

Consideration of Land Use in Environmental Remedial Actions

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Environmental Cleanup Program

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State of Oregon
Department of
Environmental
Quality

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APPROVED BY: _____
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DATE: _____

Guidance for Consideration of Land Use in Environmental Remedial Actions

Statutory Basis The 1995 Oregon Legislature passed HB 3352, and Governor Kitzhaber signed the bill into law in July, 1995. The revised environmental cleanup law and the associated rules adopted by the Environmental Quality Commission in January, 1997 state that the **Director must consider current and reasonably anticipated future land uses** at a facility and surrounding properties when selecting or approving a remedial action.

Scope and Applicability of Land Use Guidance This guidance provides a flexible framework to collect and evaluate information regarding current and reasonably anticipated future land uses at the facility and surrounding properties. This guidance is intended to be used at cleanup sites that will be going through the remedial investigation/feasibility study cleanup process where the Department will be approving or conducting the cleanup.

A Waste Management and Cleanup (WMC) land use determination is not required until a release has been discovered and further action (including investigation) is needed to address the site. In other words, the WMC land use determination is made only in the context of an environmental cleanup and applies only within this narrow context.

Understanding the current and reasonably likely future land uses, both general and specific, will be a critical element in determining human exposure to risk and selecting protective remedial options. When a risk assessment is conducted, the potential exposures must be determined and must be a reasonable estimate of the actual exposure likely to occur. Information about land use and specific activities on or near the site helps to focus the risk assessment on exposure pathways that are likely to exist.

Limitations of this Guidance

This guidance is on how to make a land use determination for use in the risk assessment and remedy selection process. While land use may be relevant to making other determinations, the particular information gathering process described in the balance of this guidance may not be necessary for:

- Cleanups conducted under the soil cleanup rules (SOCLEAN);
- Early “scoping” phases of environmental cleanup or removals;
- Evaluations related to ecological receptors; or
- Determinations of beneficial water use.

In each of the above instances, the reader is directed to the applicable rules and guidance.

What must be considered?

In selecting or approving a remedial action, the Director must take into account:

- current land uses;
 - zoning, comprehensive plan or other land use designations;
 - land use regulations from any governmental body having jurisdiction;
 - concerns of the facility owner; the neighboring owners; and the community; and
 - other relevant factors.
-

Who provides the information to DEQ?

Whoever is conducting the Remedial Investigation is obligated to gather appropriate, sufficient information and submit it to DEQ. DEQ will provide sample formats for the inquiries made of local government or surrounding property owners (see the forms in the Appendices). If the Responsible Party (RP) or the person making the inquiry does not want to use the forms, the party may gather the information in an alternative manner as long as it is adequately documented and DEQ can verify the information from the documentation.

How do land use determinations fit into the cleanup process

The following table describes the typical cleanup process and how and when land use determinations are factored into the overall process:

Stage	Description
1	A release of a hazardous substance is reported at a site.
2	A site investigation or preliminary assessment or equivalent investigation determines that some additional action is required at the site.
3	A work plan is developed and Remedial Investigation is conducted with DEQ oversight. The site is characterized looking at <u>all</u> media and appropriate transport and fate analysis to determine current and reasonably likely areas of contamination. The locality of the facility is initially defined and may be refined, if necessary, as information is gathered on the current and reasonably likely future land uses.
4	The Responsible Party (RP) gathers appropriate documentation detailing the current and reasonably likely future land uses. Uses include both the general classifications (e.g., industrial) and the specific use (e.g., metal finishing).
5	The land use documentation is presented to DEQ according to a negotiated scope and schedule. DEQ reviews the documentation, discusses the results with the RP as necessary, and provides a written response as to its preliminary land use determination.
6	The preliminary land use determination is incorporated into the Remedial Investigation, Beneficial Water Use Determination, Risk Assessment, and Feasibility Study.
7	A remedy is recommended for public notice and comment which may include comments on the appropriateness of the land use determination.
8	The remedy is selected and approved by the Director. At this point, the DEQ land use determination is final.
9	The remedy is implemented including necessary institutional controls.

Definitions

The following terms will help to define the level of effort required to determine land use:

Subject property boundaries: the recorded legal description of the property where the release has occurred.

Facility or Site: any area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.

