

Baseline Environmental Assessments (BEAs)

Liability protection for new or prospective owners or operators of contaminated property

Introduction

A person can buy, lease, or foreclose on contaminated property and be protected from liability for cleanup of existing contamination (provided they did not cause the contamination) if they conduct a baseline environmental assessment (BEA) and disclose it to the Michigan Department of Environment, Great Lakes, and Energy (EGLE) and subsequent purchasers and transferees of the property, as outlined under Part 201 (Environmental Remediation) and Part 213 (Leaking Underground Storage Tanks) of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA).

A BEA means a written document that describes the result of an all appropriate inquiry and the sampling and analysis that confirm that the property is contaminated. Meeting the timeframes for the all appropriate inquiry and BEA are critical components of the process.

NOTE

This document is provided by EGLE for informational purposes. A thorough review of Part 201 and Part 213 Statutes and other guidelines should be completed before making site-specific decisions. These documents are available on EGLE's [BEA webpage](#).

Environmental Due Diligence

A prospective owner or operator should conduct all appropriate inquiry to evaluate whether a property is contaminated before acquisition. Initially, information regarding environmental conditions at the property should be requested of the seller. Buyers may also contact EGLE, which maintains records of contaminated properties and may already have information about the contamination. The next step is to hire an environmental professional (EP) to conduct an environmental assessment of the property using the federal All Appropriate Inquiry (AAI) process [40 CFR 312] or the current ASTM International Phase I Environmental Site Assessment (ESA) standard and any subsequent assessments or studies to quantify the contamination.

The AAI or Phase I ESA may identify the presence or likely presence of hazardous substances and/or petroleum products at the property – generally defined as a recognized environmental condition (REC). Based on the findings of the AAI or Phase I ESA, a Phase II ESA or equivalent assessment may be necessary to quantify the contamination. The Phase II ESA involves collecting soil, groundwater, and/or soil gas samples and submitting them for laboratory analysis, identifying the presence of underground storage tanks (USTs), documenting abandoned containers and their contents, developing a conceptual site model (CSM), and evaluating other pertinent environmental conditions at the property.

How Contaminated is the Property?

The results of the AAI/Phase I ESA and the Phase II ESA are used to determine whether contaminants are present at the property at levels higher than unrestricted residential criteria, which are the state's most protective cleanup standards. Cleanup [criteria tables](#) are available online.

If contaminant concentrations do not exceed the unrestricted residential criteria, then the property is not regulated under Parts 201 and/or 213 and there is no need for a BEA to be disclosed to EGLE. However, the AAI/Phase I ESA and Phase II ESA documentation should be retained by the prospective owner or operator to show that they have conducted their environmental due diligence and do not have further obligations related to contamination.

If contaminant concentrations exceed one or more residential criteria, then the property is contaminated, and a BEA may be conducted and disclosed to EGLE to document the conditions at the time of purchase.

Liability Protection

Conducting and disclosing the BEA to EGLE provides liability protection for the prospective owner or operator for cleanup of contamination at the time of acquisition. This liability protection includes contamination under specific programs regulated by the NREPA, including Parts 17 (MI Environmental Protection Act), 31 (Water Resources Protection), 201 (Environmental Remediation), 213 (Leaking Underground Storage Tanks), 615 (Supervisor of Wells), and 625 (Mineral Wells). Conversely, a BEA does not provide protection from liability under other state and federal laws, including:

- ▶ Landfills regulated under Part 115 (Solid Waste Management) of NREPA
- ▶ Treatment, storage, and disposal (TSD) facilities regulated by the federal Resource Conservation and Recovery Act (RCRA) and Part 111 (Hazardous Waste Management) of NREPA
- ▶ UST operational requirements under Part 211 of NREPA
- ▶ Federal Comprehensive Environmental Response and Compensation Liability Act (CERCLA) (aka "Superfund")

The U.S. Environmental Protection Agency (EPA) and EGLE have entered into an agreement that the U.S. EPA will not take action against a person who has disclosed a BEA unless the property is on the federal National Priority List, federal funds have been spent to respond to conditions at the property, or there is an imminent danger to the public health, safety, welfare, or the environment.

Timeframes To Conduct a BEA and Submit to EGLE

A BEA must be conducted prior to or within 45 days after becoming the owner or operator of a contaminated property. "Conducted" means the AAI or Phase I ESA report, field work, sample collection, laboratory analysis and data interpretation are complete, and the BEA report is compiled and written.

The owner or operator must submit the BEA to EGLE within 6 months after the earlier of the date of purchase, occupancy, or foreclosure. The BEA must also be disclosed to subsequent purchasers or

transferees of the property; however, the liability protection for the original BEA submitter is not transferrable. Each new prospective owner/operator of a contaminated property must conduct their own BEA to receive liability protection. BEAs cannot be updated, amended, or changed after they are submitted to EGLE.

In accordance with the statutes, submittal forms have been developed for use when providing a BEA to EGLE. The form helps to assure that the appropriate information has been included for it to be considered administratively complete. The BEA submittal form is only available via RIDE; therefore, prospective owners or operators must submit the BEA using RIDE. Following completion of the submittal form as part of the online submittal, it will be reviewed by EGLE's RIDE team to confirm administrative completeness. Any identified deficiencies must be resolved before the BEA will be considered received by RRD. Additional information and guidance for submitting BEAs can be found on the [BEA Submittal Instructions](#) webpage.

Environmental Professionals

The ASTM Standard and federal AAI regulations require that AAI be conducted by an environmental professional as it is defined therein. An environmental professional is typically employed by an environmental consulting/engineering firm. Resources for finding an environmental professional include online searches for environmental, ecological, or engineering consulting firms and referrals from financial institutions, attorneys, real estate agencies, or trade associations, etc. It is wise to ask the environmental professional for references and examples of environmental due diligence and BEAs that they have prepared. EGLE does not provide recommendations for environmental professionals.

EGLE Resources

Remediation and Redevelopment Division

Michigan.gov/EGLEERRD

BEAs

Martha Thompson

517-285-3461

ThompsonM31@Michigan.gov

Geologic Resources Management Division

Michigan.gov/EGLEGeologicResources

Part 615 (Supervisor of Wells – oil/gas wells)

Part 625 (Mineral Wells)

Kaitlyn Bertram

231-878-6138

BertramK@Michigan.gov

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