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Underground Storage Tank Closure/Environmental Assessment: Commonground Blog Post Asks Whether A Data Gap is Considered a Recognized Environmental Condition?

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A September 14th post on the blog Commonground asks if there is a scenario where a Data Gap/Data Failure is considered a recognized environmental condition (“REC”).

The blog provides a forum to discuss a variety of issues related to environmental assessments.

ASTM defines a REC in the E 1527-13 standard as:

... the presence of likely presence of any hazardous substances or petroleum products in, on, or at a property:

1. Due to release to the environment;
2. Under conditions indicative of release to the environment; or
3. Under conditions that pose a material threat of a future release to the environment.

The standard defines a data gap as:

A lack of or inability to obtain information required by this practice despite good faith efforts by the environmental professional to gather such information. Data gaps may result from incompleteness in any of the activities required by this practice, including, but not limited to site reconnaissance (for example, an inability to conduct the site visit), and interviews (for example, an inability to interview the key site manager, regulatory officials, etc.

The September 14th post states in part:

I am working on a Phase I for a site that is a closed UST facility. Impacted soils were removed to below regulatory screening levels. However, groundwater sampling was never performed. The regulatory agency requested groundwater sampling via a boring, but the responsible party petitioned to the State Water Board and this requirement was rescinded and the case closed. I am looking at this now and this Data Gap is considered significant and impacts my ability to provide an opinion on a release or potential release of hazardous substances at the subject property.

The question received several responses.

One response stated:

. . . Here's the question to ask yourself. If the property was tested today, and there was ground water contamination discovered, would the state regulatory agency "open a case?" If the answer is yes, then yes, it is a REC. It is also important to ask when this requirement was rescinded. We've seen one agency "close a release case" and another agency reopen the case many years. . . even decades. . . later. It's NEVER a good idea to have unquantified potential ground water contamination. The state water board's rescinding of the testing in no way absolves the property owners and management of toxic tort liability, and regulatory agencies "reserve the right" to reopen release cases. Boo! This is not a "clean" UST closure.

The author of the original post responded:

. . . Although I don't see how I can call something a REC when I do not have sufficient information to form an opinion. The lack of groundwater analytical data is certainly a significant Data Gap but I can't see calling that a REC.

An author of a different response stated:

A REC is the "presence or likely presence of a release" that would give rise to a regulatory response or action. You clearly have this scenario as best as I can tell. NOT calling it a REC will have lawyers calling if ground water contamination is discovered and you don't call it a REC. . . .

Finally, the author of another response stated:

. . . I think you have several options actually. You can go with a REC as Jim notes above given the "likely presence" of petroleum impacts. You can with an HREC, since the site was "remediated" and the spill closed by the agency. The third option is to call it a Business Environmental Risk, where you state that the spill was closed but GW was never evaluated. This would cover you and toss the ball back to your client (and his risk tolerance) regarding a Phase II. The other thing to consider is Why did the agency rescind the sampling requirement? Were soil impacts minor?? Is the depth to groundwater greater than say 100'?? Was this a release of gasoline or No. 6 fuel oil?? Were there "clean" post excavation endpoint samples? These questions should factor into your evaluation of whether or not the release presents a "likely" impact to GW and whether to go with a REC or something else.

The author of the original post subsequently noted how he planned to present his findings:

As discussed above, groundwater sampling was not performed during historical UST removal and over-excavation activities. A review of data from LUST facilities in the immediate vicinity of the subject site indicates groundwater is present at seasonally fluctuating depths ranging from approximately 5 to 20 ft. bgs. Although groundwater was not encountered during historical over-excavation activities to the maximum depth explored of 18 ft bgs, the likelihood exists that historical seasonal groundwater may have been impacted. As such, by definition, since the presence or likely presence of a release of FHCs to groundwater cannot be ruled out, this condition is considered at REC.

[A link to the post can be found here.](#)