Facility is not defined by legal property boundaries or where physical structures are, but is determined by where the contamination is. A release of a hazardous substance may create a **facility** that is completely within the legal property boundaries of the responsible party, or, conversely, a single **facility** may cut across numerous property boundaries.

Locality of the facility: any point where a human or an ecological receptor contacts or is reasonably likely to come into contact with facility-related hazardous substances. The **locality of the facility** takes into account the likelihood of the contamination migrating over time so the **locality** is typically larger than the **facility**.

Region: a geographic area in proximity to the **locality of the facility** having characteristics that will be relevant to determining the current and future likely uses in the **locality of the facility**. The **region** is not bounded by either the extent of the contamination or a prescribed distance from the legal property boundaries. The **region** is evaluated when predicting future uses when uses may be in transition in or near to the **locality of the facility**. The **region** is not intended to be a city-wide, county-wide, or other geographically-broad area. The **region** may be an area bounded by some geographical feature shared by the **locality** (e.g., an industrial park bounded by three major streets and a river), but the key element is whether it is relevant to current or future uses in the **locality of the facility**.

What does one need to know about the extent of the contamination to properly bound the inquiry on land use?

The scope of the land use inquiry will be defined primarily by the nature and extent of the contamination. The first task, therefore, is to adequately characterize the site and determine the **locality of the facility**. In order to know where a receptor is reasonably likely to come into contact with a hazardous substance, one must first determine where the hazardous substances are and what migration pathways exist or may exist. One can then predict or model where the contamination might migrate to and what exposures might be likely. One must evaluate the reasonably likely land uses for all of the properties within the **locality of the facility**.

Is there one standard level of inquiry for all sites?

The level of inquiry and documentation will vary from site to site. The least documentation may be where a site has soil contamination only; where all potential exposures are limited within the **subject property boundaries** (i.e., the **locality of the facility** is contained within the **subject property boundary**); and where there are no relevant regional influences. More complex sites or areas with multiple or changing land uses may require more effort.

What are the minimum requirements for inquiries and documentation?

At a minimum, the responsible party must provide DEQ with the following:

1. Current and reasonably likely future uses of all the properties in the **locality of the facility**. These uses may be gathered from the property owners/occupants by personal visit, by letter, by field survey, or by other clearly documented methods.
 1. Current zoning and comprehensive plan maps and applicable regulations provided by the local jurisdiction for the properties within the **locality of the facility**.
 2. Inquiries made and responses as to whether there are **regional** trends that are relevant to land uses and activities in the **locality of the facility**.
 3. A summary of the results and conclusions along with supporting documentation as to what the current and reasonably likely future land uses are for each parcel within the **locality of the facility**.
-

What conditions may require additional documentation?

The requirements for documentation may be greater when the contamination is more extensive (involving multiple properties), when there is greater uncertainty as to the future land use, or when there are relevant regional factors. For example, if the locality of the facility involves a large number of properties and community resources such as a park or school are affected, additional supporting documentation may be required. The responsible party is strongly encouraged to consult with DEQ to determine the appropriate breadth of the inquiry which may include the following in addition to the minimum requirements:

- Statements as to regional trends that may affect current and future uses of properties in the **locality of the facility**;
- Proposals/concerns from community organizations (e.g., neighborhood planning groups; resource protection groups);
- Plans or documentation regarding use from other governmental agencies (e.g., regional government); or
- Statements regarding land use if a public meeting about the site is held.

Who must be involved when considering land use?

Whenever the Director is considering land use, the Director shall consider the local jurisdiction's land use zoning, comprehensive plan designations, and current land uses. Information obtained from the planning department should include the following:

- what is the current or most recent specific property use?
- what is the zoning designation(s), including overlay zones?
- what is the comprehensive plan designation?
- are there existing conditional uses or non-conforming uses?
- are there proposed amendments to the comprehensive plan or zoning?
- are there overlapping jurisdictions?
- are there environmental protection zones/regulations?

Note: The Appendix provides optional sample inquiry forms.

Any information from the owners/occupants of all properties within the **locality of the facility** regarding the use of their property must be considered by the Director.

Additionally, the Director must consider regional conditions that are relevant to current and reasonably likely future uses.

