

Due Diligence

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Terminology Check

- Due Diligence aka All Appropriate Inquiry (AAI)
- Phase I & II - Environmental Site Assessment (ESA)
- Comprehensive Environmental Response, Compensation & Liability Act (CERCLA)
- American Society for Testing and Materials (ASTM)

What Is Due Diligence or AAI?

- Assessing real estate for any potential risk of environmental contamination.
- The objective is to identify potentially hazardous conditions or releases at the subject property.
- CERCLA has strict liability standards that make buying contaminated land a risky endeavor.
- The Brownfields Amendments provide protection to innocent purchasers so long as they have completed their due diligence.

Who can perform AAI?



“Environmental Professionals”

- A state or tribal issued certification or license and three (3) years of full-time work experience.
- A bachelor's degree or higher from an accredited institution of higher education in a relevant discipline of science or engineering and five (5) years of full-time relevant work experience.
- Ten (10) or more years of relevant, full-time work experience.

What Specific Activities Does The AAI Rule Require?



Interviews



Research



Government
Records



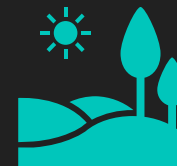
Visual
Inspection



Contamination
Assessment

Who Does This Apply To?

- Potential Brownfield Assessment, Cleanup, & RLF Grantees
 - Governmental Entities
 - Nonprofits
 - Community Organizations
- Potential Landowners
- Contiguous Landowners



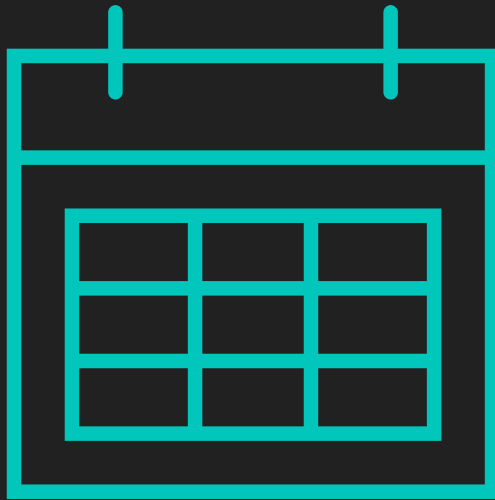
When Should Due Diligence Be Performed?

- EVERYTIME YOU BUY A PROPERTY!!!

Why Is It Important?

- Liability Protections
- Financial Certainty
- Reduce Risks
- Verify Value
- Grant Eligibility
- Loan Eligibility

When Should I Be Conducting Due Diligence?



- Some aspects of AAI must be conducted or updated within one year before the date of acquisition of a property and other aspects within 180 days before the date of acquisition.
- If AAI is conducted more than 180 days before the acquisition date, certain aspects of the inquiries must be updated i.e., interviews of current and past owners, review of government records, on-site visual inspection and searches for environmental cleanup liens).

One Size Doesn't Fit All

- ASTM Transaction Screen Environmental Assessment (E1528)
- Small Business Administration Due Diligence
- HUD or NEPA Environmental Assessments

How Much Does It Cost?

- Anywhere from \$2000 - \$8000+
Price dependent on many factors:
 - The location of the property.
 - Travel costs for your consultant.
 - The number of properties.
 - Items that are out of scope.
 - Physical features of the property.
- Cheaper does not mean better!

Where Can I Get More Resources?

- [Fact Sheet: All Appropriate Inquiries: Reporting Requirements Checklist for Assessment Grant Recipients](#)
- [Brownfields All Appropriate Inquiries](#)
- [EPA Brownfields Grants, CERCLA Liability, and All Appropriate Inquiries](#)
- [Environmental Due Diligence in Real Estate Transactions](#)
- [Tips for Hiring an Environmental Consultant](#)



Maryland
Department of
the Environment

Maryland's Environmental Due Diligence Requirements

Brownfields State Response Programs:

The Voluntary Cleanup Program

&

State Assessment and Remediation Division



Environmental Due Diligence

What is Environmental Due Diligence?

-Generally, the process that evaluates the environmental condition and risk associated with a property prior to taking title

Why Perform Environmental Due Diligence?

