

# All Appropriate Inquiry: Blackboard of Dreams and Fears

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I. INTRODUCTION .....	95
II. PHASE I DO'S AND DON'TS .....	97
III. USES OF PHASE I.....	99
IV. TWISTS AND TURNS.....	101
V. THE SCOPE OF DIFFERENT CERCLA CLEAN-UP AAI EXEMPTIONS .....	104
VI. WHAT DO THE USERS DO WITH PHASE I? .....	106
VII. WHAT DOES CLEANUP ENTAIL?.....	108
VIII. CONCLUSION—A LAWYER'S ADVICE TO CLIENTS.....	109
APPENDIX .....	112

## I. INTRODUCTION

All appropriate inquiry or AAI is a federal due diligence term for a report used in making wise environmental real estate and business decisions (the dreams) by detecting, minimizing, or avoiding environmental issues at potentially contaminated sites (the fears). Before the passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) or Superfund,<sup>1</sup> the environmental site assessment report—the key component of any AAI—was only a general commercial practice to assess risks of owning property exposed to prior dumping activity.<sup>2</sup> After 1986, especially with the Superfund Amendments and Reauthorization Act (SARA) modifications to the CERCLA third-party defense that exclude certain innocent landowners from clean-up liability,<sup>3</sup> environmental site

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1. 42 U.S.C. § 9601 (2012).  
2. See *id.* § 9601(35)(B)(iv)(I) for general pre-1997 AAI standards.  
3. See *id.* §§ 9601(35), 9607(b)(3).

assessments became more of a cottage industry. Tens of thousands of AAI reports are done quarterly in the United States.<sup>4</sup>

The touchstone of the innocent landowner is that prior to land acquisition, they “did not know and had no reason to know” of site contamination.<sup>5</sup> This legal standard requires performing all appropriate inquiry before the acquisition. An innocent landowner should not be liable for cleanup of prior, but hidden, contamination that is discovered later.

In 2002, Congress expanded the exemption to clean-up liability to others, including certain bona fide prospective purchasers, from January 11, 2002, onward, and contiguous property owners and operators for whom site contamination from off-site sources may exist.<sup>6</sup> The exemptions carry with them a variety of continuing obligations, including all appropriate inquiry, reasonable follow-up steps, and reporting.<sup>7</sup> There are no CERCLA free rides.

The technical standards for AAI became more specific, and the American Society for Testing and Materials International (ASTM International) has issued industry standards covering CERCLA environmental site assessments since at least 1997.<sup>8</sup> The *ASTM E1527 International Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, or Phase I for short, became more rigorous over the years, and today they are endorsed in United States Environmental Protection Agency (EPA) regulations.<sup>9</sup>

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4. See *Metrics: Phase I ESA Market*, COMMONGROUND, <http://commonground.edrnet.com/pages/697f3c7ce5> (last visited Sept. 19, 2014).

5. 42 U.S.C. § 9601(35)(A)(i).

6. *Id.* §§ 9601(35)(A)-(B)(i), (40), 9607(q). The contiguous landowner, if they learned of the contamination from off-site sources before acquisition, would revert to a bona fide prospective purchaser. *Id.* § 9607(q)(1)(C).

7. See Memorandum from Susan E. Bromm, Dir., Office of Site Remediation Enforcement, to Director, Office of Site Remediation & Restoration, Region I, et al., U.S. ENVTL. PROT. AGENCY attachment A (Mar. 6, 2003), <http://www2.epa.gov/sites/production/files/documents/common-elim-guide.pdf>; see also *supra* Appendix.

8. View *Historical Versions of E1527*, ASTM INT'L, <http://www.astm.org/DATABASE.CART/filtrexx40.cgi?P+DESIGNATIO+E1527+historicalpick.frm> (last visited Sept. 19, 2014). These are known as ASTM E1527-97, ASTM E1527-00, ASTM E1527-05, *id.*, and finally the current standard ASTM E1527-13. ASTM INT'L, E1527-13, STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE SELECTION PROCESS 1 n.1 (2013). The standards' applicability vary by the years of conducting the site assessments. It may be necessary to review earlier ASTM standards, or even prior commercial practices, if an issue on an older acquired site emerges today.

9. 40 C.F.R. § 312.11 (2013). The EPA adopted the new 2013 version of ASTM E1527 (November 2013) on December 30, 2013. Amendment to Standards and Practices for All Appropriate Inquiries Under CERCLA, 78 Fed. Reg. 79,319 (Dec. 30, 2013) (to be codified at 40 C.F.R. pt. 312). The earlier 2005 version of ASTM E1527 is proposed for removal from the EPA's rule. See Amendment to Standards and Practices for All Appropriate Inquiries, 79 Fed. Reg.

Some states with mini-CERCLA laws also follow similar assessment standards.<sup>10</sup>

Bear in mind what the AAI environmental site assessment is in a typical commercial context. Environmental issues are not always the top dog in a transaction, but they should not be stepchildren either. Many problems permeate transactions in the following fields of business and law: from negotiations, price, financing, back orders, contracts, litigation, personnel, labor, tax, insurance, surveys, title, physical conditions, and environmental. Accordingly, much information fills a data room for the due diligence brew of lawyers and accountants. A deal can collapse on any count, with environmental issues sometimes being the sleeping dog. If the environmental issues are minor, they can be buried. Otherwise, attorneys will scout out the major unfriendly issues and do legal battle over them. There lies a domain of AAI.

