediation to IA;
- 4) approving remediation expenditures under his/her jurisdiction and, within his/her scope of authority, and ensuring adequate program support (i.e., resources and budget) to fulfill requirements;
- 5) reviewing and approving expenditures if anticipated remediation expenditures total \$500,000 or less, for acquisitions (subsequent approval by the AS-IA is not necessary); and
- 6) re delegating approval authority in writing to a Regional Director (RD), if appropriate, if anticipated remediation expenditures total \$250,000 or less.

C. BIA RD is responsible for:

- 1) determining, upon recommendation of the Environmental Professional, not to conduct a Phase I ESA that meets AAI requirements and instead to proceed with LEDD/TSP;
- 2) determining, upon recommendation of the Environmental Professional, that in situations where landowner liability protections are not sought under the AAI regulations, the IA office may use the conclusions of a Phase I ESA that has not been updated pursuant to the AAI regulations for decision-making purposes as identified in section 1.7 C. 1) c. ii. and iii of this policy; and
- 3) addressing any appeals from decisions made by Agency Superintendents.

D. BIA Agency Superintendent serves as the Approving Official as delegated by the RD, and is responsible for:

- 1) managing and ensuring their respective organizations' DRES program activities comply with all applicable statutory, regulatory, and policy requirements; and
- 2) assigning and organizing BIA agency staff and resources to fulfill agency responsibilities.

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E. Deputy Bureau Director (DBD), OTS is responsible for:

- 1) providing oversight of BIA land acquisitions;
- 2) receiving notification of decisions made by the RD not to seek landowner liability protection; and
- 3) ensuring that statutory and regulatory timetables are met, and that guidance is available to BIA regional and agency staff tasked with real estate services activities associated with management and protection of trust and restricted lands.

F. Division Chief, DRES, OTS is responsible for implementing the requirements of this policy when acquiring real property and ensuring compliance with statutory and regulatory requirements.

I. IA Offices are responsible for:

- 1) ensuring that the Phase I ESA or LEDD/TSP is completed in terms of technical accuracy and comprehensiveness;
- 2) using one of the standards in 40 CFR 312.11 to comply with the requirements of 33 CFR Part 137 to establish liability protections under OPA;
- 3) using the most current version of ASTM standards accepted by the Environmental Protection Agency (EPA) to meet the substantive requirements of 40 CFR Part 312 (i.e., ASTM E1527 (for commercial real estate) and ASTM E2247 (for forestland or rural property));
- 4) using the most current version of ASTM E1528 to perform an LEDD/TSP;
- 5) collaborating with the DOI Office of Environmental Policy and Compliance (OEPC) for:
 - a. assistance in interpreting and implementing the requirements of this policy;
 - b. seeking additional guidance on land acquisitions (e.g., environmental compliance memoranda), as appropriate; and
 - c. receiving updates to ASTM standards consistent with the EPA's AAI requirements; and
- 6) consulting with the Office of the Solicitor (SOL) for:
 - a. obtaining legal review and guidance for proposed real property acquisition(s) including, but not limited to, advice with respect to potential legal enforcement by third parties and evaluating whether the Department's defenses for liability under CERCLA or OPA should be or have been adequately preserved;
 - b. obtaining legal review and guidance to structure the instrument for land acquisition, whether it is a deed, statute, or interagency agreement, to

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minimize, whenever possible and appropriate, the Department's and IA's exposure to associated liabilities and potential costs of remediation;

- c. obtaining legal review concerning the applicability of this policy and its requirements to site-specific acquisitions and language in specific agreements (e.g., easements, environmental covenants, deed restrictions, indemnity agreements, and other interests), as well as language of specific withdrawal agreements in which liability could arise; and
- d. obtaining legal review of acquisitions that require AS-IA approval.

