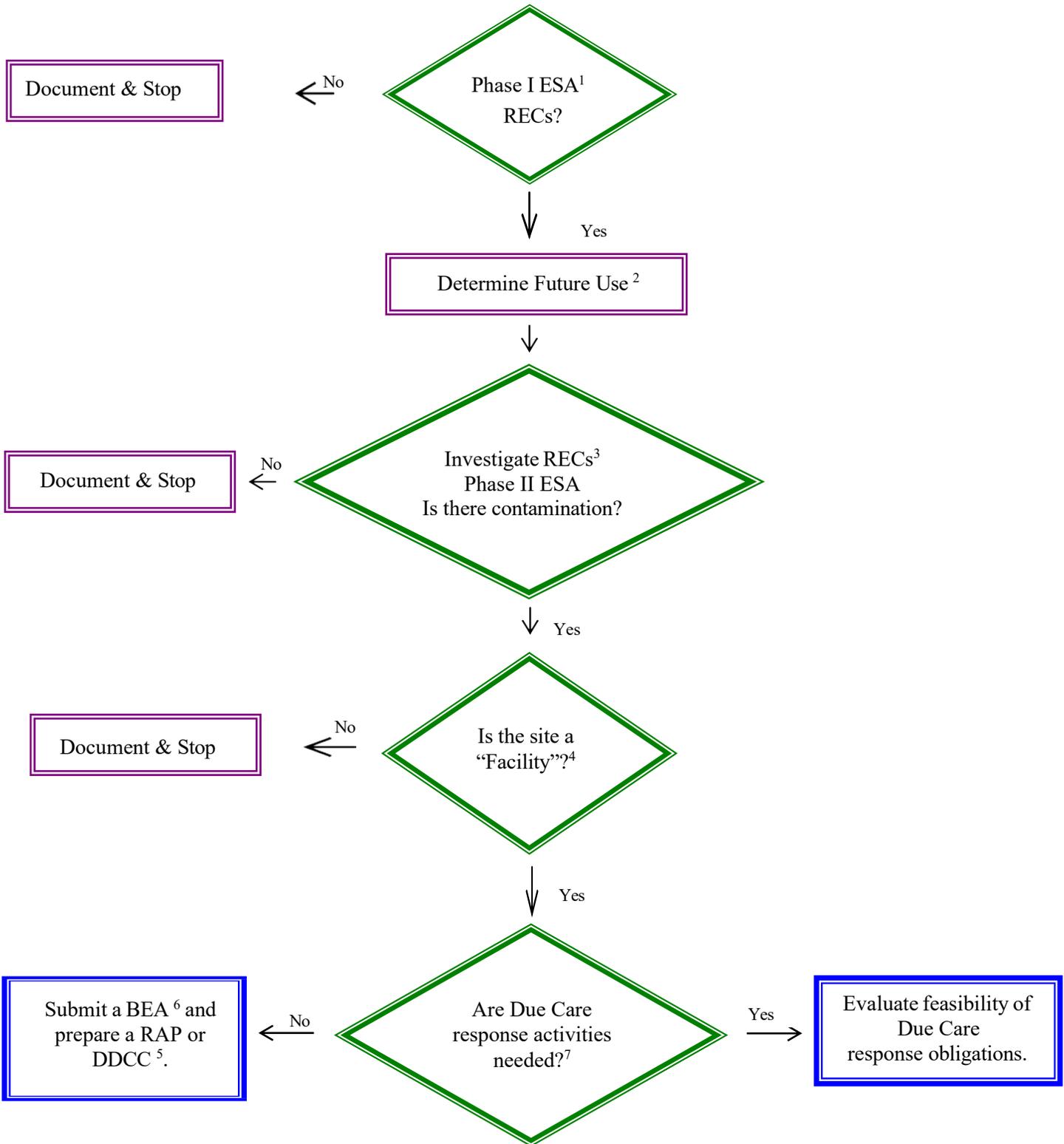




**ENVIRONMENTAL DUE DILIGENCE FOR COMMERCIAL  
REAL ESTATE TRANSACTIONS**





## Environmental Due Diligence for Commercial Real Estate Transactions Flow Chart Explanations

<sup>1</sup> **Phase I Environmental Site Assessment (Phase I ESA):** The purpose is to identify possible sources of environmental concern on the property. The Phase I ESA is necessary to determine potential liability risks. Without demonstrating that a “due diligent” investigation was completed to identify a potential concern by using the latest industry standard (ASTM E1527-21), if an environmental problem is later discovered, subsequent owner/operators may not be protected from liability and may be responsible for clean-up investigations or other costly response actions.