It is not necessarily the purpose of this Essay to explore every nuance of the new ASTM standards, nor to explain how to write an environmental site assessment report. That detail is the bailiwick of the environmental professional. This Essay will focus generally on how the lawyer can use an environmental site assessment as a legal and business tool, how they can give complete legal advice from it, and how they can better comment and perceive its pitfalls and shortcomings.

## II. PHASE I DO'S AND DON'TS

Phase I entails several elements:

1. A detailed environmental records review, including of nearby sites in agency databases;
2. A site reconnaissance or visit;
3. Interviews with present and past owners, operators, and occupants of the property and government officials; and

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34,480 (June 17, 2014) (to be codified at 40 C.F.R. pt. 312). The EPA will remove the 2005 version of ASTM E1527 from AAI rules on October 6, 2015. *See* Amendments to Standards and Practices for All Appropriate Inquiries, 79 Fed. Reg. 60,087 (Oct. 6, 2014) (to be codified at 40 C.F.R. pt. 312).

10. *See, e.g.*, LA. REV. STAT. ANN. §§ 30:2272(1)-(2), :2277 (2013). These statutes have similar terminology as CERCLA on defenses, and as a matter of practice, Phase I reports seem to comport with the state law. This is believed to be commonplace, but not all states have their own mini-CERCLA. *See 50-State Survey of Protections Available for Purchasers of Contaminated Property*, ENVTL. LITIG. COMMITTEE, A.B.A. (Jan. 2014), <http://www.dgslaw.com/images/materials/50-state-survey-contaminated-property-protections2013.pdf>. Some states have their own separate programs to address contamination, e.g., Massachusetts. *See* MASS. GEN. LAWS ch. 21E, §§ 2, 5 (2013). State law is thus an important consideration.

4. A report by a qualified consultant concluding whether there are various “recognized environmental conditions.”<sup>11</sup>

The fourth element is key, because it details whether there is an anecdotal record or other perceivable evidence of a release or threatened release of hazardous substances or petroleum indicating site contamination problems. If no release is indicated, the report user (usually the purchaser) can be an innocent landowner.<sup>12</sup> If contamination is revealed, the user has options. They can decide against the risky acquisition or renegotiate the terms of the agreement. This assumes that the agreement, or option to purchase agreement, has favorable due diligence terms, such as a due diligence period, the right of site access to conduct a Phase I report, the right of the purchaser to provide timely objections to the sale, and so forth.

An “unclean” Phase I report can also give rise to agency reporting requirements, obligations, or to proceeding further with a Phase II limited site investigation to confirm suspected contamination with actual subsurface sampling activities.<sup>13</sup> Phase I does not normally involve physical sampling.

Phase I is not absolute.<sup>14</sup> How much can one expect from a consultant for a few weeks of work and a few thousand dollars?<sup>15</sup> The consultation does not eliminate uncertainty, and it is not exhaustive.<sup>16</sup> It is only valid for 180 days, and it has variable levels of inquiry, including vapor intrusion. However, under ASTM scope, it does not include a broad panoply of other environmental issues, such as permit compliance, wetlands, asbestos, endangered species, historic properties, and so forth.<sup>17</sup> Many clients are not aware of this potential shortfall. To expand the scope on such additional issues requires a special consultant contract addendum. Here is where a knowledgeable lawyer can advise a client to expand the scope of the inquiry, especially if they can obtain any history of the site beforehand.

Beyond the expected reasonableness of the environmental professional’s site study, the user must also provide information to the consultant, including a deed history for ownership to the 1940s, liens and

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11. ASTM Int’l, *supra* note 8, §§ 7.2-.3.1.

12. *Id.* app. § X1.2.2.

13. *Id.* app. § X1.6.3.

14. *Id.* §§ 7.4, 4.5.

15. See Rachel Rindfleisch, *Six Top Concerns of Appraisers*, EDR (July 2, 2014), <http://www.edrnet.com/blog/real-estate-lenders/latest-news-for-real-estate-lenders/2014/07/six-top-concerns.of.appraisers>.

16. ASTM INT’L, *supra* note 8, §§ 4.5.1-.5.2.

17. *Id.* §§ 4.6, 4.5.3, 13.1.5.

use restrictions, any specialized information or actual knowledge of the site, reasonableness of purchase price, and commonly known or obvious contamination.<sup>18</sup> Failure to provide the environmental professional with such required information may invalidate an otherwise thorough Phase I report.<sup>19</sup> That means the potential loss of a clean-up exemption when dealing with environmental agencies or the courts. Unfortunately, there is a paucity of judicial review on Phase I reports,<sup>20</sup> but agency lawyers can also be critical when their review is sought, such as for agency “comfort letters.” Therefore, the Phase I legal reviewer must exercise extraordinary skill in the review process.

Now the stage is set for the issues that will be discussed.

### III. USES OF PHASE I

A Phase I environmental site assessment has utility in many settings. It applies to United States Department of Housing and Urban Development (HUD) insurance and mortgage funds,<sup>21</sup> United States Small Business Administration (SBA) loans,<sup>22</sup> brownfield grants,<sup>23</sup> United States Green Building Council’s Leadership in Energy and Environmental Design (LEED) siting criteria,<sup>24</sup> Oil Pollution Act (OPA) sites,<sup>25</sup> and requirements imposed by lenders.<sup>26</sup> It applies to virtually all commercial and industrial land development, including energy facilities and their products, such as refineries, liquefied natural gas, methanol,

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18. *Id.* §§ 6.2-7.

