

# Working for the Buyer and the Seller: Beware of Being “In the Middle”

Michael Covert, P.G.

National Director of Environmental Services

Terracon Consultants, Inc.

# Working for the Buyer and the Seller: Beware of Being “In the Middle”

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  - Background – Working for the Buyer
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# Litigation Case Study 1

Risk Management  
What not to do

Working for the Buyer and Seller

# How did we get into this situation?



Developer client calls - **“We’re clearing trees for roadway development and we cut into strong oil odors. We need your help!”**

# Our Initial Response

**“We’re on it!:** I’ll send someone to meet you on site and assess the situation.”

**While thinking:** This could be a great remediation opportunity!

Also, this would be a great opportunity to have my new hire get some chargeable time.





**While not**

**Remembering:** We did the Phase 1 ESA on this tract 6 months ago.



Lets go back to the beginning. . .

# Background

- Client: Fortune 10, multi-national, oil and gas company
- Project: Conduct environmental due diligence on multiple large vacant tracts (200 – 500 acres each) they own
- Project Location: Texas Gulf Coast area
- Project Specifics: To reduce costs, client agreed to provide Chain of Title and Easement Information (pipelines were a concern) 
- Intended Transaction: None stated at time of authorization 

# ESA Proposal

ENVIRONMENTAL, GEOTECHNICAL AND CONSTRUCTION MATERIALS SERVICES

RECEIVED  
MAR 04 1996

SCHEDULE A

February 22, 1996

Mr. Charles A. Monaghan  
[REDACTED] Inc. ([REDACTED])  
P.O. Box 2567  
Houston, Texas 77252-2567

Ph.: (713) 423-4088  
Fax: (713) 423-4096

Re: Proposal for Environmental Site Assessment  
Multi-Tracts of Land  
Clear Lake & Kingwood, Texas  
[REDACTED] 21-2482-96  
REVISED FROM 1/26/96, 2/5/96, 2/7/96 & 2/20/96

Dear Mr. Monaghan:

[REDACTED] appreciates the opportunity to submit this proposal to conduct an Environmental Site Assessment (ESA) of the multi-tract properties (hereinafter, the sites) as described in the survey plats and legal descriptions provided to [REDACTED] Company (see Exhibit A). The objective of this assessment is to gather data and render an opinion regarding the absence or presence of potential environmental concerns associated with past or current practices on or near the site. The scope of services is intended to meet American Society for Testing and Materials (ASTM) standard practices for ESAs (Designation: E 1527-94).

It is our understanding the project consists of multi-tracts of land in the Kingwood and Clear Lake areas, most all of which are currently vacant land.

An outline [REDACTED] of services, budget and schedule is provided in the following sections:

[REDACTED]

Houston Office  
2313 W. Sam Houston Parkway North, Suite 107  
Houston, Texas 77063  
(713) 722-0700 Fax (713) 722-0788

Dallas Office  
4747 Irving Blvd., Suite 206  
Dallas, Texas 75247  
(214) 630-1010 Fax (214) 630-7070

Austin Office  
3913 Todd Lane, Suite 312  
Austin, Texas 78744  
(512) 442-1122 Fax (512) 442-1181

"It is our understanding that the 50 year chain-of-titles will be provided for each of the tracts of land by the client. These title reports should include environmentally significant easements such as petroleum pipelines..."