1.6 Definitions.

- A. All Appropriate Inquiries (AAI)** is an inquiry constituting all appropriate inquiries into the ownership and uses of the subject property consistent with good commercial and customary standards and practices, as defined in sections 101(35) (B)(i) and 101(40) (B) of CERCLA, 40 CFR Part 312, and 33 CFR Part 137 that will qualify the IA office for one of the threshold criteria for satisfying landowner liability protections pursuant to CERCLA and/or OPA liability, assuming compliance with other elements of the defense.
- B. Bona fide prospective purchaser** is a person (or tenant of a person) who acquires ownership of a facility after January 11, 2002, and establishes by a preponderance of the evidence each of the requirements set forth in CERCLA § 101(40) and applicable regulations by conducting AAI on or before the date of purchase. All bona fide prospective purchasers must conduct AAI into previous ownerships and uses of the facility in accordance with generally accepted good commercial and customary standards and practices.
- C. Environmental Professional** is a person with specific education, training, and experience as set forth in 40 CFR 312.10(b) and 33 CFR 137.25. The AAI regulations require that AAI investigations, of which Phase I ESA is a critical component, must be conducted or supervised by an Environmental Professional that meets the specific requirements established in the CFR sections noted.
- D. Hazardous substance** is a substance as defined in CERCLA § 101(14).
- E. Landowner liability protection** is a defense to CERCLA and/or OPA liability available for the landowner who qualifies for and meets certain statutory criteria to preserve defenses under CERCLA for "bona fide prospective purchaser" liability protection, contiguous property owner liability protection, or innocent landowner defense under 42 U.S.C. §§ 9601(35)(A), 9601(40), 9607(q), and 9607(r) including, but not limited to, conducting AAI. For OPA, the liability protections pertain to the

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operator of a facility who qualifies for and meets certain statutory criteria to preserve defenses for innocent landowner defense to liability under 33 U.S.C. § 2703 (d)(4) of OPA.

- F. Limited Environmental Due Diligence: Transaction Screen Process (LEDD/TSP)** is an evaluation conducted prior to a land acquisition to identify Potential Environmental Concerns (PECs). Such analysis determines the potential of, and extent of liability for, oil and hazardous substances or other environmental remediation. This includes, but is not limited to, a determination of the absence or presence of oil and hazardous substances or conditions that indicate an existing or past release, or a material threat of a release on the real property, into the air, soil, sediment, groundwater, surface water, or any structures located on the real property. The standards can be found in ASTM standard E1528; however, completion of this evaluation will not meet the standards for a Phase I ESA for landowner liability protection from CERCLA or OPA.
- G. Occupancy Agreement** is the formal written agreement between the General Services Administration (GSA) and the IA office defining the financial terms and conditions for the occupancy of GSA-provided space.
- H. Oil** as defined in 33 U.S.C. § 2701 (23), means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredge spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) section 101(14) of CERCLA and which is subject to the provisions of that Act.
- I. Petroleum products** are those substances included within the meaning of the petroleum exclusion to CERCLA, 42 U.S.C. § 9601(14), as interpreted by the courts and EPA, that is: petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under 42 U.S.C. § 9601(14)(A-F), natural gas, natural gas liquids, liquefied natural gas, and synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). The word fraction refers to certain distillates of crude oil, including gasoline, kerosene, diesel oil, jet fuels, and fuel oil, pursuant to Standard Definitions of Petroleum Statistics.
- J. Phase I Environmental Site Assessment (Phase I ESA)** is a pre-acquisition evaluation of real property that identifies Recognized Environmental Conditions (RECs) and other environmental issues of concern. A Phase I ESA is used by IA offices to assist in identifying and evaluating associated liabilities; evaluating potential costs of remediation; and evaluating the total cost of acquisition inclusive of environmental issues of concern, associated liabilities, and potential costs of remediation. The Phase I ESA must comply with all AAI requirements set forth in 40

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CFR Part 312 and 33 CFR Part 137 as well as ASTM standards E1527 (for commercial real property) or E2247 (for forestland or rural property).