19. *See id.* § 6.1. The ASTM standard now states that the environmental professional “shall” request such information, *id.*, the absence of which effects his or her ability to identify recognized environmental conditions.

20. *See* Anthony Adragna, Superfund, Third-Party CERCLA Defense Outcomes Uncertain Without Case Law, Attorney Says, 45 BNA ENV’T REP. 1769, 1769-70 (2014).

21. *HUD Adopts New ASTM Phase I Standard for Conducting Environmental Assessments*, *Envtl. Due Diligence Guide Rep.* (BNA) 33, 33 (May 15, 2014), [http://news.bna.com/ddln/display/batch\\_print\\_display.adp?searchid=23420267](http://news.bna.com/ddln/display/batch_print_display.adp?searchid=23420267) (subscription required).

22. *Phase I Standard Widely Used Months After ASTM Adopts It*, *Envtl. Due Diligence Guide Rep.* (BNA) 33, 34 (May 15, 2014), [http://news.bna.com/ddln/display/batch\\_print\\_display.adp?searchid=23420267](http://news.bna.com/ddln/display/batch_print_display.adp?searchid=23420267) (subscription required).

23. *See* Stanley A. Millan, Anne J. Crochet & Roger A. Stetter, Louisiana Practice Series: Louisiana Environmental Compliance § 4:12 (2013-14 ed. 2012); 42 U.S.C. § 9601(39) (2012).

24. *See High Priority Site*, LEADERSHIP IN ENERGY & ENVTL. DESIGN, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/node/2615514?return=/credits/new-construction/v4> (last visited Sept. 19, 2014); *Site Assessment*, LEADERSHIP IN ENERGY & ENVTL. DESIGN, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/node/2758172?return=/credits/new-construction/v4> (last visited Sept. 19, 2014).

25. Oil Pollution Act of 1990 § 1003(d)(4), 33 U.S.C. § 2703(d)(4) (2012); *see* 33 C.F.R. § 137.1 (2013).

26. *See* 42 U.S.C. § 9601(20).

green diesel, and so forth.<sup>27</sup> Some agencies have their own specialized environmental site assessment procedures, such as the United States Department of Defense's Military Munitions Response Program (MMRP) and Formerly Used Defense Sites (FUDS) Program,<sup>28</sup> which are beyond the scope of this Essay.

Of the many Phase I report users that legal reviewers encounter, it is probably infrequent that anyone other than the consultant and perhaps the attorney reads the entire environmental site assessment. Usually, clients or users only rely on the short Phase I executive summary, checklists, or perhaps a short memorandum or email. However, misreading conclusions that there are no recognized environmental conditions "except for . . ." can be a fatal error. The "except for" language usually leads to identification of a contamination issue.<sup>29</sup> Lions, tigers, and bears in environmental land can come in all sizes, from issues involving large refineries to small gas stations and dry cleaners. Also, regardless of the agreed-upon scope of the Phase I assessment, the breadth of the report may touch upon observing wooded areas, observing older buildings, or noting gaps in data that may either render the report incomplete or point to environmental problems not bargained for, such as asbestos, wetlands, endangered species, and so forth.<sup>30</sup> They should not be ignored. Wearing blinders in understanding what a Phase I report reveals is a flaw in the review process. Environmental surprises will occur.

Phase I is an enlightened blackboard toward realizing a developer's dreams (mall, shopping center, golf course, industrial plant, commercial building), and addressing or negating their fears, i.e., site contamination. The Phase I report must not only be complete to stand the test of a possible challenge later, but its review must also be complete to stand the test of diligence early on. Everything should be complete enough to warn clients of potential contamination risks and help to foretell of possible permit issues associated with wetlands, endangered species, and other environmental surprises.

A client, of course, should not be fearful of all environmental issues because those issues can be managed if known. Knowledge of such issues can mandate additional steps, such as surveys for Louisiana black bears, red-cockaded woodpeckers, or gopher tortoises; wetland

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27. ASTM INT'L, *supra* note 8, §§ 4.1, 3.2.65; *id.* app. § X.1.1.2.2.

28. *3Rs Explosives Safety Education Program*, DENIX, <http://www.denix.osd.mil/uxo/> (last visited Sept. 19, 2014); U.S. ARMY CORPS OF ENG'RS, U.S. DEP'T OF THE ARMY, REG. NO. 200-3-1, FORMERLY USED DEFENSE SITES (FUDS) PROGRAM POLICY (2004).

29. ASTM INT'L, *supra* note 8, § 12.8.2.

30. *Id.* § 8.3.2.

delineations; asbestos or lead-based paint assessments; historic site surveys; vapor intrusion screening; Phase II site investigations; or agency reporting.<sup>31</sup> Once known, the business risks and costs of the entanglements can be balanced against the benefits before walking away from an otherwise good deal.

Options can be created. Buffer zones can work around protected species.<sup>32</sup> Mitigation can support wetland permits.<sup>33</sup> Use restrictions can be filed or recorded in lieu of clean remediation closures.<sup>34</sup> Each aspect has a cost, but the economic benefits of the investment may be overriding.