The Phase I ESA does not include sampling at the site. It is a research process that will include a site inspection, property history research, interviews, and regulatory database reviews. A Phase I ESA will conclude whether the site does or does not have “Recognized Environmental Conditions (RECs) or not. If RECs are identified, recommendations for addressing them, often a Phase II ESA Subsurface Investigation, will be given.

<sup>2</sup> **Determining Future Property Use:** An understanding of the intended future property use and associated hazardous substances is necessary in order to prepare for the possibility of pursuing a Baseline Environmental Assessment (BEA) and gathering adequate data that can be used to differentiate contamination caused by past operations versus a new release that may be caused by future operations.

<sup>3</sup> **Investigating Concerns or Phase II ESA:** The purpose is to determine if the RECs identified in the Phase I ESA have resulted in environmental contamination. The information obtained from completing the Phase I ESA should determine the constituents of concern (i.e., petroleum from historical gas station operations, solvents from painting operation, etc.) and the areas warranting investigation. This investigation is called a Phase II ESA Subsurface Investigation, and it typically involves subsurface soil and/or water sample collection and analysis.

The Phase II ESA Subsurface Investigation may also incorporate ground penetrating radar (GPR) to investigate the possible presence of underground storage tanks (USTs). The Phase II ESA may include “investigating other areas of concern,” such as possible contaminant migration onto the site attributable to off-site sources that were identified during the course of the Phase I ESA. Note that, if it can be conclusively demonstrated that existing on-site contamination is caused solely from an off-site source, the property owner is not liable under Michigan P.A. 451 Subpart 201, and no BEA is necessary assuming the property owner did not otherwise cause the release.

<sup>4</sup> **Facility Determination:** If contamination is discovered during the Phase II ESA Investigation, the detected concentrations will be compared to applicable residential cleanup standards. These are cleanup standards established by the State of Michigan that are considered “safe” for residential property usage. If on-site contaminant concentrations are found to exceed these levels, the site will be classified as a “Facility.” If the site is a “Facility”, then, the purchaser may seek state liability protection from existing contamination by completing a BEA and showing they are in compliance with Due Care

<sup>5</sup> **Documentation of Due Care Compliance (DDCC) or Response Activity Plan (RAP)/Response Activities:** DDCC or a RAP is for properties that are found to be a “Facility” based on an on-site release. A DDCC or RAP describes the nature of on-site contamination and what conditions, or response actions have (DDCC) or will be (RAP) taken to protect the occupants/ visitors of the site from unacceptable exposure to those contaminants. In some cases, response activities may be required by a new property owner such as paving over an area of concern or connecting to a municipal water supply.



**<sup>6</sup> Baseline Environmental Assessment (BEA):** The purpose is to provide liability protection for a purchaser or new owner/operator of a property if contamination is discovered such that the property is classified as a “Facility.” The BEA requires only that the site be a “Facility.”

Previously, the BEA was used to demonstrate that if a future release occurred, there exists sufficient documentation to differentiate the new release from contamination present at the time of purchase/occupancy.

The extent of the investigation to support a BEA, beyond showing the property is a “Facility,” is largely the decision of the client and/or their lender. More data generated at the time of completion of the BEA will assist in future determination as to whether or not a release occurred during the client’s ownership/occupancy so that the Michigan Department of Environment, Great Lakes, and Energy (EGLE) can distinguish the historical release from a future release, if necessary to assign cleanup liability.

Upon completion, the BEA must be submitted to EGLE for the purchaser to qualify for liability exemption from preexisting contamination. The EGLE no longer accepts BEAs for review.

**<sup>7</sup>Evaluate Due Care response obligations:** In order to protect occupants/visitors of the site from exposure to known contaminants, “Due Care” response activities may be necessary. These activities commonly include paving over a contaminated area, removing an underground storage tank (UST), restricting access to a portion of the site, or connecting to municipal water. If response activities are needed for the property to be in compliance with Due Care, then a RAP will be prepared to show what steps will be taken. Once the response activities have been completed, a DDCC report is prepared. Complying with Due Care is required upon ownership or occupancy, and a new owner has up to six months to document that they are in compliance with Due Care.