- K. Potential Environmental Concerns (PECs)** are defined in ASTM E1528 as the possible presence of any hazardous substances or petroleum products on a property under conditions that indicate the possibility of an existing release, a past release, or a threat of a future release of any hazardous substances or petroleum products into structures on the property or into the ground, ground water, or surface water of the property. The term includes hazardous substances or petroleum products even under conditions in compliance with laws. Note that “threat of release” is generally understood to be present when hazardous substances or petroleum products are poorly managed (for example, in corroded tanks or damaged containers), but the release of the contaminants has not yet occurred, and there is an opportunity to take response action to prevent a release of the contaminants.
- L. Real property** means land, or interests in land, including easements, and any improvements thereon (e.g., roads, buildings, and other structures, including installed permanent features).
- M. Recognized Environmental Conditions (RECs)** are: (1) the presence of hazardous substances or petroleum products in, on, or at the subject property due to a release to the environment; (2) the likely presence of hazardous substances or petroleum products in, on, or at the subject property due to a release or likely release to the environment; or (3) the presence of hazardous substances or petroleum products in, on, or at the subject property under conditions that pose a material threat of a future release to the environment. A *de minimis* condition is not a REC.
- N. Release** is defined in CERCLA § 101(22) as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance, oil, petroleum product, or pollutant or contaminant into the environment, including the abandonment or discarding of any barrels, containers, or other closed receptacles containing a hazardous substance, oil, petroleum product, or pollutant or contaminant.
- O. User** means the party seeking to complete a Phase I ESA of the subject property or conducting AAI to seek to qualify for landowner liability protections to CERCLA or OPA liability.

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1.7 Standards, Requirements, and Procedures.

A. Standards and Requirements.

- 1) Prior to the acquisition of real property, IA must determine the associated liabilities and potential remediation costs that could result from the presence, extent, and/or release of hazardous substances, oil, or petroleum products. Such determinations must be considered in any decision to acquire real property and must be considered when establishing the total cost of acquisition.
- 2) The responsible IA office must use either a Phase I ESA or LEDD/TSP to identify the presence or potential presence of RECs or PECs, as applicable, as well as the associated liabilities and potential costs to remedy contamination. This provides the IA office with valuable information on the property's baseline environmental conditions at the time of acquisition, including the liabilities and potential remediation costs, and allows for an evaluation of the true costs of a proposed acquisition.
- 3) Before taking title to real property, except as specified in section 1.7 B. below, and in accordance with applicable regulations and/or guidance, the IA office must either:
 - a. Complete a Phase I ESA in compliance with 40 CFR Part 312 and/or 33 CFR Part 137, as applicable, to preserve certain defenses to CERCLA and/or OPA, as well as to understand baseline environmental conditions that a Phase I ESA would identify; or
 - b. Under limited circumstances, complete an LEDD/TSP in place of a Phase I ESA in accordance with the most recent version of ASTM standard E1528. The RD may determine, upon recommendation of the Environmental Professional, whether to use an LEDD/TSP where the land is comprised of native prairie or lands not previously disturbed and that have had no historic or current infrastructure development. The Environmental Professional must conduct a site investigation of conditions likely to affect RECs in connection with the subject property.

The use of aerial imagery/United States Geological Survey (USGS) topographic maps can be used for verification of past property usage. The LEDD/TSP cannot be used when the IA office is seeking to preserve defenses to liability under CERCLA and/or OPA.

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- 4) IA may establish, in consultation with SOL, additional real property pre-acquisition assessment procedures to meet its needs, including developing criteria for when *not* to seek landowner liability protection from CERCLA and/or OPA. These procedures could assist in defining the objectives of the IA office's comprehensive environmental assessment (e.g., evaluate total cost of acquisition inclusive of potential costs of remediation, determine associated liabilities, identify RECs or PECs, and ascertain potentially responsible parties). This may include liability indemnification agreements.
- 5) Costs for the cleanup of hazardous substances, oil, petroleum products, or any other RECs should be properly estimated by qualified parties prior to acquisition, or the applicant remediates the property prior to acquisition and completes an updated Phase I ESA after remediation is complete. The estimated costs of cleanup must be disclosed in writing and provided to the responsible decision-maker along with any appraisal report as part of the IA office's overall evaluation of a proposed real property acquisition if remediation was not completed.
- 6) Except as precluded by law or congressional action, prior to acquiring real property from another Federal Government agency, including the Department of Defense or its components, IA should enter into written agreements, to the extent practicable, to document how compliance requirements will be met, and which party will be responsible for compliance requirements and potential future remediation efforts. In developing agreements for real property to be acquired from other federal agencies, the agreement should provide that future property use is determined by IA in consultation with the applicant, and that the federal agency transferring real property agrees to clean up the property to accommodate such future property use prior to acquisition.
- 7) IA prohibits the use of the Central Hazardous Materials Funds (CHF) to conduct a Phase I ESA or LEDD/TSP, or to fund environmental compliance or cleanup work associated with property acquired after September 30, 1995, where the environmental contamination was, or reasonably could have been, identified prior to acquisition.