Once the information is gathered, how will DEQ evaluate it?

DEQ will always start with the premise that remediation will be protective of human health and the environment for current and reasonably likely future uses of the land. For example, if a site is industrial and is likely to remain industrial, the site will be protected or restored to a level where industrial activities could take place without exceeding the acceptable risk level. Reaching this protective level may involve active remediation measures (e.g., treatment) or more passive measures such as engineering or institutional controls. In all cases, the exposures and pathways will be managed to ensure protective levels.

The current use, if there is an active one, often is the best guide for future use. If the current use is consistent with zoning, comprehensive plan designations, and surrounding uses, it is likely current uses and reasonably likely future uses will be the same. However, there are cases where a very specific current use is unlikely to extend into the future. If, for example, there is little infrastructure or other economic investment in the property, it is reasonable to assume the site may be re-developed into some other specific use that is consistent with the general uses allowed by the local ordinances. Likewise, there may be regional trends that run counter to current use and current zoning that may result in future uses that are different than current uses.

Property owners within the **locality of the facility** should have their property protected or restored to its reasonably likely use. If, for example, the use of the property is residential but the source property is industrial, the residential property owner should have his property restored/protected for residential use.

Community concerns have more weight if there are current plan revisions or resource recovery plans for properties within the **locality of the facility**. Speculation or the mere desire for a facility to be used differently in the future has less weight, but concerns as to how the remedial action will affect the community must be given fair consideration.

In all cases, the DEQ project manager will look at all relevant information as to what has happened, what is currently happening, and what seems likely to happen at the site. No one single element will by itself determine what is reasonably likely.

Institutional controls may be required.

When DEQ makes a determination about land use and likely exposure, DEQ may require certain measures to preserve the assumptions that went into the determination. For example, assume an area is zoned for “mixed use” (commercial/residential), and a responsible party wishes to clean up an abandoned commercial property for future, unspecified commercial use. DEQ would require some form of institutional control on the property to limit uses for specified commercial purposes only. The zoning code by itself would not be enough. In a mixed use zone, the land could be used for residential purposes or high exposure commercial purposes. Institutional controls may be employed to ensure that the remedy is protective for the proposed use, and the institutional controls will be in place should the zoning code change.

What Does the Land Use Determination Determine?

The land use determination is only an intermediate step – certain factors regarding receptors and pathways can now be supplied to the risk assessment, and, if baseline risk exceeds the acceptable risk level, a protective remedy can be selected. Land use does not dictate the risk assessment; it is just a part of the information needed to make the risk assessment adequately reflect risks at the site.

Neither the Director’s final determination nor the project manager’s preliminary determination is a “land use decision” by the local jurisdiction. Information gathered from a local jurisdiction is a ministerial, information-gathering action and does not constitute a “land use decision.” DEQ’s determinations are environmental cleanup decisions and these considerations of land use are not binding or appealable as are land use decisions by governing bodies. Additionally, these environmental cleanup decisions do not go through the “land use compatibility statement” (LUCS) process.

Additional information.

See the following Appendices for examples for application of this guidance. Also see related guidance on such issues as risk assessment, beneficial water use determinations, feasibility studies, or hot spots. For specific questions about this guidance, contact Brooks Koenig at (503) 229-6801.

Appendices

Example 1

Example 2

Sample Land Use Confirmation Form

Sample Letter to Planning Jurisdiction

Sample Letter to Citizen

Sample Post-card Survey Form

Example 1

Contamination has been discovered on a piece of vacant property in Portland which is zoned “heavy industry.” The contamination is limited to soils only, and the sources of the contamination are clearly delineated on site. All contamination and reasonably likely future exposures (the **locality of the facility**) is contained within the **subject property boundaries**. All immediately adjacent properties are zoned industrial including a vacant lot next door. The region is an industrial sanctuary, and inquiries indicate there are no plans for or trends toward other uses.

What is the minimum documentation required for this site?