- Understand liability at the property
- Understand the risk of contamination
- Necessary to help qualify for landowner liability protections



Background Environmental Liability

Federal CERCLA Liability

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). This Federal Law is known as “Superfund”



<https://blog.idrenvironmental.com/american-hazardous-waste-history-part-2-love-canal>

The law provides EPA the authority to investigate sites where there is a suspected threat to public health, or the environment caused by a release or potential release of a hazardous substance



Background Environmental Liability

Maryland's Hazardous Materials and Hazardous Substance Act

Title 7, Subtitle 2 and 5 of the Environment Article, Annotated Code of Maryland

- Controlled Hazardous Substances
- Voluntary Cleanup Program

These laws provide the State the authority to address hazardous waste sites



Federal All Appropriate Inquiry

Code of Federal Regulations Title 40 Part 312 Subpart C Standards and Practices

Outlines *what is required for evaluating the previous ownership and uses of a property*, this is known as the *All Appropriate Inquiries (AAI)*. AAI also outlines *what is required to help qualify for protection from liability for a range of contaminants under CERCLA*. Three important points are:

1. Perform the AAI prior to taking Title to the property
2. AAI is valid for 180-days from property transaction and up to one year with an Update
3. AAI is necessary to obtain federal CERCLA 104(k)(2)(B) Brownfields characterization and assessment grant funds



Phase I Environmental Site Assessment

Level 1 Site Assessment

The ASTM international Phase I ESA (E1527-13) is a type of due diligence outlined in a report

- Satisfies AAI

The purpose of the Phase I is to help identify contamination or recognized environmental conditions (RECs) at the property and provide good commercial and customary practice for performing ESAs



Phase I Environmental Site Assessment

ASTM REC Definition

The presence or likely presence of any hazardous substance or petroleum products in, on, or at a property under conditions that indicate an existing release, past release, or a material threat of release



State Environmental Oversight & Liability Protection

Maryland State Response Programs

Two Brownfields response programs

1. The Voluntary Cleanup Program (VCP)
 - Offers State liability protections via issuance of:
 - No Further Requirements Determination (NFRD)
 - Certificate of Completion (COC)

2. The State Assessment and Remediation Division (SARD)
 - Offers technical oversight for hazardous waste only
 - No liability protections provided
 - Provides a Site Status Letter (for the oversight performed)



Additional Liability Protection

CERCLA Liability Protection

MDE maintains a Memorandum of Agreement (MOA) with EPA Region III that completed sites investigated and or remediated with oversight by the VCP would be of no federal interest to EPA under CERCLA





VCP Application Requirements

Phase I Environmental Site Assessment

VCP Statute requires all applications include a Phase I Environmental Site Assessment that follows the principles of **ASTM International**

VCP policy allows the Phase I ESA to be valid for one year and must meet the standards outlined by ASTM International

VCP Program is governed under Title 7, Subtitle 5 of the Environment Article, Annotated Code of Maryland. VCP Application Requirements are listed in §7-506



VCP Application Requirements

Phase II Environmental Site Assessment

A Phase II ESA is required upon application to the VCP

- Unless the Phase I ESA does not identify any RECs
- Submission of a Phase II ESA Work Plan is also acceptable
 - The Phase II ESA delay will extend all applications deadlines



VCP Application Requirements

Beyond Level I & II ESAs

1. Potential exposure routes such as a well survey to identify nearby domestic groundwater users
2. Information from other regulatory programs
 - For example: Asbestos notification, presence of lead paint, discharge permits (NPDES) or other regulatory programs that are noted as non-scope issues
3. VCP Application form and fee



Responsible Person Status

Responsible Person (RP):

RP is defined as the owner or operator of a site containing a hazardous substance (Full RP definition is located at § 7-201(t) Environment Article, Annotated Code of Maryland)

RP Exceptions:

- Innocent landowners meeting the AAI
- Inheritance, holder of mortgage or deed of trust
- A person who receives IP status
- Govt entity: A State, County or Municipal government, any other political subdivision of such except when:
 - Willful misconduct
 - Gross negligence



Responsible Person Liability Protection

RP Limited Liability Protection

- The Department may not bring a State enforcement action against the participant at the eligible property
- The participant is released from further liability for the remediation of the property for any contamination identified in the environmental site assessment
- Not subject to a contribution action instituted by another responsible person



