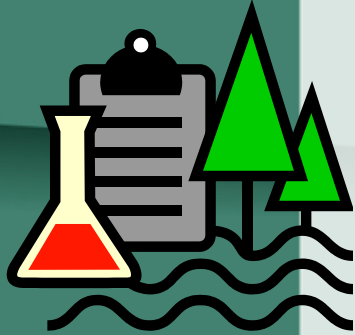


## ENVIRONMENTAL DUE DILIGENCE: MAKING SURE YOUR CLIENT IS “INNOCENT” OR “BONA FIDE”



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# CERCLA (Superfund) In a Nutshell

Comprehensive Environmental Response, Compensation and Liability Act (Superfund Law), 42 U.S.C. § § 9601, et seq.

- Imposes strict liability for contamination (liability without fault)
- Imposes liability that is joint and several (responsible for anything, liable for all)
- Landowner who did not spill anything or cause the release can be liable, unless “innocent” (did not know, had no reason to know)
- Amended in 2002 (brownfields) to protect knowing buyers of contaminated property (“bona fide” prospective purchasers)



# Typical Types of Buyers

1. Risk Adverse Buyer: Performs due diligence, learns there are environmental concerns and decides to walk away
2. Happy Buyer: Performs due diligence, learns there are no environmental concerns and becomes an “innocent landowner”
3. Sophisticated Developer Buyer: Performs due diligence, identifies environmental concerns, thoughtfully manages them, and becomes a “bona fide prospective purchaser”



# What is environmental due diligence?

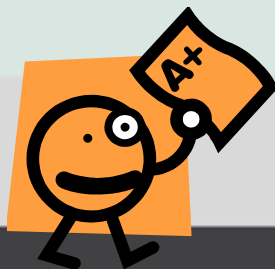
- Phase I Environmental Site Assessment (non-invasive - records, conversations, and a walk through)
- Phase II Environmental Site Assessment (invasive – soil borings, groundwater testing, vapor samples, sediment samples, surface water samples, etc.)



# Impact of Inadequate Due Diligence

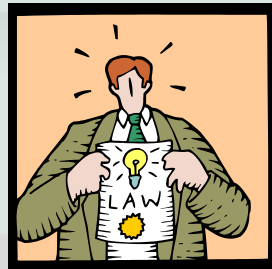
If the buyer will be asserting an “innocent landowner” or “bona fide” prospective purchaser defense, the Phase I ESA must be perfect.

- An inadequate Phase I ESA makes the purchaser not “innocent” (no contamination found) or not “bona fide” (contamination found).
- For contaminated property, the failure to identify and implement “**appropriate care**” makes the purchaser not “bona fide.”



# Sources of Phase I ESA Authority

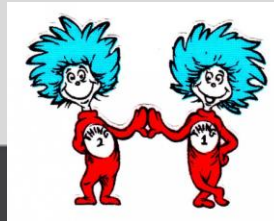
- EPA regulations at 40 CFR 312
- ASTM E 1527-05 of E 1527-13 standards
- Federal Register publication of All Appropriate Inquiries rule, 70 FR 66070-66113



# What Do Lawyers (and Judges) Look For In Environmental Due Diligence?

The 18 Things That Matter The Most:

- For the Phase I ESA, there are 10 things to look for.
- If knowingly buying contaminated property and want the bona fide prospective purchaser defense, there are 8 more things to look for.



# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 1. Environmental Professional

- PE or PG and 3 years relevant experience
- Licensed by state to perform AAls
- Bachelors degree or higher and 5 years experience
- 10 years experience

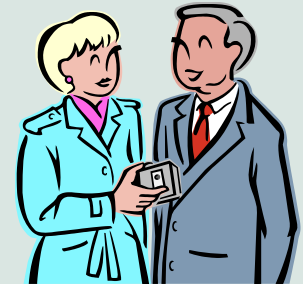




# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 2. Interviews

- Owners, operators, and occupants
- Current and past facility managers
- Past owners, operators and occupants
- Employees of past and current occupants
- For abandoned properties, owners and operators of neighboring properties



# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 3. Historical Records

- Look back to as far back as property contained structures or to time first time the property was used.
- Types of records: aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.



# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 4. Environmental Cleanup Liens

- Search for existence liens filed or recorded under federal, state, local or tribal law
- Records obtained by the person for whom report is being prepared may be provided to the environmental professional



# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 5. Review Government Records

- Databases of government records
- Government records
- Federal, state, local or tribal
- Subject property and adjoining properties
- Records of reported releases and investigation reports
- Records of activities that may cause contamination – landfill, storage tanks, waste handling
- CERCLIS records
- Public health records



# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 5. Review Government Records (cont.)

- Registries of engineering controls, land use controls, institutional controls
- Records of releases or threatened releases on nearby properties
- Records of nearby NPL sites
- Records of nearby leaking storage tanks sites
- Records of RCRA generator sites
- Distance of nearby release sites relevant and considers: nature of release, geology, land development density, property type, past use, migration pathways

# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 6. Site Inspection

- Visual inspection of facility and locations where hazardous substances may have been used, stored, treated, handled, and disposed
- Visual inspection of adjoining facilities from the subject property line
- Visual inspection must be performed and cannot accept seller denial of access



# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 7. Specialized Knowledge or Experience

- Buyer's knowledge of the subject property
- Buyer's knowledge of area surrounding subject property
- Buyer's knowledge of conditions of adjoining properties
- Any other experience
- American Nat'l Bank v. Harcross, 1997 WL 281295 (N.D. Ill.)



# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 8. Purchase Price

- Property being sold for less than the market value, because the seller knows the property is contaminated
- Deal is too good to be true





# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 9. Commonly Known or Reasonably Attainable Information

- Information generally known about the property in the local community
- Current owners or occupants
- Local and state governmental officials
- Other persons in the community
- Local newspapers, websites, organizations, libraries, historical societies
- Hemingway Transport v. Kahn, 74 FR 148 (Bankr. D. Mass. 1994) – “had [defendants] exerted a modicum of effort, ... would ... inspect further”



# Ten Criteria for All Appropriate Inquiries (Must Be in the Phase I ESA Report)

## 10. Degree of Obviousness

- Consideration of the totality of information collected
- Foster v. US, 922 F.Supp. 642 (D.D.C. 1996) – cursory visual inspection, soil stained, in run-down industrial area, and did no testing – not an “innocent landowner”
- The All Appropriate Inquiries process does not require sampling, but in some cases, it is obvious that sampling should be performed.

**DUH!**

# 10 Phase I Environmental Site Assessment Requirements under 40 CFR § 312

1. Performed by an Environmental Professional
2. Interviews with Knowledgeable Persons
3. Review of Historical Records
4. Review for Environmental Cleanup Liens
5. Review of Government Records
6. Site Inspection and Walk-Through
7. Consideration of an Specialized Knowledge
8. Consideration of Purchase Price
9. Consideration of Any Commonly Known or Reasonably Obtainable Information
10. Degree of Obviousness

Phase I

# 8 Bona Fide Prospective Purchaser (“BFPP”) Requirements under 42 U.S.C. § 9601(40)

1. **Disposal** of hazardous substances occurred **before purchase**
2. Buyer made **all appropriate inquiries** into property condition before purchase
3. Buyer provided required notices concerning hazardous substances
4. Buyer exercised **appropriate care** with respect to hazardous substances
5. Buyer complied with institutional controls for hazardous substances
6. Buyer cooperated and assisted response action personnel
7. Buyer complied with EPA information requests
8. Buyer not related to person potentially liable for response costs



# *PCS Nitrogen v. Ashley II of Charleston*, 714 F.3d 161 (4<sup>th</sup> Cir. 2013)

- Ashley II purchased a property with a long history of industrial use. Redevelopment plan was mixed-use.
- Ashley II knew the property was contaminated.
- In litigation that followed, Ashley II said it was not liable.
- Ashley II said it was a “bona fide prospective purchaser” and met the eight requirements.

# *PCS Nitrogen v. Ashley II of Charleston*

- Ashley II ran into trouble with “appropriate care” (BFPP criterion 4)
- What is “appropriate care” – take reasonable steps to:
  - Stop any continuing release
  - Prevent any threatened future release
  - Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance
- These are the buyer’s “continuing obligations”

# *PCS Nitrogen v. Ashley II of Charleston*

Ashley II “did not take the ‘reasonable steps to ... prevent any threatened future release’ ... that ‘a similarly situated reasonable and prudent person would have taken...’ ”

Why did the court find Ashley II failed to exercise “appropriate care”?