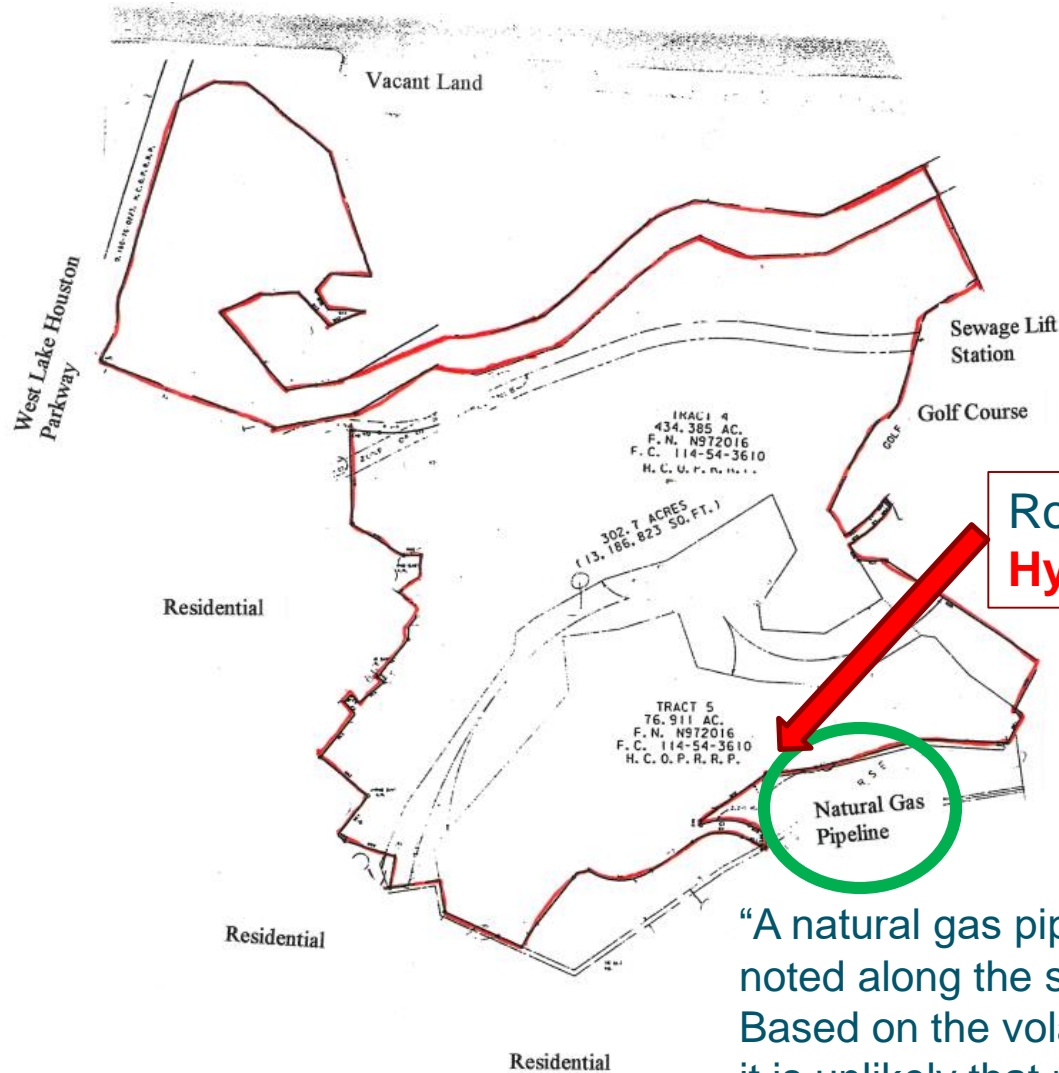
# Background

- Project completed – no RECs identified
- Title and Easement information NOT provided
- Reports delivered to client
  - ESAs “silent” on missing Title and Easement information
  - No discussion of proposed scope or client’s failure to provide documents
- Client requested Report Reliance for its Buyer
  - A subsidiary development company
  - Intended mixed use residential
- Reliance granted (no limit of liability) – Never a good thing!





# Background



Road cut location  
**Hydrocarbon odors**

“A natural gas pipeline easement was noted along the southern boundary. Based on the volatile nature of the gas, it is unlikely that natural gas releases would environmentally impair the site.”