Responsible Person Liability

RP Liability

- RP maintains liability for contamination (i.e., responsible for contamination that has migrated from the property)
- Cause new contamination
- Exacerbate existing contamination



Inculpable Person Status

Inculpable Person (IP):

As defined in § 7-501, Environment Article, Code of Maryland Regulations

IP:

- Has no prior or current ownership interest in an eligible property at the time of application to participate in the VCP
- Has not caused or contributed to contamination at the eligible property at the time of application to participate in the VCP
- A successor in interest in an eligible property acquired from another inculpable person



Inculpable Person Status

IP Status

VCP Applicants must receive a VCP status letter identifying IP status prior to taking title to the property

IP Status letter granted by:

1. Receive IP status upon application acceptance
2. Request Expedited IP status
 - a. Executed expedited IP Affidavit
 - b. Fee \$2,000



Inculpable Person Liability Protection

IP Liability Protection

The IP obtains the same liability protections offered to RPs

IP is not liable for the existing contamination identified in the assessments

IP Responsibilities:

- Source control
- Eliminate exposure pathways LUCs
- Secure and stabilize the property if they withdrawal from VCP





Resources

Voluntary Cleanup Program Resources

Website

https://mde.maryland.gov/programs/land/MarylandBrownfieldVCP/Pages/vcp_info.aspx

LRP Mapping Site

<https://mde.maryland.gov/programs/land/MarylandBrownfieldVCP/Pages/mapping.aspx>

Telephone 410-537-3493



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Stephen Luttrell, Esq.

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Superfun(d) Themes



- Liability without fault
- Understand the Nuances
- Never assume
- Stay Vigilant



Back to the Basics- CERCLA



Why do we do conduct appropriate due diligence before acquiring, taking an interest in, or developing property?

- **Because CERCLA says you (pretty much) need to-** to avoid automatically incurring liability under CERCLA, you need to ensure you aren't acquiring unnecessary liability.
- **To protect our investments-** to ensure your investment isn't burdened by unrecognized costs or liability.
- **For our communities & neighbors-** to generally help improve conditions and the environment for our community and neighbors, now and in the future.





Back to the Basics- CERCLA

*The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, a.k.a. "Superfund") automatically imposes **joint and several liability** for the costs of all removal actions, response actions and natural resource damages on:*

- a. The current owner and operator of an impacted facility [e.g. property];*
- b. The owner and operator of the facility at the time hazardous substances were disposed/released at the facility;*
- c. Any person who arranged for the transport and/or disposal of such hazardous substances at the facility; and*
- d. Any person who accepted for transport and/or disposal of such hazardous substances at the facility.**

Except

**See 42 U.S.C § 9607(a).*



Back to the Basics- CERCLA

When first enacted in 1980, CERCLA contained a very limited number of exemptions against its statutory joint and several liability provisions:

1. an act of God;
2. an act of war; and
3. certain acts or omissions of third parties.*

In amendments enacted in 1986, the “third party” exemption was expanded to include:

1. “innocent landowners” who “exercised due care” and “did not know and had no reason to know” that hazardous substances had been released on a property.**

* 42 U.S.C § 9607(b).

** See § 9601(35)(a).



Back to the Basics- CERCLA

The 1986 amendment went on to clarify that to establish a party had no reason to know, they “must have undertaken, at the time of acquisition, *all appropriate inquiry* into the previous ownership and uses of the property consistent with good commercial and customary practice in an effort to minimize liability.”*

This resulted in what we all now know as the “Phase I Environmental Site Assessment Process”. It’s standard (E 1527) was established by ASTM (a private, non-profit entity) with the intention of it serving as part of a recognized “commercial and customary practice” for environmental due diligence.

Critically, the statute did not formally recognize or cross-reference the ASTM standard itself.

* 42 U.S.C § 9601(35)(b).