- Ashley II did not timely clean out and fill sumps
- Ashley II did not monitor and address a debris pile
- Ashley II did not maintain a crushed rock cover on part of the site

# *Voggenthaler v. Maryland Square, LLC,* 724 F.3d 1050 (9<sup>th</sup> Cir. 2013)

- Maryland Square purchased property with known PCE contamination.
- Before purchase, Maryland Square hired Entrix, Inc. and an attorney to review Nevada DEP files.
- After the purchase, Maryland Square hired an environmental contractor to remove a building from the property.
- In litigation brought by neighbors, Maryland Square was alleged to have exacerbated the contamination through its building destruction activities.
- Maryland Square submitted to the court statements prepared by an expert explaining its response to the contamination.



# Voggenthaler v. Maryland Square, LLC

- Court found that Maryland Square did not establish BFPP status.
- “The submission does not indicate that Maryland Square took any remedial steps, such as removing the soil after demolishing the building...”
- “Maryland Square **failed to limit human exposure to a contamination already present.**”
- Identified “no steps that it took to remove the contaminated soil or limit the spread of PCE. NPDE was then forced to remove the contaminated soil six years after the building was destroyed...”
- Did not establish that it fulfilled “**the numerous regulatory requirements for making appropriate inquiries....merely state[d] that Maryland Square retained Entrix, Inc. to review files and prepare a report.**”

## ***3000 E. Imperial, LLC v. Robertshaw Controls Co., 2010 WL 5464296 (C.D. Cal. Dec. 29, 2010)***

- Knowingly bought contaminated property in late 2006 and worked on environmental issues in cooperation with California environmental agency.
- Environmental consultant sampled contents of USTs in May of 2007, reported TCE detected in samples in September 2007, removed contents of USTs to 55 gallon drums in October 2007.
- Did not excavate and remove the tanks until a couple years later. Defendant said Plaintiff should have excavated USTs at the time, but the court found Plaintiff acted reasonably to obtain BFPP status.
- “Since Plaintiff had the USTs emptied soon after learning that they contained a hazardous substance, the Court finds that the Plaintiff took reasonable steps to stop any continuing leak or to prevent any future leaks of TCE from the USTs.”

***SPC Limited Partnership, LLLP v. Sparrows Point, LLC,***  
**2017 WL 3917153 (D.Md. Sept. 6, 2017)**

- Issue in this case was whether the BFPP lost that status by engaging in disposal after the acquisition. (BFPP criterion 1)
- “[Plaintiffs] argue that the passive migration of benzene through groundwater ... constitutes a current ‘disposal’....this is not a ‘disposal’”
- Also, Defendant was not sufficiently affiliated with a liable party. (BFPP criterion 8)

# *Von Duprin LLC v. Moran Electric Service, Inc.,* 2019 WL 535752 (S.D. Ind. Feb. 11, 2019)

- Defendant claimed BFPP status for three parcels of property.
- The Former Ertel Facility
  - Leased facility from 2007-2013, and purchased in 2013
  - Due diligence done in 2013
  - Court said was an operator since 2007, and not a BFPP.
- The Zimmer Parcel
  - Phase I criteria not met
  - “did not make the necessary and required inquiries with the owner of the parcel”
  - “does not have the required Environmental Professional certifications”
- Former Moran Facility
  - Court was satisfied that because Defendant acted on and implemented the recommendations of a Phase II ESA; it was a BFPP for this parcel.

# ***Cranbury Brick Yard LLC v. United States,*** **2018 WL 4828410 (D. N.J. Oct. 3, 2018)**

- Plaintiff bought a brownfield site and was a BFPP at the time of purchase.
- During the construction activities and associated cleanup work, the contractors hit a UST.
- Contaminated soils associated with the storage tank incident were mixed with noncontaminated soils and used as fill on the site.
- “CBY cannot demonstrate it is a BFPP because disposal took place at the Site during its ownership as defined by 42 U.S.C. § 9601(40)(A).”

# *Cranbury Brick Yard LLC v. United States*

- Can a small release that happens in connection with actual cleanup activity being performed by a developer be considered a “disposal” after the purchase? Is this what Congress meant?
- Case is on appeal at the Third Circuit Court of Appeals, Case No. 18-3287.
- CBY’s brief argues “cleanup operations necessarily involve moving and safely disposing materials and, as here, sometimes result in discharges that are cleaned up in the ordinary course”
- CBYs’ brief argues the “all disposal” requirement should be read alongside the “appropriate care” requirement in context with the purpose of CERCLA’s brownfields amendment.

# Questions?

Need a Copy of Presentation or Article?

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