

The Case Against the Baseline Environmental Assessment

Authored by David R. Switzer

Following the creation of the Baseline Environmental Assessment (BEA) for the State of Michigan in 1995, purchasers of commercial property have been quick to use the BEA to protect themselves against liability for cleanup of pre-existing contamination. The darker side of the BEA has only been revealed with time. In particular, a BEA locks in site contamination and the associated stigma of contamination for years to come, the Due Care obligations that accompany the BEA may be onerous, and, far too often, the BEA may not render the desired protection.

A BEA is generally not appropriate in a situation where there is little contamination. Many category “N” (N for no future use of hazardous substances on the property) BEAs have been written, based upon one or few soil samples that show minimal contamination. The theory has been that the BEA provides blanket coverage against known and, more importantly, potentially undiscovered contamination. However, a proper Phase I environmental site assessment should have rendered a good picture as to whether there is a potential for the presence of undiscovered contamination of any significance. A BEA is not a remedy for an inadequate Phase I.

The problem with use of the BEA is that, once written and submitted to the Michigan Department of Environmental Quality (MDEQ), the site is permanently on record as contaminated property. When the owner later sells the property or tries to obtain a loan, he will discover the “stigma” of contamination. The “stigma” that accompanies contaminated property on the market will likely lower the value of the property. In particular, out-of-state purchasers who are not familiar with the Michigan BEA process may strictly avoid contaminated property. The adverse impact of stigma is especially undesirable in those situations where remediation at reasonable cost would have permanently removed the pre-existing contamination.

To obtain a BEA, the site must have enough contamination to be a “facility”. Once one knows that his site is a facility, he is subject to Due Care Obligations per 1994 PA 451 section 324.20107a. There has recently been a renewed emphasis on Due Care by MDEQ personnel. For starters, one cannot “exacerbate” site contamination. Construction of a building over the top of contamination is exacerbation. Other common examples of exacerbation include the activities that occur during construction, including

pumping and improper disposal of contaminated groundwater as well as construction of new migration pathways in the form of utility trenches.

Other Due Care obligations that accompany a BEA include preventing unacceptable human exposure. This may require notification of neighbors and utility companies that contamination may be migrating off-site. Such notification often generates alarm. Owners must also maintain documentation of Due Care actions. It's fair to say that documentation of compliance is rare. Failure to comply with Due Care obligations can result in fines as well as potential payment for damages.

The BEA can at times be ineffective protection. This is especially true of category "D" and "S" BEAs. A category "D" BEA is based upon the new site owner using chemicals that are clearly different from those that may have been released on the site. Often, the conclusion that the chemicals are different is based upon the Material Safety Data Sheets (MSDS) that describe the chemicals that the owner intends to use. MSDS sheets, however, often don't list individual chemical constituents. For example, one typical gear oil MSDS lists as ingredients: MINERAL OIL, PETROLEUM DISTILLATES, SOLVENT-REFINED HEAVY PARAFFINIC; (MINERAL OIL) - Ingredient CAS Number: 64741-88-4. If the site is contaminated with benzene, CAS #71-43-2, comparison of the two CAS numbers would make it appear that the gear oil is different from the pre-existing benzene contamination. However, the "PETROLEUM DISTILLATES" indicator implies that there is likely benzene in the gear oil. For this reason, the category "D" BEA is inappropriate and ineffective.

A category "S" BEA is written if the new chemicals to be used are the same as the chemicals that contaminate the site. A category "S" BEA that relies upon site characterization requires an inordinate amount of soil borings as well as soil and groundwater analytical testing. For anything other than a very small site, the costs are exorbitant. For this reason, most category "S" BEAs rely upon engineering controls such as secondary containment. The petitioner must specifically acknowledge in writing, however, that if the controls fail, the burden to distinguish new contamination from old lies with him. It's questionable how much protection this BEA provides.

The BEA process can be of great advantage in appropriate circumstances. However, it is not a wholesale panacea to the problem of site contamination. BEAs have been overused and misused, often saddling a property owner with permanent contamination. In particular,

when remediation or site closure is possible at costs that are reasonable, remediation or closure is always preferable to a BEA.

David R. Switzer received his engineering degree from the US Naval Academy, a J. D. and a Master of Laws degree in environmental law and marine affairs from the University of Washington and has worked as both plaintiffs' counsel and defense attorney in civil and criminal environmental cases. Mr. Switzer is a principal at Yeoman Group, a company offering environmental risk management services. Mr. Switzer can be contacted at Yeoman Group (248-349-8363) or at dswitzer@yeomangroup.net.