CERCLA's 2002 Brownfield Amendments

In 2002, CERCLA was further amended by the “Brownfields Amendments” for the specific purpose of supporting the redevelopment of Brownfield sites. These Amendments provided certain additional protections for certain parties and wastes, including the exemption most parties currently seek:

1. contiguous property owners; and
2. “Bona fide prospective purchasers” (BFPPs).*

** 42 U.S.C § 9607(q) & (r).*





CERCLA's 2002 Brownfield Amendments

The BFPP exemption applies to purchasers of property contaminated by hazardous substances who would have otherwise been liable under CERCLA solely by virtue of their ownership of the contaminated property, and effectively requires:

1. The property acquisition must have occurred after 2002;
2. The owner conducts “all appropriate inquiries”; and
3. The owner must satisfy post-acquisition continuing obligations, including *but not limited to* taking steps to stop any continuing release, prevent any threatened future release, and take steps to limit exposure to any previously released substances, to assist regulatory officials, and comply with land use restrictions and controls. *In short, cooperate, don't do anything to impede remediation requirements and efforts, don't exacerbate the problem, and be aware.**

* 42 U.S.C § 9601(40).



CERCLA's 2002 Brownfield Amendments

The Brownfields Amendments also codified the ASTM E 1527-97 Standard as meeting, and required EPA to also establish regulations to adopt future versions of the Standard, and conclusively defined what practices constitute “all appropriate inquires” for property acquisitions occurring after 1997.

- These Regulations, which first went into effect in 2006, formally identified and adopted the ASTM E 1527-05 standard as satisfying CERCLA's requirements.*
- In 2013 & 2013, the -05 version of the Standard was replaced by the -13 version (and attend the next presentation in this webinar series to hear more about the next planned update to the Standard).

* 40 C.F.R. § 312.



Maryland's Hazardous Substances Law

Meanwhile, back in the land of pleasant living

Maryland, like all other states, has its own state law that is generally analogous to key aspects of CERCLA.*

- Establishes that liability under the state's hazardous waste law is assigned to those that are defined as being a "responsible person", for reasons effectively tracking CERCLA.*
- Maryland's law and regulatory programs generally track federal investigation and remediation programs.*

** Md. Code Ann. Envir. §7-200 et seq.*





Maryland's Hazardous Substances Law

In 1997, Maryland codified its own Brownfields program, known as the Voluntary Cleanup Program (VCP).*

- Established a *process* by which a party could obtain from the Maryland Department of the Environment, *prior* to the acquisition of a property, a formal determination that it wasn't a "responsible person" under the State's hazardous substance enforcement law- but rather an "inculpable person" not liable for any existing contamination at an eligible property.
- The statute provided that if an "inculpable person" completes the requirements of the VCP at a property, that person would be protected from any future enforcement action and may not be subject to any contribution action under state law brought by a responsible person.

* Md. Code Ann. Envir. §7-500 et seq.



Maryland's Hazardous Substances Law

Satisfaction of the VCP's requirements provides additional benefits:

- Critically, the VCP's protections are also extended to any person's lender with a security interest in the property and, for inculpable persons, to any successor in title upon satisfaction of its requirements.
- In 1997, EPA Region III and the MDE signed a Memorandum of Agreement by which EPA agreed to consider a site to be "of no federal interest under [CERCLA]" when a site "has been investigated or remediated in accordance with the practices and procedures of [Maryland's Controlled Hazardous Substances Laws, including the VCP]."

