



Proposition for Support
GBA Research Concerning the Standard of Care for
Phase I Environmental Site Assessments
2014 - 2019

The Geoprofessional Business Association's (GBA's) Environmental Business Committee has been conducting Phase I environmental site assessment (Phase I ESA) standard-of-care surveys since 1989, producing extremely important reports that have helped define the standard of care and helped our members to save millions of dollars in losses by avoiding litigation or successfully defending themselves in legal disputes. Circumstances now are such that yet another survey is needed and we are inviting environmental consulting firms to participate, for their own benefit and, especially, for the benefit of its members.

BACKGROUND:

As you may be aware, the standard of care is what a trier of fact – a judge or jury – believes is the diligence commonly exercised by a group of peers performing the same service at the same time in a defined area, such as a region, state, or area within a state. When a trier of fact believes a professional failed to meet the standard of care and, as a result, inflicted damage or injury on a client or third party, the professional is found liable for professional negligence.

In almost all cases, as part of a trial, the trier of fact is required to form an opinion about standard of care based upon the testimony of expert witnesses who cite their opinions about the standard of care that was in effect when the alleged negligence occurred. Most regrettably, some of these experts are not really expert at all. Worse, some will say almost anything for a fee, and that can create serious problems for those of your members who perform Phase I ESAs.

OUR FINDINGS

Experience shows – unquestionably – that, when an expert's testimony is buttressed by the findings conveyed by our Phase I ESA surveys, the validity of that expert's testimony is significantly enhanced in the eyes of a trier of fact. The most common need for that enhancement occurs when a plaintiff's expert claims that the plaintiff was damaged because the defendant professional failed to perform "required" activity that the opposing expert – and a survey of hundreds of peer professionals – said was not required at all. In fact, the survey report of itself can discourage the claims that initiate litigation.

GBA has consistently documented that, while practitioners will follow the guidance document, strict compliance with all the provisions of ASTM is almost never accomplished. Nor should it be. ASTM stipulates within the standard itself that the level of inquiry is variable and all sites do not require the same level of investigation. However, plaintiff's counsel generally does not make that distinction.

GBA's studies have consistently shown that there is little difference in services provided based on geographic area. Thus, it can be argued the GBA studies represent a review of how environmental due diligence is being performed across the country. It will always be up to the trier of fact in a legal proceeding to determine what the standard of care for the service was and we hope the GBA documents will provide meaningful information to support his/her determination. GBA has completed these studies periodically, because the standard of care may vary through time as components of the standards change. They also provide snapshots of different periods of time designed to capture moments prior to substantive changes in the standards and laws regarding due diligence processes.

OUR NEXT STUDY STARTS NOW

We now are proposing an eighth study, done much like the last ones, focusing on the four-year 2014-2019 period. We need to do this to protect our members and yours from the biased testimony of "expert witnesses" in the court of law.

Since GBA began the process of documenting the standard of care and how professionals engaged as experts in disputes should comport themselves, we have found that the hardest part of conducting the study is gathering Phase I ESA reports from our members. Some members either do not appreciate the value the survey will provide, believe the process is too cumbersome, or believe that they cannot provide a copy of their report due to client confidentiality.

WE NEED YOUR HELP

Your effort required is minimal. We are gathering Phase I ESA reports written between 2014-2019 from our members now. We prefer to accept the reports electronically. We are also happy to have redacted reports; consequently, client confidentiality may not be an issue; however, it is always appropriate to check your contract documents and if necessary ask permission from your client. Sending this letter along with your request may help explain what you need. The prior Phase 1 studies are all freely available on the GBA website. Please get a copy, take a look, and you will see how the data is handled in the report.

To participate, you must submit a Phase I report electronically to our Task Force Leader, Jerry Samford (Troutman Pepper) Jerry.Samford@troutman.com by October 1, 2020. Appendices to the reports are essential. You may submit several reports if you like, but please try have them authored by different offices for different clients. Please do not try to select what you think might be the "best" reports. Alternative delivery can be made available by contacting Mr. Samford. We would like to have copies of the

proposal associated with the report as well, with all project cost information redacted. One of the components we evaluate is how the proposal and report compare, particularly with regard to any client requested changes/modifications to the scope of the study.

OUR NEXT STEPS

The GBA Environmental Business Committee is responsible for the review effort and report preparation. They will be scheduling the review for October in association with the Fall 2020 semi-annual meeting. The duration of the meeting will depend in part on the number of reports submitted. Past experience suggests a two-day meeting will be necessary. If you would like to participate in the review process, please communicate directly with Jerry Samford at jerry.samford@troutman.com. Jerry will also be happy to answer any questions you might have about submitting reports or the review process.

The GBA Environmental Business Committee and Legal Affairs Committee believe that the standard practice review documents produced in the past have had a positive impact on our member firms and continuing this process is a worthwhile use of resources of member firms and the organization. Please feel free to send any questions you may have to Terry Scanlan, Chair, Legal Affairs Committee at TScanlan@cairncross.com, or to Jerry Samford at Jerry.Samford@troutman.com.

We sincerely hope you will decide to collaborate with us in this effort, and I would be happy to discuss this with you in person if you like.

Thank you for your consideration,

W. Jerrold Samford, P.G.
GBA Environmental Business Council
Chair, GBA Council of Fellows