B. Exceptions. This policy chapter does not apply to the following situations:

- 1) **Mandatory fee-to-trust and real property acquisitions:** Under certain mandatory acquisition statutes, judicial decrees, and legislative transfers, the DOI Secretary has no discretion to refuse to acquire land regardless of the findings of any environmental analysis. Therefore, IA will not require compliance with this policy as a precondition to processing and completing mandatory acquisitions. Nevertheless, it still is important for IA to understand any potential legal liabilities

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and any environmental hazards that might be present on the lands it must acquire. Accordingly, the cognizant IA office must conduct a site investigation of conditions likely to affect RECs (in connection with the subject property). However, acquisition is not conditioned upon the site investigation or the findings. Additionally, the IA office will, to the maximum extent practicable, ensure that reports to Congress, comments on proposed legislation, congressional testimony, and responses pertaining to the acquisition of real property, contain environmental site assessment information from a Phase I ESA or LEDD/TSP and estimates of remediation costs in order to inform total costs for any congressionally mandated acquisition of contaminated property.

- 2) Leases for commercial real estate, GSA Occupancy Agreements, and agreements between IA and non-governmental entities for the use of buildings or structures: This exception does not apply to leases where there is reason to believe a building or structure has been used to store or handle hazardous substances, oil, or petroleum products, or where there is visible evidence of hazardous substances, oil, or petroleum products.
- 3) Federal lands transferred through public benefit transfer programs where IA acquires an interest in real property solely as a pass-through entity: Easements that do not convey authority or rights to participate in the management of the property (e.g., conservation or other negative easements) or do not otherwise create the potential for federal environmental liability.
- 4) Other less-than-fee property interests, such as access easements, water rights, or mineral rights, whose acquisition and reasonably expected future use will not expose IA to associated liabilities or potential remediation costs that would trigger the requirements of this chapter: The applicability of this exemption must be determined on a case-by-case basis in consultation with SOL.
- 5) Non-scope environmental issues of concern for a broad array of environmental conditions that may be present on a property but are outside of the scope of releases of hazardous substances, oil, or petroleum products addressed by CERCLA or OPA.

C. Procedures.

1) Phase I Requirements

- a. The applicant or IA office will complete a Phase I ESA in compliance with the applicable requirements of CERCLA, OPA, and the AAI regulations (40 CFR Part 312 and 33 CFR Part 137), unless it is otherwise determined by the RD,

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upon recommendation from the Environmental Professional, to conduct an LEDD/TSP. The ASTM standards may be used to satisfy the AAI requirements.

- b. **Review of Contractor Work Product:** Any Phase I ESA completed by a contractor on behalf of the applicant or IA office must be completed under the review and oversight of the IA office. The IA office may approve the Phase I ESA only after a qualified individual, as designated by IA, determines that it complies with applicable statutory and regulatory standards. Note that the Phase I ESA itself must be conducted by an Environmental Professional as specified in section 1.7 C. 1) f. below.
- c. **Time Requirements:** A Phase I ESA must be completed prior to taking title to the subject property, and in accordance with the following standards:
 - i. To ensure landowner liability protections for IA, as required by the AAI regulations (40 CFR 312.20 and 33 CFR 137.33), a Phase I ESA must be completed no more than one year prior to the date of acquisition. The date of the report generally does not represent the date the individual components of AAI were completed and should not be used when evaluating compliance with the 180-day or one-year AAI requirements. For more details on timing requirements, see 40 CFR 312.20 and 33 CFR 137.33. The following specific components of the Phase I ESA must be completed or updated no more than 180 days prior to the date of acquisition:
 - Interviews with past and present owners, operators, and occupants.
 - Searches for recorded environmental cleanup liens.
 - Government records reviews.
 - Visual inspections of the site and adjoining properties.
 - The declaration by an Environmental Professional that all appropriate inquiries into the previous ownership and uses of the property have been conducted.