#### IV. TWISTS AND TURNS

What do Phase I reports apply to? These report requirements do not apply to some mergers and acquisitions where stock, as opposed to land, is being directly acquired, because the target company may already be a responsible party at a contaminated site.<sup>35</sup> Certainly other commercial and industrial real estate projects are affected, but Phase I reports are not necessary for individual residential purchases.<sup>36</sup>

Thus, movable property is not subject to AAI requirements. Oil platforms are also not subject to AAI, although they can be fixed to the ocean floor. However, this subsurface property is usually based on an offshore lease, and even considering the improbability of ocean floor cleanup, leases have a particular problem in the AAI setting. Rather, besides structural integrity inspections, e.g., a condition and valuation survey or certificate of inspection, a regulatory compliance audit—assessing site future and past legal compliance—seems more appropriate for most platforms or vessels.<sup>37</sup> Related land-based facilities, such as barge-cleaning yards, would, however, remain subject to AAI.

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31. *Id.* § 13.1.5.

32. Buffer areas around habitats are considered mitigation in habitat conservation plans pursuant to Endangered Species Act of 1973 § 10(a), 16 U.S.C. § 1539(a) (2012). See *Habitat Conservation Plans Under the Endangered Species Act*, U.S. FISH & WILDLIFE SERVS. (Apr. 2011), <http://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>.

33. 33 C.F.R. § 332.1(a)(1) (2013).

34. See ASTM INT'L, *supra* note 8, § 5.3.

35. *Id.* § 4.2.3. See *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998), for protection of parent corporations from indirect CERCLA liability.

36. See ASTM INT'L, *supra* note 8, §§ 1.1, 3.2.12-13, 4.2.2.

37. For offshore development, see, e.g., United States Department of the Interior (DOI), Bureau of Safety and Environmental Enforcement standards and statistics on compliance and enforcement at 30 C.F.R. § 250 (2013) and *Inspections and Enforcement*, BUREAU OF SAFETY & ENVTL. ENFORCEMENT, <http://www.bsee.gov/inspection-and-enforcement/index/> (last visited Sept. 19, 2014). Other vessel requirements can be found in log books, United States Coast Guard marine sanitation devices, EPA vessel general permits, and so forth.

Commercial limitations covered by the AAI standard include leases.<sup>38</sup> However, the statutory protections afforded by CERCLA are problematic for leases; the statute talks broadly about acquisitions, including leases, for “clean” Phase I reports and innocent landowner exemptions,<sup>39</sup> but for “unclean” Phase I reports, it talks about bona fide prospective purchasers as owners primarily and lessees secondarily. As such, the clean-up exemption only applies to acquisition of ownership after January 11, 2002, including a tenant of such an owner. However, the statute is silent when a tenant does not have a derivative exemption from an owner/lessor, i.e., when the lessor acquired the property before 2002.<sup>40</sup> In 2012, the EPA opined that in those circumstances, as long as a lessee satisfies all the obligations of a bona fide prospective purchaser, e.g., performs a Phase I assessment before acquisition of the leasehold, the lessee in the EPA’s discretion will be entitled to the exemption.<sup>41</sup> Unfortunately, unlike a rule or law, this policy guidance does not legally bind other responsible parties to forebear from private enforcement if they seek CERCLA cost recovery or contribution from lessees, nor does it necessarily bind the courts in such private scenarios.<sup>42</sup> Nevertheless, lessees can qualify as “owners” under some CERCLA case law,<sup>43</sup> and perhaps a court will recognize their status as equivalent to bona fide prospective purchasers.

We must also address off-site threats. AAI requirements include “*recognized environmental conditions* in connection with the *property*,” referring to other properties within an additional approximate minimum search distance of the subject property.<sup>44</sup> Of course, if the subject property is uphill from a problematic off-site location or too far away or if regulatory records do not reveal uncontrolled releases from off-site sources, such additional properties should not represent a recognized environmental condition with respect to the subject property. If, however, the environmental professional concludes that releases from an

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38. See ASTM INT’L, *supra* note 8, § 3.2.13.

39. 42 U.S.C. § 9601(35)(A) (2012).

40. *Id.* § 9601(40).

41. Memorandum from Cynthia Giles, Assistant Adm’r, Office of Enforcement & Compliance Assurance, EPA, and Mathy Stanislaus, Assistant Adm’r, Office of Solid Waste & Emergency Response, EPA, to Reg’l Adm’rs, Regions I-X, U.S. ENV’T’L PROT. AGENCY (Dec. 5, 2012), [http://www2.epa.gov/sites/production/files/documents/tenants-bfpp-2012\\_0.pdf](http://www2.epa.gov/sites/production/files/documents/tenants-bfpp-2012_0.pdf). Of course, the price for an EPA clean-up is a windfall lien if property values are increased by the EPA’s action. 42 U.S.C. § 9607(r).

42. See 42 U.S.C. §§ 9607, 9613.

43. *United States v. S.C. Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1984) (citing 42 U.S.C. § 9607(a)(2)).

