

CONSERVATION

# FRONTIERS

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Burned solid waste found in Mojave National Preserve

## This Issue

### Getting Down in the Dirt & Out in the Field: The New Standards for Due Diligence

by SHELTON DOUTHIT and ZOE AHNSTROM

*When land trusts and public agencies acquire lands for conservation purposes, they are expected to conduct a variety of due diligence inquiries and failure to do so—particularly with regard to possible environmental contamination—can jeopardize project approval and impose future and incalculable long-term liabilities. Recent legal changes impose new requirements, but many organizations have not yet adopted the practices necessary for compliance. However, it is essential to satisfy the requirements so that the organization may qualify for liability defense under CERCLA and avoid future problems. Directors and managers of land trusts should ask several questions: Are we sufficiently knowledgeable to make informed decisions about meeting the requirements? Do we have a staff person qualified to conduct inquiries? Can we knowledgeably hire and review the product of a contractor? This edition of Conservation Frontiers provides a solid understanding of the key elements of which every land trust and agency acquiring land should be aware.*

In 2006, the Environmental Protection Agency (EPA) established new requirements for due diligence called All Appropriate Inquiry (AAI). By conducting AAI, one satisfies one of the requirements to qualify for the innocent landowner defense to liability as described within the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) with regard to hazardous materials and petroleum products found on property targeted for acquisition. The American Society of Testing and Materials (ASTM) modified its existing practice, E 1527-00 - Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment, to reflect the new EPA requirements. Although, federal and many state agencies have adopted the Phase 1 process as a standard practice, most land trusts have not. Yet, land trusts that involve

public partners are expected to conduct environmental due diligence using the new practice.

### All Appropriate Inquiry: New Rules and New Names

Many land trusts and conservation agencies are familiar with ASTM E 1527-00, the “Phase 1” environmental site assessment. The ASTM developed the Phase 1 process in the 1980s as a guide to performing environmental site assessments; the process is voluntary.

In the late 1990’s following years of debate, the EPA and Congress began formulating new rules concerning environmental site assessments as part of proposed brownfield amendments to CERCLA. Nationwide, environmental due diligence was being implemented sporadically and the qualifications of the individuals performing due diligence was

called into question especially in cases involving federal clean-up funds. Better compliance with the practice was needed.

On November 1, 2006, Congress enacted AAI establishing new elements and requirements, and ASTM outlined these in ASTM E 1527-05. Within this practice, legislators also established the definition of who can perform environmental site assessments by instituting qualifications and the Environmental Professional (EP) was born.

AAI defines the EP as someone who “possesses sufficient specific education, training and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of release or threatened release of hazardous substances on, at, in or to a property”. To qualify as an EP, the individual must satisfy one of the following four specifications:

- Hold a current Professional Engineer’s or Professional Geologist’s license or registration and have three years of full-time relevant experience, or
- Be licensed or certified by the federal government, state, tribe or U.S. territory and have three years of relevant full-time work experience; or
- Possess a Baccalaureate or higher degree in science or engineering and have five years of relevant full-time work experience; or
- Have ten years of relevant full-time work experience.

Additionally, the EP should remain current in his or her field through continuing education or other activities.

To conduct AAI, the practice stipulates ten areas of inquiry that, through their synthesis, reveal the likelihood that a user (the land trust) is acquiring a contaminated site. These ten steps include:

- A review of environmental records
- A review of historical records
- Conducting interviews
- A site reconnaissance
- Determining the “degree of obviousness” of contamination
- Discussing “data gaps”
- Gathering commonly known information about the property
- Searching for environmental liens
- Considering “specialized” knowledge
- Considering the purchase price vs. value of the property



Above-ground storage tanks with soil contamination



Two of the more than 100 mason jars (some intact, many broken) filled with crude oil and partially buried on a site

The last four elements are new to the process. These elements are called “User Provided Information” and were added by Congress to ensure that the user is involved in the investigative process. Specialized knowledge is that knowledge possessed by the land trust that sheds light onto any chemicals or processes used at the property that may be material to contamination of the site. For example, an agricultural land trust that owns a cattle ranch and is in the process of acquiring a new ranch is aware of a dip tank operation used to treat parasites on livestock. This information would be conveyed to the EP as specialized knowledge. It is also incumbent on the user to let the EP know if the property price is less than the appraised value. A reduction in price may indicate contamination known to or suspected by the seller/donor.

Other concepts not found in E 1527-00 include the degree of obviousness of contamination and the identification and discussion of data gaps. The concept of “degree of obviousness” requires the EP to carefully document readily detectable site contamination through visual observation or odors. The EP is also required to identify and discuss the significance of “data gaps”. Data gaps are the lack or inability to obtain the information required within the practice (e.g., the inability to interview the landowner or to find land history documents).

All Appropriate Inquiry carries with it the force of law and increases the roles and responsibilities of the user. However, there is a limit to how much inquiry is required. Information is deemed appropriate if it is “reasonably ascertainable”, i.e., the information is publicly available and obtainable within 20 days.

