

**SCHNAPF LLC**  
**AGENCY FILE REVIEWS: THE DARK SECRET OF PHASE 1 REPORTS**  
**OUTLINE PRESENTATION**  
**AUGUST 30, 2012**

**Statutory Provisions:**

- Third Party Defense-42 U.S.C. 9607(b)(3)
  - Release solely caused by Party
  - No Direct or Indirect Contractual Relationship
  - Due Care
  - Precaution Agst Foreseeable Act and Omissions of Third Parties
  
- 1986 Innocent Landowner Defense (ILO)
  - “No Contractual Relationship”-42 U.S.C. 9601(35)(A)
  - “Did Not Know or Have Reason to Know” that hazardous substances were released or disposed- 42 U.S.C. 9601(35)(A)(i)
  - Appropriate Inquiries into previous ownership and use “in accordance with generally accepted good commercial and customary standards and practices.” 42 U.S.C. 9601(35)(B)(i)(I)
  
- 2002 Bona Fide Prospective Purchaser (BFPP) 42 U.S.C. 9601(40)
  - AAI
  - Continuing Obligations (Appropriate Care)
  
- 2002 Contiguous Property Owner (CPO). 42 U.S.C. 9607(q).
  - AAI
  - Did Not Know or Have Reason to Know
  - Continuing Obligations
  
- AAI Criteria [ILO, BFPP and CPO)
  - Reviews of federal, state, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility. (42 U.S.C. 9601(35)(B)(iii)(V)

**AAI Rule-**

- Sec 312.1(c)- Purpose to identify conditions indicative of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances.
  
- Sec. 312.20(b)(3)- Scope includes reviews of federal, tribal, state, and local government records.

- 312.20(e)- Objective ... to result in the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.
- 312.20(e)(1) and (2)-Identify the following information:
  - Current and past uses of hazardous substances;
  - waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;
  - current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;
  - engineering controls; and institutional controls
- 312.21(c)(1)- Results must be documented in a written report that at a minimum includes an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases.
- Sec 312.26(b)- review of that Federal, tribal, **state**, and **local** government records or data bases of government records... **must** be reviewed for the purposes of achieving the objectives and performance factors:
  - Records of reported releases or threatened releases, including site investigation reports;
  - Records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases...including landfill and other disposal unit location records and permits, storage tank records and permits, hazardous waste handler and generator records and permits, federal, tribal and state government listings of sites identified as priority cleanup sites, and spill reporting records;
  - CERCLIS records;
  - Public health records;
  - Emergency Response Notification System records;
  - Registries or publicly available lists of engineering and institutional controls

#### **AAI PREAMBLE-**

- scope is to identify releases and threatened releases of hazardous substances which cause or threaten to cause the incurrence of response costs;
- government records may contain information regarding environmental conditions at a property.. [including]... information on previously reported releases.  
Government records and available databases can provide valuable information on:
  - remedial actions and emergency response activities that may have been conducted at a particular property;

- institutional controls related to a particular property;
- information on activities or property uses that could cause releases or threatened releases to be present at a property.
- If a particular source of information cannot be accessed within a reasonable time frame or within reasonable costs, then the information should be sought from other sources.
- If a particular source of information will only provide information that can more easily or readily be found elsewhere, the particular source does not have to be obtained or consulted.

## ASTM E1527

- **8.1.1 Objective**—The purpose of the records review is to obtain and review records that will help identify recognized environmental conditions in connection with the property;
- **8.2.1 Standard Federal, State, and Tribal Environmental Record Sources**—The following standard environmental record sources **shall** be reviewed, subject to the conditions of 8.1.1 through 8.1.7
- ***Proposed 8.2.2 Regulatory Agency File and Records Review*** - If the property or any of the adjoining properties is identified on one or more of the standard environmental record sources in 8.2.1, pertinent regulatory files and/or records associated with the listing should be reviewed in accordance with Sections 8.1.1 through 8.1.7.
  - The purpose of the regulatory file review is to obtain sufficient information to assist the environmental professional in determining if a recognized environmental condition, historical recognized environmental condition, controlled recognized environmental condition, or a de minimis condition exists at the property.
  - If, in the environmental professional’s opinion, such a review is not warranted, the environmental professional must explain within the report the justification for not conducting the regulatory file review
  - As an alternative, the environmental professional may review files/records from an alternative source(s) (e.g., on-site records, user provided records, records from local government agencies, interviews with regulatory officials or other individuals knowledgeable about the environmental conditions that resulted in the standard environmental record source listing, etc.).
  - A summary of the information obtained from the file/record review shall be included in the report and the environmental professional must include in the report his/her opinion on the sufficiency of the information obtained

from the files/records review to evaluate the existence of a recognized environmental condition, historical recognized environmental condition, controlled recognized environmental condition, or a de minimis condition.

- **Revised 8.2.3 Additional Federal, State, Tribal, and Local Environmental Record Sources**—To enhance and supplement the standard environmental record sources in 8.2.1, local records and/or additional federal, state or tribal records **shall** be checked when, in the judgment of the environmental professional, such additional records (1) are reasonably ascertainable, (2) are sufficiently useful, accurate, and complete in light of the objective of the records review (see 8.1.1), and (3) are generally obtained, pursuant to local good commercial or customary practice, in initial environmental site assessments in the type of commercial real estate transaction involved.