44. ASTM INT’L, *supra* note 8, §§ 8.1.1-1.2.



off-site location may migrate onto the subject property, they may identify that off-site location as a recognized environmental condition in connection with the subject property.<sup>45</sup>

This off-site threat scenario is problematic because it could cause the purchaser's continuing obligations to change from being an innocent landowner or contiguous property owner/operator. The purchaser may only become a bona fide prospective purchaser if the Phase I consultant finds the off-site location to be a recognized environmental condition in connection with the subject property being acquired.<sup>46</sup> The statute is unclear as to which exemption, innocent landowner or contiguous property status, will prevail should there be no actual migration of releases from the off-site location onto the subject property. The contiguous property owner/operator exemption will be lost if the owner/operator did in fact "know or have a reason to know that the [subject] property 'was' or 'could be' contaminated . . . from other real property not owned or operated by [the acquirer of the subject site.]"<sup>47</sup> This issue is a sensitive one, as discussed below, and it is within the discretion of the environmental professional's judgment of the significance of off-site releases. Legal review of a draft Phase I report, where the facts support a finding that the off-site location is only an "environmental concern" or otherwise a true recognized environmental condition, is important here.

The difference between a bona fide prospective purchaser and a contiguous property owner/operator is important in this instance. For one thing, the contiguous property owner/operator status clearly applies to all lessees, while the bona fide prospective purchaser exemption is not as clear. Although the continuing obligations of the contiguous property owner/operator or bona fide prospective purchaser are similar, each is more onerous than that of the innocent landowner.<sup>48</sup>

Finally, to round out these select conundrums, petroleum contamination must be addressed. CERCLA addresses exemptions from clean-up liability only for hazardous substances, which excludes petroleum.<sup>49</sup> However, the AAI covers an assessment of both petroleum and hazardous substance releases,<sup>50</sup> primarily because brownfield sites can be contaminated by either substance, as well as controlled substances, and

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45. *Id.* § 8.1.10.

46. *Id.* §§ 3.2.8, 8.1.10.

47. 42 U.S.C. § 9607(q)(1)(A)(viii)(II); ASTM INT'L, *supra* note 8, § 3.2.17.

48. Memorandum from Susan E. Bromm to Director, *supra* note 7, at 6-13.

49. 42 U.S.C. §§ 9601(14), 9607(a).

50. ASTM INT'L, *supra* note 8, §§ 1.1.1-1.2.

require a Phase I assessment for redevelopment and grant purposes.<sup>51</sup> However, in the absence of a CERCLA exemption for petroleum, where does that leave a site owner with petroleum as a recognized environmental condition, e.g., from leaking underground storage tanks?

The OPA has a petroleum cleanup “third-party” exemption for innocent landowners only and not for a bona fide prospective purchaser or others.<sup>52</sup> Additionally, the OPA only applies to waters and certain adjoining shorelines, not to all lands.<sup>53</sup> Therefore, the OPA’s exemption may only apply in narrow circumstances. The “imminent hazard” and underground storage tank (UST) provisions of the Resource Conservation Recovery Act (RCRA) also have no broad exemptions.<sup>54</sup> Therefore, absent special state laws, an indemnity agreement, or distressed property insurance, a petroleum contaminated site owner/operator may be left holding the clean-up bag. Thus, petroleum is an anomaly in the application of CERCLA clean-up exemptions.

#### V. THE SCOPE OF DIFFERENT CERCLA CLEAN-UP AAI EXEMPTIONS

We have discussed three CERCLA statutory exemptions or defenses to clean-up liability. These exemptions are not for other types of liability, such as toxic tort, personal injury, or property damage. Vapor migration and intrusion from underneath buildings and resulting tort damages remain a troublesome issue for the future.<sup>55</sup> That poorly understood area of risks associated with certain redevelopments is beyond the scope of this Essay.

The first exemption is the innocent landowner. An analog to Simon Templar, known as The Saint, may epitomize this statutory innocence. That is, our “saint” must not cause or worsen the contamination, the contamination must have preexisted their acquisition, and the all-

51. 42 U.S.C. §§ 9601(39)(A), (39)(D), 9604(k)(2)(B)(ii).

52. See 33 U.S.C. § 2703(a)(3) (2012).

53. *Id.* § 2702(a).

54. See 42 U.S.C. §§ 6972-6973, 6991-6991i. However, Subchapter IX of RCRA on USTs has a lender safe harbor similar to CERCLA. See *id.* § 6991(b)(h)(9).

55. See, e.g., Steven T. Miano, *Defense Strategies for Vapor Intrusion Toxic Torts*, LAW360 (May 16, 2014, 1:24 PM), <http://www.law360.com/articles/536853/defense-strategies-for-vapor-intrusion-toxic-torts>; Douglas A. Henderson & Jeffrey J. Hayward, *Vapor Intrusion Litigation Under RCRA: Where Environmental Law Meets Toxic Torts*, 26 TOXICS L. REP. 140, 140-41 (2011); see also *EPA To Regulate Workers' Exposure to Vapor Intrusion, Lawyer Says*, 23 *Env'tl. Due Diligence Guide Rep.* (BNA) 57, 57 (Aug. 21, 2014), [http://news.bna.com/ddln/display/batch\\_print\\_display.adp?searchid=23420267](http://news.bna.com/ddln/display/batch_print_display.adp?searchid=23420267) (subscription required). See also ASTM INT'L, E2600-10, STANDARD GUIDE FOR VAPOR ENCROACHMENT SCREENING ON PROPERTY INVOLVED IN REAL ESTATE TRANSACTIONS (2010), for vapor intrusion screening. ASTM INT'L, *supra* note 8, §§ 3.2.56 and 9.4.1.6 require the environmental professional to address vapor migration where warranted.