# Now, for the rest of the story...

## Onsite discussion with the Developer Client (Buyer)

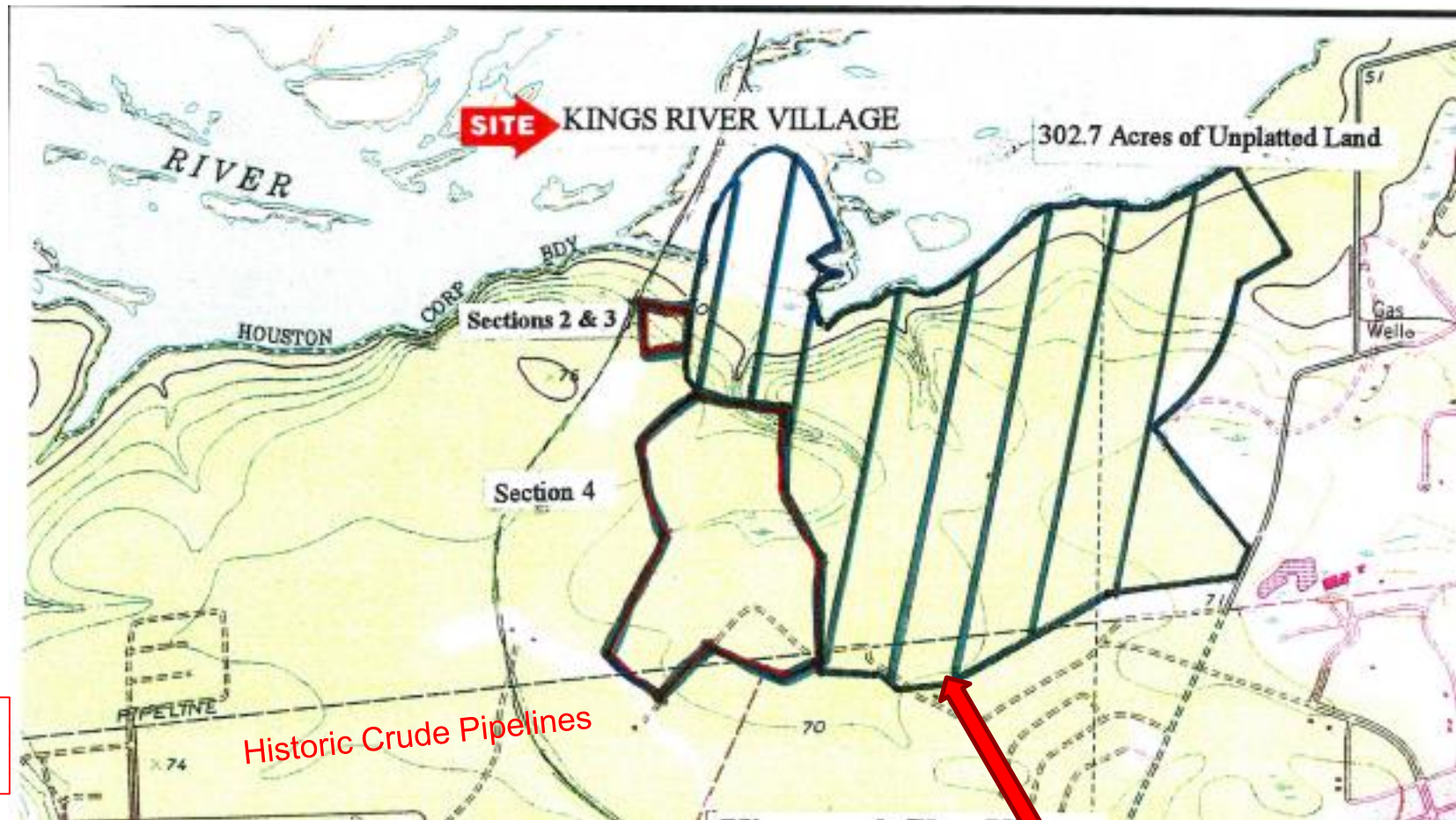
Client: “Thanks for meeting me onsite. I reviewed the Phase 1 ESA you gave us reliance on. It looks like the oil odor is coming from the pipeline easement. As you can see, this is a serious problem that is affecting a large number of our proposed residential tracts!

Our New Hire: “Yes, I can see that. I had no idea there was a Phase 1 on this site. This looks like a really big problem!”

Client: “I’m very concerned about this. How could you have missed this during the Phase 1?”

Our New Hire: “I have no idea how they could have missed this. It should have been identified in the Phase 1.”

# Now, for the rest of the story. . .



Historical  
Refinery

Historic Crude Pipelines

Subsequent review of easement records identified 4 historic crude pipelines in the onsite natural gas pipeline easement.

Road cut location  
**Hydrocarbon Odor**

# The end of the story

- Continued working for Developer Client (Buyer)
  - Comprehensive site investigation identified extensive hydrocarbon impacts to soil and groundwater.
  - Due to residential use/ impaired property value, client demanded cleanup to non-detection. Estimated cost \$2,000,000.
- Project was re-platted. Affected area was changed to commercial. Ultimate cleanup cost was \$800,000

# The end of the story

- Developer Client filed litigation to recover costs from consultant.
- After mediation - settled out of court

**What can we learn from this unfortunate experience?**

# Lessons Learned

When working for the Seller, do not give Reliance to the Buyer

- If unavoidable, “carefully” grant reliance:
  - review proposal and report(s) first
  - use a Reliance agreement vs a letter
  - execute a waiver of potential conflict of interest - Buyer and Seller.
  - notify the relying party of any proposed scope changes or deletions not included in the report.
- Remember, an “**argument**” for the Seller can be “**ammunition**” for the Buyer.