As with any site where land use is being considered, this will require the following documentation:

1. Confirmation as to what the current and reasonably likely future uses (both general zoning use and specific activity use) are on all properties within the **locality of the facility**. Information may be gathered by personal visit, letter, field survey or other clearly documented methods.
 2. The local jurisdiction’s zoning map, comprehensive plan designation, and applicable regulations. The responsible party should gather the information from the local jurisdiction or have the local jurisdiction complete the questionnaire.
 3. Documentation as to inquires made regarding the presence of any regional trends relevant to land use within the **locality of the facility**.
 4. A summary of the land use conclusions along with the supporting documentation.
-

DEQ analysis: Since the property is vacant, DEQ would start with the premise that any industrial use allowed outright in the industrial zone forms a pool of reasonably likely uses. In this instance, the specific land use (vacant/no use) cannot be factored into a risk assessment. Since the property is vacant with no active use and no proposed use, DEQ will assume that some form of industrial use is reasonably likely. DEQ will recommend the use of an appropriate industrial scenario risk assessment. This risk assessment may be supplanted by a specific-use risk assessment if the Responsible Party or others can provide evidence of the specific use(s) and exposures.

Uses that are merely possible (e.g., those that are allowed only with special limitations or by means of a conditional use process) normally would not be considered to be reasonably likely without other supporting information such as regional trends. These limited or conditional uses would be the exception rather than the rule for determining reasonably likely future uses. Likewise, in those categories where the activity is prohibited by the code, DEQ will typically rule out such use as reasonably likely.

What land use gets factored into the risk assessment?

Industrial use will be used in the risk assessment, but the specifics of that should be left to the risk assessment team. Once the details of the exposure assumptions are established, DEQ may include institutional controls in the selected remedy to preserve the assumptions and to assure the protectiveness of the remedy.

Example 2

The owner of a former auto service shop wants to sell his property. He knows from past practices there was contamination on the site: there were both leaking underground storage tanks that held petroleum products and an old “dry well” where some chlorinated solvents had been disposed. The owner has conducted some preliminary work to characterize the site, and he has come to DEQ’s Voluntary Cleanup Program for oversight so he can sell his property with a DEQ-approved cleanup. The responsible party wants to clean up the site quickly, and he wants to use an industrial/commercial land use determination for the baseline risk assessment and remedy selection phases. The owner has stated that the land use is clearly commercial: the parcel was used for commercial use; it is zoned for commercial use; and he intends to sell it for commercial use.

The site is located within a recently annexed part of Portland at a corner of a major arterial street and a minor collector street. The adjacent property on the arterial street is a bookstore located in a vintage bungalow; other properties along the arterial are a mix of residential and commercial. There is a small creek on the back side of the site. The creek floods frequently and many abutting properties have wetlands on their residential property.

The property is zoned commercial. Before the area was annexed, the county had zoned all property along the arterial as commercial and all property on the collector as residential as many of the residences along the arterial were converting to commercial use. The city kept the zoning the same when the area was annexed although there was controversy in the neighborhood regarding the future fate of the neighborhood.

The contamination at the site has reached groundwater. The petroleum plume is under the adjacent bookstore, and both the petroleum and the solvent plume are discharging into the creek. It appears as if only the upper aquifer is contaminated, and almost everyone in the area is on City water and sewers.

What are the minimum requirements for documentation in this example?

First, the owner must make inquiries as to the current and reasonably likely future land use of all properties in the **locality of the facility**. The inquiries may be by personal visit, letter, field survey or other method. The responsible party must provide information on the type of inquiry and responses to DEQ. (Sample cover letter and response card are in the Appendix.)

Next, land use information must be obtained from the local planning jurisdiction for all properties in the **locality of the facility**. The sample questions for the local jurisdiction are on the form in the Appendix. Actual current specific uses are required in addition to what the zoning map and comprehensive plan indicate.

Third, inquiries must be made regarding regional trends/patterns to determine if there are relevant factors that may affect land use and exposures.

The fourth step is to present the summary and supporting documentation for DEQ review or to consult with DEQ if additional inquiry is needed.

**Data Results
and Conclusion**

Let us assume the inquiries lead to the following responses:

All the properties in the locality of the facility intend to continue their current specific uses. Both the current and reasonably likely future uses will remain the same.

(The separately-conducted beneficial water use determination demonstrates that no one uses the shallow aquifer, and neither the creek nor the wetlands are adversely affected by the discharge.)

The local planning jurisdiction documents that all property on the arterial is both used for and zoned as commercial; all property on the collector is residential. There are no environmental overlay zones.

