

# Baseline Environmental Assessments

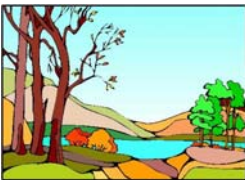
## Establishing and Maintaining Liability Protection for New Owners and Operators of Contaminated Property

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At Fausone Bohn, LLP we do a lot more than practicing environmental law these days. However, we have deep roots in the environmental field and the firm still spends a considerable percentage of its time with land use, environmental and real estate practice issues. We are often surprised at the questions raised by even sophisticated real estate owners, operators, lessors, lessees and developers. We hope the enclosed newsletter refreshes this information for you and reminds you that we can help you on these types of real estate issues.

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### Michigan Law



As a result of legislative changes to Michigan's Natural Resources and Environmental Protection Act Part 201 initiated in the mid-1990's, new owners and operators (including, but not limited to, lessees, land contract vendees, etc.) can acquire and re-use contaminated property and not be liable for existing environmental conditions by following the Baseline Environmental Assessment (BEA) process. The BEA has evolved to become a valuable tool in helping your clients manage their risk exposure.

Michigan law provides that an individual who buys, leases, forecloses or commences operations on a contaminated property is liable for pre-existing environmental conditions regardless of their knowledge of the contamination at the time of possession. Since commercial property and casualty policies exclude most pollution losses, property owners and/or operators, hereinafter "owner/ operators", can be faced with a substantial loss exposure.

A Baseline Environmental Assessment (BEA) can reduce a prospective owner/operator's exposure to strict liability for pre-existing contamination by establishing the extent of contamination present at the time of initial occupancy and/or use.

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### Liability Protection Under A BEA



A BEA provides liability protection for both known and unknown contamination under specific sections of Michigan's Natural Resources and Environmental Protection Act (NREPA), namely, Part 201 Environmental Remediation, Part 213 Leaking Underground Storage Tanks, Part 31 Water Resource Protection, Part 17 Michigan Environmental Protection Act, Part 615 Supervisor of Wells, Part 625 Mineral Wells.

A BEA **does not** provide liability protection for any federal clean-up laws such as the Comprehensive Environmental Response, Compensation and Liability Act (a.k.a. CERCLA or Superfund), or any other sections of Michigan law including tort and personal injury claims. A BEA does not provide liability protection for contamination caused or exacerbated by the new owner/ operator.

The time frame allowed for the completion of a BEA is quite narrow. Under the law, a BEA must be conducted prior to or within 45 days after becoming the owner/operator. The law does not specifically state how far in advance of becoming an owner/ operator a BEA can be performed, however, common practice has been to conduct a BEA during the normal due diligence period that generally proceeds acquisition and/or occupancy of a property.

Once the BEA is completed, an owner/operator can either disclose the BEA to the MDEQ within 8 months of the date of completion or petition the MDEQ within 6 months of completion for official approval of the BEA. While simple disclosure is free of charge, a petition for adequacy requires payment of a \$750 fee to the MDEQ.

Although the liability protection afforded between a petition and a disclosure is essentially the same, a petition provides the owner/operator with a written determination of the technical adequacy of the BEA. If the MDEQ identifies deficiencies in the BEA through the petition for adequacy, the petitioner may have an opportunity to cure those deficiencies within the allowed time frame.

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### Duty of Due Care "Section 7a Compliance"



Once the BEA has been disclosed to the DEQ, the owner/operator must comply with the five ongoing "due care" requirements in order to avail themselves of future BEA liability protections.

1. Prevent Exacerbation of the Existing Contamination
2. Prevent Unacceptable Human Risk and Protect Public Health and Safety
3. Take Reasonable Precautions Against Acts or Omissions of a Third Party
4. Documentation of Compliance
5. Notification

In certain circumstances, such as discovering the existence of discarded or abandoned hazardous waste on the property, or the knowledge of contaminants migrating from the property, in both the MDEQ and immediately adjacent surrounding property owners may be required to be formally notified.

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Baseline Environmental Assessments, a/k/a BEAs, provide property owner/operators with an important tool in the risk management process. Depending on the complexity of the environmental conditions and the property transaction in question,

a client may wish to discuss both the BEA and post- acquisition "due care" requirements with a qualified environmental counsel. Planning for this potential risk exposure early on, and integrating this knowledge into the site's operations, can further reduce potential future liability.

This article was authored by Paul F. Bohn, a principal in Fausone Bohn, LLP, and an experienced environmental counsel. You can learn more about Mr. Bohn and the Fausone Bohn law firm at [www.fb-firm.com](http://www.fb-firm.com) (248/380-9988). Mr. Bohn wishes to thank Mr. Dan Hale, CIC, LIC, AAI, a former law clerk with the firm, in the preparation of this article.

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