appropriate inquiry prior to acquisition must not have discovered the hidden contamination, which is only revealed later after the acquisition.<sup>56</sup> Thus, our “saint” must not know or have reason to know about the contamination before acquisition. Yet, if and when the contamination is subsequently discovered, e.g., Naturally Occurring Radioactive Material (NORM) contaminated fence posts discovered on site after a “clean” Phase I report, they must exercise due care and take precautions against foreseeable events.<sup>57</sup> In addition, our “saint” must cooperate with authorities, comply with any land-use restrictions, and not impede the effectiveness or integrity of response actions.<sup>58</sup>

Although our “saint” need not clean up the past contamination, they may lose protective status if the follow-up after an all-appropriate inquiry discovers a lack of due care, such as failure to detect ongoing leaching from sumps; failure to investigate fully for an unreasonable time, e.g., failing to monitor the conditions of a known debris pile; or failure to maintain cover on a contaminated area.<sup>59</sup> Additionally, if our “saint” fails to disclose known contamination to a subsequent purchaser, they lose protected status.<sup>60</sup> Thus, our “saint” cannot escape liability if they make the contamination worse, and worker safety may dictate additional action anyway.

The bona fide prospective purchaser must similarly undertake all appropriate inquiry before acquisition that occurs after January 11, 2002, but in this exemption, they may have reason to know of the contamination.<sup>61</sup> In other words, the Phase I report is not clean. Our acquirer is no longer pure like a “saint” but is more like a spectator in a Jerry Springer Show, where the audience already knows something troubling. In addition to the continuing obligations of the innocent landowner, our “Jerry” must also have no affiliation with other potential parties, comply with agency information requests, and provide required notices or reporting to agencies upon discovery in Phase I or Phase II.<sup>62</sup>

Finally, the contiguous property owner/operator’s land may be exposed to contamination from off-site sources, including contaminated

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56. 42 U.S.C. § 9601(35).

57. *Id.* § 9607(b)(3).

58. *Id.* § 9601(35)(A).

59. *See* PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 180-81 (4th Cir. 2013). This case deals with the loss of bona fide prospective purchaser status due to a lack of appropriate care. *See id.* Its ruling with respect to care could apply to innocent landowners who ignore timely action after discovering contamination.

60. 42 U.S.C. § 9601(35)(C).

61. *Id.* § 9601(40)(A)-(B).

62. *Id.* § 9601(40)(D)-(H).

groundwater.<sup>63</sup> Their duties include performing a “clean” Phase I all appropriate inquiry before acquisition, as well as performing all the steps of the bona fide prospective purchaser.<sup>64</sup> This defense is like Buster Keaton in *Steamboat Bill, Jr.* (1928), where he innocently stands alone in front of a building that suddenly collapses on him. This is analogous to the off-site contamination falling or leaching onto his land. The defense is not limited to after January 11, 2002, but it is limited to issuance of a “clean” Phase I report.<sup>65</sup>

#### VI. WHAT DO THE USERS DO WITH PHASE I?

The innocent landowner and contiguous property owner/operator can go their merry ways if a proper Phase I assessment is conducted—at least until a later discovery of prior contamination is made known to them. However, to secure a valid Phase I assessment, they need to ensure that the acquisition is not made more than 180 days after the date of any key step of Phase I, not just the date printed on the cover page, or it must be updated before closing.<sup>66</sup> Other environmental issues disclosed in the Phase I assessment must also be addressed. However, as previously mentioned, the bona fide prospective purchaser has numerous continuing duties because the Phase I or Phase II report has undoubtedly disclosed recognized environmental conditions early on.<sup>67</sup>

A “recognized environmental condition” is evidence of a hazardous substance or petroleum contamination in connection with the subject property.<sup>68</sup> De minimis conditions, e.g., poor housekeeping and oil stains, are excluded. The recognized environmental condition includes a prior recognized environmental condition that is “controlled” by institutional controls, e.g., residential use restrictions, or engineering controls, e.g., groundwater monitoring.<sup>69</sup> In other words, the site was investigated, risk evaluated, and partially cleaned up, but residential land contamination remains and must be controlled.

A recognized environmental condition does not include a “historical recognized environmental condition,” which, by definition, has been remediated to unrestricted standards, i.e., residential-use standards.<sup>70</sup> The problem with these latter conditions is that if remediation standards have

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63. *Id.* § 9607(q)(1)(D).

64. *See id.* § 9607(q)(1)(A)-(B).

65. *See id.*

66. ASTM INT’L, *supra* note 8, § 4.6.

67. *See supra* Part IV.

68. ASTM INT’L, *supra* note 8, § 3.2.78.

69. *Id.* §§ 3.2.78, .2.18.

70. *Id.* § 3.2.42.

changed by agencies over time, the historically recognized environmental condition may revert to a recognized environmental condition in a future Phase I report, because new, restricted levels of contamination legally exist on site under CERCLA. For instance, ten pollution units allowable on-site for a UST clean-up a decade ago may later be reduced to four units, creating a problem if five units remain. In summary, the finding of a recognized environmental condition changes a party's status from an innocent landowner or contiguous property owner/operator to a bona fide prospective purchaser with additional continuous duties.

Assuming there is a recognized environmental condition, the new purchaser/lessee's consultant should follow-up with a Phase II site investigation to confirm or negate contamination recognized in Phase I.<sup>71</sup> Phase II involves sampling and analytic testing to confirm or rebut a hypothesis in the Phase I report that a site has contaminants.<sup>72</sup> The environmental consultant's analysis of lab reports and collation of raw data against current regulatory benchmarks then become key.