The responsible party sought out the following regional interests and learned:

- The Neighborhood Association Land Use Committee has no plans or proposals for a change in land use;
- The “Friends of the Creek” expressed no regional concerns about the proposed land and water use; and
- The Development Commission states there are no discernible regional development patterns/trends.

The RP provides a summary report and supporting documentation showing:

1. The current and reasonably likely future use is commercial;
2. The local jurisdiction confirmation of zoning and planning designations;
3. Other governmental, private environmental organizations, or citizen groups have no documentation that would indicate other than the commercial designation.

This preliminary land use determination would now be incorporated into the risk assessment where exposures and pathways consistent with commercial exposures would be used.

March 28, 2002

[Local Planning Jurisdiction
1234 Step Ave.
Town OR]

RE: Land Use Confirmation Report

Dear [Specific Name]:

The Oregon Department of Environmental Quality (DEQ) and [insert name of responsible party] are conducting an investigation of a release of hazardous substance(s) at and in the locality of the facility described below. In order to accurately determine what risks, if any, there are to people and ecological receptors, DEQ must consider what the current and reasonably anticipated land uses and beneficial uses of water are in the locality of the facility. We will consider land use at both the risk assessment stage and at remedy selection. In addition to the information provided by the local jurisdiction, we will consider the concerns of the facility owner, neighboring owners, and the community. If you have questions regarding the information desired, please call [Project Manager @ (5**) 234-5678].

Site Information:

(Completed by DEQ or Responsible Party)

(Note: By DEQ definition, a "facility" is wherever contamination comes to be and may include more property than the "subject property boundary." The "locality of the facility" includes, areas where contamination has migrated and where it might migrate and expose humans or ecological receptors.)

Name of Applicant: _____

Subject Property Boundary Address: _____

Facility Address(es), if any: _____

Locality Address(es), if any: _____

Legal Description(s) _____

Tax Account Number(s) or
State ID # Map(s) _____

Quarter-section Map Number(s): _____

What are the current use(s), if any and are known, of the properties?

(Describe the activities on the subject property and identified properties with more detail than the zoning designation.)

What are the proposed use(s), if any and are known, of the properties?

(Describe the proposed activities on the subject property and identified properties with more detail than the zoning designation.)

TO BE COMPLETED BY PLANNING AGENCY

What is the current zoning for the source property and other properties described above?

(Include all overlay zones and maps.)

Are the current use(s) allowed under current zoning?

(Always address subject property and include list of allowed uses for properties in locality of facility.)

Are the current use(s) conditional uses?

(If applicable, provide short history for source property; indicate CUs for other properties in locality of facility.)

Are the proposed uses, if any, allowed outright or conditionally for these properties?

(Always address source property and include list of allowed uses for properties in locality of facility.)

Are the comprehensive plan designation(s) the same as current zoning?

Is there a community plan in progress?

(If yes, is the plan consistent with the current uses, zoning, and comp plan?)

Are there Goal 5 resources protected or known natural hazards in the locality of the facility?

Prepared by: _____

Title: _____

Attachments: Zoning Map

Code excerpts

Other: [list]

Note: It is not a requirement to use this sample letter or format, but a similar level of information should be supplied and similar facts gathered. This sample letter addresses both land use and water use issues. If only land use issues are involved, one would need to edit out the water use references.

[Date]

[Ms. Planner]
City Planner
City of [Local] Planning Department
[Address]
[City, State, Zip]

RE: Remedial Investigation and Feasibility Study
at [Facility]

Request for Information on:

1. Current and Reasonably Likely Future Land Use
2. Current and Reasonably Likely Future Beneficial Use of Surface Water and Groundwater

Dear Ms. [Planner]:

The Department of Environmental Quality (DEQ) is overseeing investigation and cleanup/remediation of [Facility and address] [The Responsible Party] is conducting a Remedial Investigation and Feasibility Study (RI/FS) of the site and affected surrounding areas under a Consent Order with DEQ.