# Lessons Learned

Intended use of ESA (including relying parties) should be known at the time proposal

- Proposed single-family residential is “**High Risk**” and should be avoided or carefully managed.

When the Client agrees to provide ESA information, make sure you receive it

- Schedule should be tied to receipt of information
  - “report will be delivered 10 days from receipt...”
- Explicitly state if information is not received



# Lessons Learned

When a client calls with a project opportunity, check if you have previously done an ESA or already worked on the project.

Never send a New Hire to meet a client to discuss a significant issue on site

- When you discover a potential error or omission on a project, assign a “seasoned” company veteran to interact with the client.



# Litigation Case Study 2

Risk Management  
What to do

## Working for the Buyer

# How did we get into this situation?



Developer client calls - **“We’re clearing the site and we encountered a white fluffy substance. We think it’s asbestos. We need your help!”**

# Our Initial Response

## “We’re on it!:

I’ll send someone to meet you on site and assess the situation.”

## While thinking:

That’s the site we just did the ESA on. If, I remember correctly, it was a former asphalt roofing manufacturer. I better pull the previous reports.

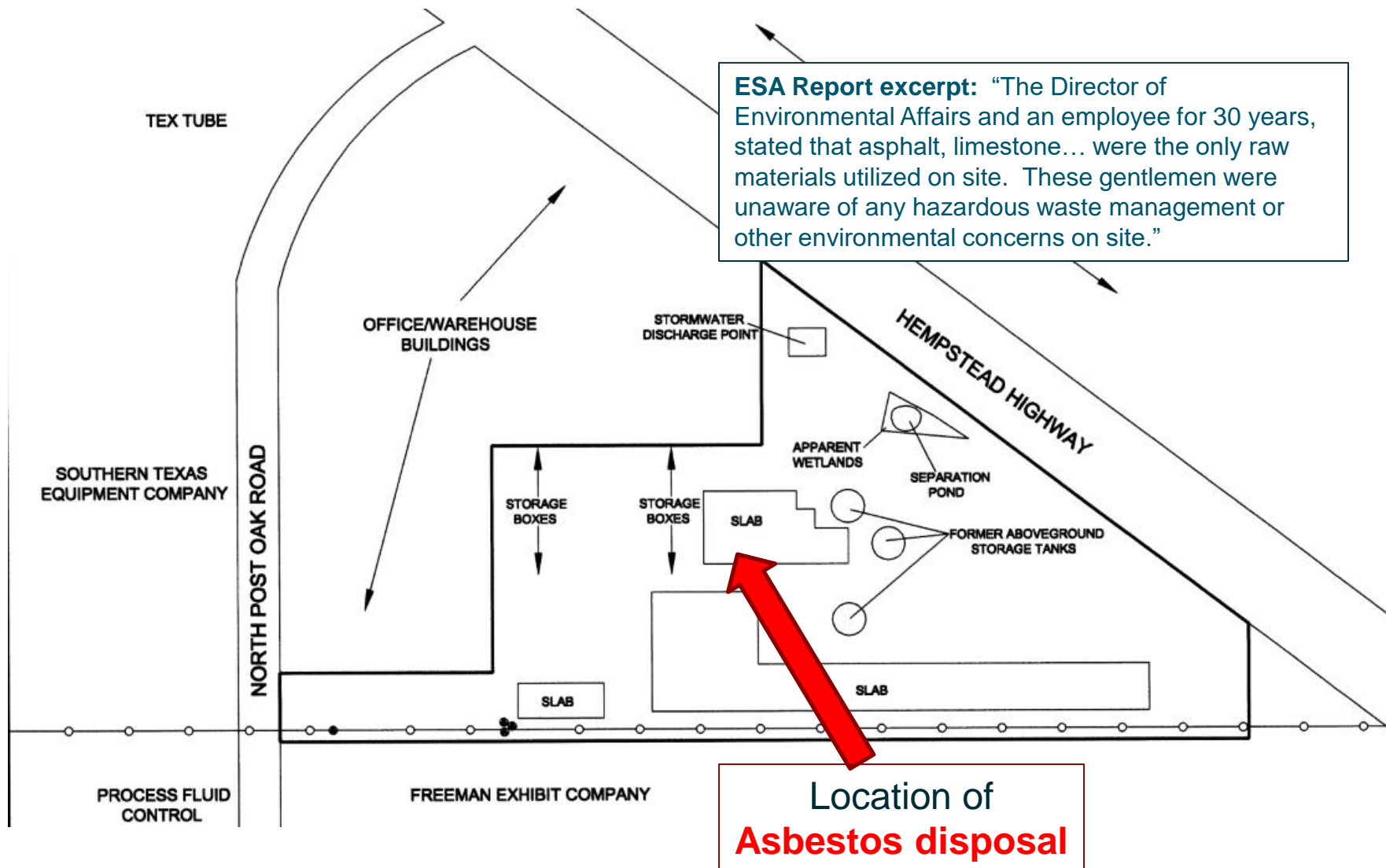
Also, I better check with Steve, our most experienced consultant, to see if he can meet the Client on site.