If the Phase II is "clean," the party may seek a "comfort letter," which is a nonbinding opinion from an agency recognizing an exempt status; however, if the consultant finds contamination, obligatory reporting of the contamination found may be required by agency regulations. After following up with the agency, additional investigation, risk analysis, remediation, deed restrictions, and "no further action" letters may be sought.<sup>73</sup> These are time-consuming and costly.

Of course, these obligations may fall on the existing owner/seller if the party conducting the additional site studies is exempt from clean-up liability. Such result depends on the negotiations between the parties, the value of the site, and the schedule of the transaction.

Another option is to pursue a voluntary clean-up agreement with a state agency.<sup>74</sup> Although voluntary agreements involve a high pedigree of site study, public involvement, and partial remediation, a certificate of completion statutorily protects nonliable parties, including future owners and banks, from future clean-up liability. However, if warranted, a last option is to pursue cost recovery litigation from other parties who are responsible for the contamination.<sup>75</sup>

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71. ASTM Int'l, E 1903-11, Standard Practice for Environmental Site Assessments: Phase II Environmental Site Selection Process §§ 1.1.2-.2.6 (2011).

72. MILLAN, CROCHET & STETTER, *supra* note 23, § 9:23.

73. *Id.* ch. 7, § 4:33.

74. *Id.* § 4:35.

75. See 42 U.S.C. §§ 9607, 9613, or state law, e.g., LA. REV. STAT. ANN. § 30:2271 (2013). See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004).

## VII. WHAT DOES CLEANUP ENTAIL?

Cleanup involves time, money, planning, agency input, consultants, and, of course, a construction contract to remediate the site to standards, dispose of the debris, and backfill the site with clean fill.

Agencies often use toxic “cookbooks,” referred to as risk-based corrective action or “do nothing” cleanups, and publish clean-up standards based on the use of a site, e.g., residential or commercial.<sup>76</sup> These books have both prescriptive tables as well as site specific risk criteria for screening (no action) and remediation.<sup>77</sup> The standards are frequently expressed in arcane scientific notions, e.g., 1.2E+01 milligrams per kilogram (or twelve parts per million), rather than in easier-to-grasp fractions, whole numbers, or decimals, of say twelve parts per million here.<sup>78</sup> What does  $X$  parts per million of pollutant  $Y$  mean anyway?

The remediation world is both large (the site) and very small (the chemicals). However, small numbers of chemicals can be harmful if there is enough exposure to them, e.g., volatiles and lead. For instance, a golf ball sitting on the artificial turf of an indoor football stadium may occupy an area of one part per billion of the entire indoor space, and as long as it is sitting, it does no real harm. This is analogous to a few particles of heavy metal trapped and bound to soil in static circumstances. However, once movement and target populations are added to the equation, the golf ball, or metallic particle, can be dangerous. Add a champion golfer teeing off the ball in the stadium,<sup>79</sup> or, analogously, the effect of outdoor wind, rain, or groundwater movement to the heavy metals, and different scenarios are possible. If the stadium is empty, or the heavy metal particles are in a boundless deserted desert, the risk of harm is low or only potential. However, add crowds and population, and no one would feel safe in the stadium, although in the heavy-metal scenario, people outside may not be aware of the metallic particle’s danger being evoked by nature. Nevertheless, small doses of

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76. MILLAN, CROCHET & STETTER, *supra* note 23, § 4:36.

77. See, e.g., *Risk Evaluation Corrective Action Program (RECAP)*, LA. DEP’T OF ENVTL. QUALITY §§ 2.12, 6.4, tbl.2 (Oct. 20, 2003), <http://deq.louisiana.gov/portal/Portals/0/technology/recap/2003/RECAP%202003%20Text%20-%20final.pdf>.

78. *Id.* § 2.8.

79. This scenario was almost made real as Tiger Woods hit golf balls on the mile-long Bosphorus Bridge from Asia to Europe on November 5, 2013, while cars were driving on the opposite span. See Chris Chase, *Tiger Woods Hit a Golf Ball from Europe to Asia*, USA TODAY SPORTS (Nov. 5, 2013), <http://ftw.usatoday.com/2013/11/tiger-woods-hit-a-golf-ball-from-europe-to-asia>.

metals over time can be harmful, and remediation is aimed at reducing sources of these small doses to acceptable levels.<sup>80</sup>

But how much mote-ness is still unsafe, or how clean must “clean” be? The cookbook or site-specific risk evaluation usually determines that. Each of the chemical constituents have numerical standards, which are usually based on and extrapolated from scientific animal studies.<sup>81</sup> For instance, Louisiana standards for lead in soil are 400 parts per million for residential land and 1,400 parts per million for industrial.<sup>82</sup> The EPA’s soil screening level study for plants, birds, and mammals was presumably used as a basis for extrapolation of these numbers, but inasmuch as the EPA found lead to be ubiquitous, it did not choose the safest level of zero.<sup>83</sup> Therefore, the numbers that the EPA chose represent a reasonable to low risk, or a mix of science, policy, and “voodoo,” but rarely does the EPA choose a regulatory number representative of an absolute no risk for all types of populations. To the EPA, there is no zero. Of course, some feel that the EPA or the cookbook levels are overkill anyway.