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- ii. In certain situations, the RD, upon recommendation of the Environmental Professional, may decide not to seek landowner liability protections under the AAI regulations. Instead, the IA office may use the conclusions of a Phase I ESA that has not been updated pursuant to the AAI regulations to make the acquisition decision for up to 30 months when:
- The property is composed of native prairie, agricultural land, or undisturbed ground with no structures or commercial business operations that produce, store, or include uses related to petroleum products, hazardous substances, or any product that could produce environmental harm if released on the land, in groundwater, or in surrounding bodies of water.
 - When the Phase I ESA does not identify RECs.
 - The applicant proposes no change in land use, construction activities, or ground disturbance.
 - If after 30 months, no final decision has been made to acquire the property, the IA office or applicant must update the Phase I ESA pursuant to 40 CFR Part 312.
- iii. In certain situations, the RD, upon recommendation of the Environmental Professional, may decide not to seek landowner liability protections under the AAI regulations. Instead, the IA office may use the conclusions of a Phase I ESA that has not been updated pursuant to the AAI regulations to make the acquisition decision for up to 18 months when:
- The property is rural and/or residential in nature consisting of single family residences of one-to-four dwelling units, including accessory land, buildings, or improvements incidental to such dwellings which are exclusively for residential use and there are no commercial business operations that produce, store, or include uses related to petroleum products, hazardous substances, or any product that could produce environmental harm if released on the land, in groundwater, or in surrounding bodies of water.
 - When the Phase I ESA does not identify RECs.
 - The applicant proposes no change in land use or construction.

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- If after 18 months, no final decision has been made to acquire the property, the IA office or applicant must update the Phase I pursuant to 40 CFR Part 312 before acquiring an interest in the property.
- d. Visual Inspections: Provided that other requirements in 40 CFR 312.27 and 33 CFR 137.65 are met, an exception to the on-site visual inspection of a property may be granted in unusual circumstances where it cannot be performed because of physical limitations, remote and inaccessible location, or other inability to obtain access to the property after good faith efforts.

If an on-site visual inspection cannot be conducted, the requirement to conduct such an inspection of the subject property can be satisfied using other methods, including the use of aerial photography, aerial imagery, and/or aerial flyover, or by viewing the subject property from the nearest accessible vantage point (as detailed in standard ASTM E2247; Phase I ESA for forestland or rural properties).

- e. Prior assessments: A prior Phase I ESA may be used if: (a) it is reviewed and found to comply with the AAI regulations (40 CFR Part 312 and 33 CFR Part 137), (b) the information accurately reflects the current conditions of the property, (c) the prior Phase I ESA must be completed no more than one year prior to the date of acquisition, and (d) the components of the assessment identified in section 1.7 C. 1) c. must be completed or updated no more than 180 days prior to acquisition.

A prior Phase I may not be used without current investigation of conditions likely to affect RECs in connection with the subject property. Note that the RD may determine, upon recommendation of the Environmental Professional, that in situations where landowner liability protections are not sought under the AAI regulations, the IA office may use the conclusions of a Phase I ESA that has not been updated pursuant to the AAI regulations for decision-making purposes as identified in section 1.7 C. 1) c. ii. and iii.

Additional tasks may be necessary to document conditions that may have changed materially since the prior ESA was conducted. If all of the Phase I ESA requirements are not met by the prior ESA report, whether it was conducted by the IA office, an outside party, or an IA-contracted party, the IA office must complete a new Phase I ESA addressing any missing information or data gaps and ensure that all applicable ESA requirements are met prior to the acquisition.