As part of the RI/FS, [the Responsible Party] must evaluate releases of hazardous chemicals from their site into the environment, including releases to soil and water, and assess what risks of exposure to these chemicals may pose to humans and/or the environment. As part of their risk evaluation, [the Responsible Party] must compile information on the current and reasonably likely future land uses and current and reasonably likely future beneficial uses of surface water and groundwater in the locality of the site. This information will be used to determine what level of remediation will be required. The information requested includes the following:

1. current and reasonably anticipated future land use designations in the locality of the site,
2. any reasonably likely amendment changes to currently adopted land use plans or zoning, and
3. current and reasonably likely future beneficial uses of surface water and groundwater in the locality of the site.

Following completion of the RI/FS, [expected completion date], DEQ will select a proposed cleanup remedy and will initiate a public comment process. A map of the general area is attached, along with a copy of the most recent Environmental Cleanup Project Bulletin describing the site, hazardous substances that have been released to the environment, and the current status of the RI/FS work.

As the local land use agency, your input is sought this matter. Enclosed is a land use information form which we would like you to complete and return to us not later than [date]. While this review is not a "Land Use Compatibility Statement" (LUCS), other jurisdictions have handled them in a similar fashion including charging the same fee.

Please call me at (503)#-# if you have any questions or need additional information.

Sincerely,

DEQ Project Manager

Attachments: Map of Area, Cleanup Bulletin, Land Use Information Form

cc:

Note: It is not a requirement to use this sample letter or format, but a similar level of information should be supplied and similar facts gathered. This sample letter addresses both land use and water use issues. If only land use issues are involved, one would need to edit out the water use references.

[Date]

Mr. & Ms. Citizen
Address
Portland, Oregon

RE: Remedial Investigation and Feasibility Study at
[Facility]

Request for Information on:

1. Current and Reasonably Likely Future Land Use
2. Current and Reasonably Likely Future Beneficial Use of Surface Water and Groundwater

Dear Mr. & Ms. Citizen:

The Department of Environmental Quality (DEQ) is overseeing investigation and cleanup of [facility and location]. [The Responsible Party] is conducting a Remedial Investigation and Feasibility Study (RI/FS) of the site and affected surrounding areas under a Consent Order with DEQ.

As part of the RI/FS, [the Responsible Party] must evaluate chemicals that have come from their site, wherever they may be present in soil and water. [The Responsible Party] must assess any risk of exposure these chemicals may pose to humans and the environment. As part of their risk evaluation, [the Responsible Party] must compile information on the current and reasonably likely future land uses and current and reasonably likely future uses of surface water and groundwater in the locality of the site. This information will be used to determine what level of remediation will be required.

As a property owner/user within the locality of the facility DEQ would like your input on land and water use associated with your property. Your property [physical relationship to site]. DEQ is seeking the following information:

1. historic land, surface water and groundwater uses,
2. current land uses and beneficial uses of surface water and groundwater, and
3. reasonably likely future land uses and beneficial uses of surface water and groundwater.

To make your reply easier, DEQ has prepared the enclosed response postcard and would appreciate if you would complete the postcard and return it by [due date]. DEQ will consider

your comments, along with those of agencies and other neighborhood property owners, to ensure that the cleanup remedy to be proposed by the responsible party will be protective.

When [the Responsible Party] has completed their RI/FS, [expected date], DEQ will recommend a cleanup remedy and will initiate a public comment process. A map of the general area is attached, along with a copy of the most recent Environmental Cleanup Project Bulletin describing the site, hazardous substances that have been released to the environment, and the current status of the RI/FS work.

Please call me at [phone number] if you have any questions or need additional information.

Sincerely,

DEQ Project Manager

Attachments: Area Map, Cleanup Bulletin, land/water use response form

Note: This letter addresses both land use and water use issues. If only land use issues are involved, one would need to edit out the water use references.

Property:			
Your Telephone Number for Contact by DEQ:			
<i>Check all of the boxes below that apply to your property and return by mail to DEQ</i>			
Historic	Current	Planned	Land Activity/Use
			Residential
			Commercial
			Industrial
			Agricultural
			Recreational
			Other (describe)
			Water Uses
			Drinking Water
			Irrigation/Landscape
			Industrial Process
			Recreational
			Aesthetic (decorative)
			Wildlife
			Other (describe)
			Water Sources(s)
			Municipal Supply
			Small Supplier (<5)
			On-site well
			Surface water
Additional Comments?			
For more information contact: Project Manager, Address, Phone			