These risk numbers make up the target levels for soils to meet in laboratory testing of samples taken from sites before screening or cleanup and for verification of the excavation sidewalls and floors before backfilling after cleanup. If the numbers meet current residential standards, there is a clean closure of “no further action” status.<sup>84</sup> If not, deed restriction against residential use may be necessary before closure is granted. However, regulatory protections from clean-up liability do not express any immunities to bar tort liability from off-site migration.<sup>85</sup> Special distressed property insurance is needed for that tort problem.

#### VIII. CONCLUSION—A LAWYER’S ADVICE TO CLIENTS

We will divide the legal obligations into pre-Phase I, Phase I review, and post-Phase I categories.

- A. The scope of the AAI must be evaluated at the pre-Phase I stage. Phase I reports should not be ordered like any old hamburger.

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80. *Risk Evaluation/Corrective Action Program (RECAP)*, *supra* note 77, pmb1.

81. *Id.* tbl.2.

82. *Id.* app. D.

83. See Office of Solid Waste & Emergency Response, *Ecological Screening Levels for Lead*, RISK ASSESSMENT INFO. SYS. 19 tbl.6.2 (Mar. 2005), [http://rais.ornl.gov/documents/ecossl\\_lead.pdf](http://rais.ornl.gov/documents/ecossl_lead.pdf).

84. *Risk Evaluation/Corrective Action Program (RECAP)*, *supra* note 77, § 1.2.1.

85. See, e.g., *Grefer v. Alpha Technical*, 2002-1237 (La. App. 4 Cir. 3/31/05); 901 So. 2d 1117, *writ denied*, 2005-1590 (La. 3/31/06); 925 So. 2d 1248, and *cert. granted, judgment vacated sub nom. Exxon Mobil Corp. v. Grefer*, 549 U.S. 1249 (2007).

Users need to have Phase I reports their way. That is why the ASTM Standards allow for the broadening of the scope of a Phase I assessment if woodlands, old buildings, wet areas, wildlife habitats, historic buildings, or operating industrial companies are located on the subject property. Surveys, wetland delineations, and even full compliance audits may be needed at this early stage. However, some matters, such as leases, petroleum, or off-site sources may not easily disappear. It is also necessary to check applicable state laws on clean-up exemptions and any special assessment requirements.

- B. The purchase agreement must ensure a due diligence period and site access, provide for the right of the buyer to object to environmental conditions found in the Phase I report, and provide for fulfillment of regulatory reporting requirements in case a Phase II assessment or a special environmental report is needed, e.g., in the case of endangered species or wetlands.
- C. During the Phase I assessment, it is most useful to have a legal review of a draft report, and this consideration should be a contractual obligation for the consultant. These reviews not only protect clients but others involved in the Phase I process as well. The user and property must be properly identified; data gaps must specify if they are significant; limiting conditions, e.g., access, must be questioned; interviews must be completed; user-provided information must not be lacking; title information must be reviewed; agency data must be evaluated; and report conclusions must be specific as to any recognized environmental conditions.
- D. After the Phase I report is completed, the conclusion must be reviewed with the client. If there is a six-month delay until closing, the report will have to be updated. If contamination is reported, Phase II reports, agency reporting, and options must be evaluated. If non-scope issues are revealed, follow-up must be discussed with the client. This could include permit issues, Occupational Safety and Health Administration (OSHA) worker safety issues associated with demolition, and other environmental concerns. If the Phase I report is clean, consider asking for an agency “comfort” or “no interest” letter.
- E. With the final Phase I report, the client can decide to close, walk away, renegotiate some of the terms and conditions of the sale or lease, or inquire about distressed property insurance, provided that the agreement to purchase has due diligence provisions. Ultimately, the report can be used as a business tool for making wise environmental decisions.



- F. Finally, environmental advice is not given in a vacuum. Expect a pushback or hubris from a developmental interest if one's legal opinion is too conservative or problematic. Negotiating for the best environmental choices even among friends is commonplace, as dreams often mute fears.

Appendix

Chart Summarizing Applicability of “Common Elements” to Bona Fide Prospective Purchasers, Contiguous Property Owners, and Section 101(35)(A)(i) Innocent Landowners<sup>86</sup>

<i>Common Element among the Brownfields Amendments Landowner Provisions</i>	<b>Bona Fide Prospective Purchaser</b>	<b>Contiguous Property Owner</b>	<b>Section 101 (35)(A)(i) Innocent Landowner</b>
All Appropriate Inquiry	**	**	**
No affiliation demonstration	**	**	**
Compliance with land use restrictions and institutional controls	**	**	**
Taking reasonable steps	**	**	**
Cooperation, assistance, access	**	**	**
Compliance with information requests and administrative subpoenas	**	**	****
Providing legally required notices	**	**	*****

\*\* Although the innocent landowner provision does not contain this “affiliation” language, in order to meet the statutory criteria of the innocent landowner liability protection, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. CERCLA §107(b)(3). Contractual relationship is defined in section 101(35)(A).

\*\*\*\* Compliance with information requests and administrative subpoenas is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection.

86. Memorandum from Susan E. Bromm to Director, *supra* note 7, attachment A.

However, CERCLA requires compliance with administrative subpoenas from all persons, and timely, accurate, and complete responses from all recipients of EPA information requests.

\*\*\*\*\* Provision of legally required notices is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. These landowners may, however, have notice obligations under federal, state and local laws.