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If the IA office intends to rely on a prior Phase I ESA to satisfy AAI, it must be listed as a “user” or must confer with SOL prior to acquisition to ensure that any contractual and legal obligations as the “user” of a prior Phase I ESA are met. Any prior assessment conducted by outside parties (including a Phase I ESA or LEDD/TSP) should be considered as a part of the “User Provided Information” and “Records Review” section of the final Phase I ESA report.

- f. Pursuant to 40 CFR 312.10(b)(5) and 33 CFR 137.25(a)(4), a person who does not qualify as an Environmental Professional may assist in conducting a Phase I ESA if such person is under the supervision or responsible charge of an Environmental Professional when conducting such activities.

IA may develop its own certification program for Environmental Professionals. At a minimum, the IA office must determine what constitutes “relevant experience” in accordance with 40 CFR 312.10(b) and 33 CFR 137.25, and determine whether their personnel are Environmental Professionals. This may include using an IA training program to facilitate meeting these requirements or relevant courses provided by other agencies or bureaus/offices.

2) LEDD/TSP Requirements

- a. The RD may determine, upon recommendation of the Environmental Professional, to use an LEDD/TSP in accordance with the most recent version of ASTM standard E1528. Whether the LEDD/TSP is performed by an IA employee or by a contractor, the IA office is responsible for ensuring that the LEDD/TSP is complete in terms of technical accuracy and comprehensiveness in order to ascertain whether PECs exist that could expose the Department or IA to associated liabilities or potential costs of remediation.
- b. The LEDD/TSP must be conducted or supervised by a qualified individual, as determined by IA. This person does not need to be classified as an Environmental Professional, as that term is defined in the AAI regulations.
- c. Prior to taking title to the subject property, the LEDD/TSP must be completed and approved.
- d. Prior assessments may be used if the prior assessment is reviewed and found to comply with this policy and there have been no material changes at the subject property since the prior assessment was conducted that could affect PECs. If all the requirements of the standards in the most recent version of ASTM E1528 are not met, the applicant or IA office should complete a new assessment.

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3) Finalizing a Phase I ESA or LEDD/TSP

- a. The IA office must incorporate the Phase I ESA or LEDD/TSP results and the associated liabilities and potential costs of remediation in its evaluation of the estimated total cost of the acquisition, unless the applicant remediates the property, and the IA office or applicant performs an additional Phase I ESA. This information must be provided as part of the acquisition approval process as documented in section 1.7 C. 6) below.
- b. If evidence is found during the initial Phase I or LEDD/TSP that indicates environmental contamination could be present on the land, the IA office may require that the applicant complete additional analysis to determine the potential cost of remediation (e.g., ASTM standard E1903 for Environmental Site Assessments: Phase II), unless a reasonable cost estimate can be ascertained by other means. Such additional analysis is not intended to fully characterize the nature and extent of contamination or assess the associated risks (e.g., site characterization as part of an Engineering Evaluation/Cost Analysis or a Remedial Investigation/Feasibility Study), but only to gather sufficient information to enable the IA office to reasonably estimate the cost of addressing the conditions identified in the Phase I ESA or LEDD/TSP.

The results of the additional analysis must be incorporated into the Phase I or LEDD/TSP prior to acquisition. It is recommended that the applicant consult with the IA Environmental Professional regarding the scope and extent of the Phase II ESA before proceeding to ensure the data collected, analyzed, and evaluated will satisfy all needed requirements.

- c. The IA office should coordinate with SOL to identify any information on known potentially responsible parties for the purpose of confirming there is no affiliation between the IA office and the potentially responsible party for purposes of developing landholder liability protections.

4) Funding

The IA office reviewing an acquisition of property may provide funds or resources if the applicant is unable to conduct a Phase I ESA or LEDD/TSP and/or complete any further investigation of contaminated real property proposed to be acquired, including the identification and evaluation of cleanup alternatives. The IA office may not obtain funding for a Phase I ESA or LEDD/TSP from the Department's CHF. The CHF also will not be used to fund remediation work associated with property acquired after September 30, 1995, where the environmental contamination was, or reasonably could have been, identified prior to acquisition.