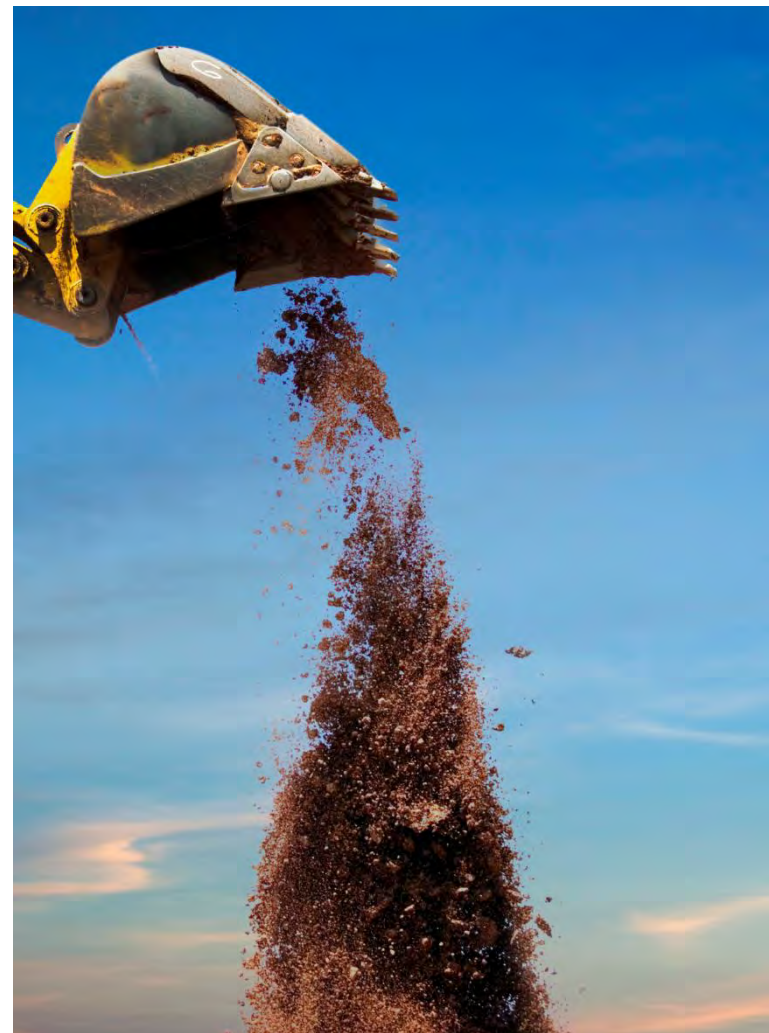


Key Points & Takeaways

- **Details matter!**
- *Watch as the structure of property transactions tend to change over time, and the team overseeing environmental issues are often forgotten!*
- *Watch when parcels are divided, subdivided, and combined, often with resulting changes in ownership. Each of those changes in ownership require compliance with AAI requirements, as well with any separate Maryland VCP requirements if enrolled (including ensuring IP status).*
- *Don't treat the requirements and obligation for a Phase I ESA as a "check the box" practice! With consultants, you typically get what you pay for. Don't treat it as a commodity, read it carefully and watch for nuance. Don't be afraid to push if you feel there are data gaps and unanswered questions.*

Lessons Learned

- **Watch for and recognize the difference between federal and state requirements!**
 - *Town of Mt. Airy- Secured inculcable person status under MDE VCP, but failed to meet AAI requirements by completing a Phase I ESA within six months of closing on its acquisition of rails to trails real property. This failure resulted in EPA rejecting an application for a Brownfields Grant.*
- **Every transfer of title, no matter how small, will almost always require a Phase I ESA and AAI.**
 - *Maryland VCP- Assume that every transfer of land, no matter how small or ministerial it may seem, will require the completion of a Phase I ESA and AAI within six months of closing. Frankly, its cheap insurance and you never know who will require evidence and for what reason in the future.*



Lessons Learned

- **Follow up to an expedited IP Status application under the Maryland VCP.**
 - *Maryland VCP- If you submit an application for an expedited inculpable person status determination, do not forget to file a full and complete VCP application within six months of the date of the MDE's response letter in order to ensure your IP status "vests".*
- **Scrutinize the Phase I and pull on any loose threads!**
 - *Massachusetts- A Phase I was completed but didn't identify any "recognized environmental conditions." However, there were some questions about ponds historically located on the property. Digging into the question and historical records, over and above the requirements of the ASTM standard, identified that the site was historically occupied by a tannery and the ponds were actually waste lagoons used for decades to dispose of hazardous material.*



Lessons Learned

- **Watch for post-closure requirements as a BFPP to ensure you're meeting continuing obligations and are not exacerbating existing contamination.**
 - *Private development (NJ)- site contractor failed to follow Environmental Management Plan and co-mingled impacted soils and non-impacted soils in a soil stockpile. This cross-contamination resulted in over \$7 million dollars in additional site sampling and soil disposal costs.*
 - *Ashley (Charleston, SC)- failure to properly manage site stormwater runoff after closing resulted in the U.S. Court of Appeals for the 4th Circuit finding that a buyer had failed to meet its continuing obligations to properly manage residual contamination and stormwater runoff, resulting in the exacerbation and spread of historic contamination. This resulted in the developer incurring CERCLA liability after it had acquired a property as a BFPP, thus forfeiting the legal protections it had previously secured and subjecting it to a contribution claim by its former owner.*





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THANK YOU.

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