## After reviewing the Reports with Steve:

We did the ESA 3 months ago. The Seller was a manufacturer of roofing products. We interviewed the Director of Environmental Affairs for the manufacturer and he was unaware of any environmental concerns (other than asphalt) on site. I wonder if he was telling us everything??



**Lets go back to the beginning. . .**



# Background

- Client: Local Developer
- Project: Conduct environmental due diligence on a former roof manufacturing facility
- Project Location: Houston, TX
- Project Specifics: Prior ESA covering multiple sites provided w/ redactions. Seller deleted text referencing asbestos use and burial on site.  
Site visit delayed due to site demo work by owner
- Intended Transaction: Redevelopment to commercial/industrial warehouse

# Now, for the rest of the story...

- Client: “Thanks for meeting me onsite. The concrete recycler found asbestos attached to the concrete slabs. They shut us down and notified the State. It looks like there is buried asbestos on site. I reviewed the ESA you gave us and there was no mention of Asbestos.
- Steve: “I brought the ESA report with me. Let’s take a look at it. We specifically, asked the Director of Environmental Affairs and a long-time site employee for the Seller if they knew about any releases which may be an environmental concern on the site. The report states these gentlemen were unaware of any hazardous waste management or other environmental concerns on site.”
- Client: “I wonder if the Seller knew about this?”
- Steve: “Great question. We did receive a report from them with deletions. Let me do some digging to figure out if there may be any records documenting the Seller’s knowledge of this issue.”
- Client: “Thanks for your help. I will have my attorneys contact you to discuss how we can pursue the Seller on this matter.”

# The end of the story

- Continued working for Developer Client (Buyer)
  - Comprehensive site investigation identified extensive asbestos burial and impacts to soil.
  - State records documented that Seller had conducted limited asbestos cleanup on site immediately prior to ESA. Director of Environmental affairs for Seller signed the paperwork for the state.

# The end of the story

- Developer Client remediated, redeveloped and sold the site for a significant profit.
- Developer Client filed litigation against Seller for fraudulent inducement and impairment of inspection.
- Lawsuit was ultimately appealed to the Texas Supreme Court.



# Lessons Learned

A consultant's best defense (if working for a Buyer) is to “point at” the Seller.

- You must interview the Seller **every time** - document that they do not know about environmental problems on site.
- Seller is usually “in the best position to know” if there is a problem.
- This defense is lost when you work for the Buyer and the Seller.
- If a problem is subsequently identified, work with the Buyer to prove the Seller had prior knowledge.

# Lessons Learned

When a problem is discovered, assign a seasoned consultant to meet with the client - manage their expectations

- Prior reports should be reviewed
- Preliminary position should be established before discussions with the client
  - . e.g. “Talk to the Seller. They have your money.”

# Overall Takeaways

- Pick a Side
  - Working for the Seller can have less risk – they already own the problem; However, they “don’t want to know”
  - Working for the Buyer has more risk if something is missed – they usually “want to know”
- Pay Attention – A Wolf may be disguised in Sheep’s clothing
- No good deed goes unpunished – the story of Reliance
- The key to Successful Risk Management is:
  - a “well thought out” position, and
  - “high level” communication with the client

# Questions and Discussion