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5) Acquisition

Following the preparation of the Phase I ESA or LEDD/TSP report, including the determination of any associated liabilities and potential costs of remediation, IA may acquire the real property, provided one of the following conditions exists:

- a. There is no evidence of releases, or threatened releases, of hazardous substances, oil, or petroleum products, nor is there evidence of PECs.
- b. The pre-acquisition proposal, which would include the findings of a Phase I ESA or LEDD/TSP and any calculated liabilities and potential costs of remediation associated with the acquisition, is approved in accordance with section 1.7 C. 6) below.

6) Acquisition Approvals

Approval, as described in this paragraph, is required for all real property acquisitions whenever the Phase I ESA identifies a REC(s) or an LEDD/TSP identifies a PEC(s), or the acquisition could otherwise result in associated liabilities or potential costs of remediation to the Department or IA. Where applicable, a formal estimate of the costs of remediation alternatives, taking into consideration reasonable future-use assumptions, should be included as part of the request for approval.

- a. IA may acquire an interest in real property with RECs or PECs upon receipt of the following levels of approval:
 - i. If there is evidence of a release, or threatened release, of hazardous substances, oil, or petroleum products, or any identified RECs, and associated liabilities and potential costs of remediation are estimated to exceed \$500,000, the acquisition must be approved by the AS-IA (after the IA office consults with the SOL).
 - ii. If there is evidence of a release, or threatened release, of hazardous substances, oil, or petroleum products, and associated liabilities and potential costs of remediation are estimated to be \$500,000 or less, the DBIA may approve the acquisition after consulting with SOL. The DBIA may re-delegate this approval authority (as documented in 3 IAM 4) to the RD for acquisitions for which associated liabilities and potential costs of remediation total \$250,000 or less. The RD must also consult with SOL prior to approving the acquisition and may not re-delegate this authority.

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- b. Requests for approval pursuant to this section must provide detailed information on the benefits of the acquisition relative to the total cost, including the fair market value of the property; the estimated costs of acquisition, including associated liabilities and potential costs of remediation to address hazardous substances, oil, or petroleum products; and any other known or reasonably estimated monetary costs or damages that are expected to be associated with the acquisition.
- c. The AS-IA, in consultation with SOL as appropriate, may impose additional limitations on, or requirements for, acquisitions that are necessary to protect the interests of the Department or IA.
- d. If the IA office determines it is appropriate, the existence of any RECs or PECs found prior to the transfer, as well as the associated liabilities and potential costs of remediation, should be documented during the transfer of property. This documentation should identify whether the party transferring the property, or some other potentially responsible party, will be responsible for addressing the associated liabilities and potential costs of remediation, in whole or in part.

The IA office should work closely with SOL early in the acquisition process to determine if liability protections such as environmental covenants, indemnity agreements, or other environmental cleanup agreements should be negotiated with the seller prior to the Federal Government taking title to the property, or if the seller can address RECs or PECs prior to the transfer. In the case of a transfer from another federal agency, the AS-IA should negotiate an agreement with the transferring agency, prior to the transfer of administrative jurisdiction, assigning responsibility for the funding and performance of any activities necessary to address RECs or PECs.

7) Environmental and Disposal Liabilities

Environmental liabilities are subject to the Federal Accounting Standards Advisory Board's Statement of Federal Financial Accounting Standard (SFFAS) Number 5, Accounting for Liabilities of the Federal Government. If IA acquires real property with associated liabilities and potential costs of remediation, the IA office must coordinate with its environmental office to determine whether the subject property should be listed on the Environmental and Disposal Liability (EDL) database.

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8) Records Retention

The IA office must maintain documentation of the process and the findings of the Phase I ESA or LEDD/TSP. The IA office must retain these records as part of the acquisition case file and real property record as long as the Department/IA manage and retain ownership of the real property. After the Department/IA no longer manages or retains the real property, the IA office must consult the IA Office of Trust Records for guidance on future records management.

9) Reprogramming

Any reprogramming proposal should be submitted according to established Departmental reprogramming procedures.

Approval



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Bryan Mercier
Director, Bureau of Indian Affairs

Date