### Implementing AAI

Land trusts and public agencies have approached the implementation of AAI in different ways. For example, the Mojave Desert Land Trust (MDLT) has developed a system involving stages of investigation. If a property is located in a remote location with no history of land use and no site address, a Pre-Acquisition Liability Survey (PALS) is performed. The PALS is a lim-

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## Some simple quality control measures may save you time, money and heartache.

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ited investigation involving an interview with the seller/donor, a limited search of environmental databases and aerial photographs available through the internet, and a site inspection.

If the property has a history of “high risk” land use (e.g., mining or agriculture), a full AAI-compliant Phase 1 Environmental Site Assessment is conducted. If the conclusion of the Phase 1 is that contami-

nation is present, then MDLT conducts a Phase 2 or Phase 3 assessment. A Phase 2 Environmental Site Assessment is performed to determine the character and extent of the contamination and the Phase 3 involves site remediation. As required by AAI, an EP conducts or supervises the PALS and Phase 1 processes while a licensed Professional Engineer or Registered Geologist supervises the Phase 2 and Phase 3 processes. As one of MDLT’s public partners, the Bureau of Land Management has accepted the PALS level of inquiry by MDLT. However, the National Park Service does not and AAI-compliant Phase 1 surveys are conducted on all land MDLT sells or gifts to the Park Service.

### Consider Quality Control Measures when Contracting

To ensure that AAI is being implemented appropriately, land trusts and conservation agencies need to become aware of the new rules and become active in the process, particularly when contractors are involved. Some simple quality control measures may save you time, money and heartache.

Become familiar with the property prior to hiring a contractor. Most contractors are familiar with urban landscapes, but lack skills (e.g., map reading and orienteering) useful in a more rural or remote environment. How will you know your contract EP has inspected the entirety of the property? How do you know the contract EP was on the target site?

If you do not know your contractor, get and check references. Some EPs present themselves as appropriately educated,

trained and experience, but actually lack these qualities. Until you are comfortable with your contract EP, accompany him or her in the field.

### On-going Responsibilities

Under the new rules, the land trust has satisfied only one of the requirements for CERCLA liability protection upon completing AAI. The user must also take mea-

asures to address any issues identified through AAI and continue to manage the property to prevent any future contamination. In other words, CERCLA requires the prospective buyer to become more active in the process of caring for the land. The implication for land trusts is that AAI is a further justification for thorough due diligence and the development of more a thoughtful comprehensive land stewardship program – a goal we are all striving to achieve.

For more information on AAI, see the following sources:

- 40 CFR Part 312. This is the Code of Federal Regulation that contains the AAI. For the regulation text, visit [http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title40/40cfr312\\_main\\_02.tpl](http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title40/40cfr312_main_02.tpl)
- ASTM Standard Practice E 1527-05. Visit [www.astm.org/Standards/E1527.htm](http://www.astm.org/Standards/E1527.htm) to view the entire standard.
- U.S.EPA's Office of Brownsfields Cleanup and Redevelopment. For more information, call 202-566-2774 or visit [www.epa.gov/brownfields](http://www.epa.gov/brownfields). ■

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*The Council helps land trusts protect the natural areas and farmlands important to the state and local communities by increasing the resources and tool available to conserve and steward land.*

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Shelton Doudit



**CALIFORNIA COUNCIL OF LAND TRUSTS**

1029 K Street, Suite 48  
Sacramento, CA 95814  
916 497 0272 tel  
916 443 2558 fax  
mail@calandtrusts.org  
www.calandtrusts.org

## case study

# An Inadequate Phase 1 Site Inspection



**A 2-acre dump missed during a prior Phase 1 site inspection**



**A close-up of the dump found to release hazardous material**

IN 2007, SHELTON DOUTHIT CONSULTING LLC (SDC) was hired to perform an AAI compliant Phase 1 Environmental Site Assessment involving an 800-acre parcel of land located in southeastern San Diego County, California. The client was a national land trust that had acquired the property for eventual transfer to Bureau of Land Management (BLM) for inclusion into an ecological management area. The previous Phase 1, conducted by another firm, had expired and SDC was hired on the recommendation of the BLM. Prior to conducting the site inspection, SDC received and reviewed a copy of the previous Phase 1 and alarm bells quickly sounded. Evidence suggested the perimeter of the property had not been inspected, and a number of roads, trails and possible structures on the property had not been discussed in the prior report. The report contained no photos of three-quarters of the property. The property was vacant at the time of the second Phase 1, but had been used in the past as a pig farm and orchard. The land trust had acquired the property based on the due diligence documented in the previous Phase 1.

Upon entering the property, SDC personnel walked and/or drove all roads and trails. A central ridge was also climbed to provide a clear view of the perimeter of the property. Upon reaching the top of the ridge, it was apparent that a large dump was located along the

southern perimeter of the property in an area that was not visible from the roads. Upon closer examination, the dump spanned an area over 2 acres. The contents of the dump included vehicles, electrical components, household waste, appliances and hazardous waste. It was determined that the dump had burned during a recent wildfire. Based on previous experience with similar burned dumps, it was suspected that the ash from the dump was hazardous. It was obvious that the dump was old and missed during the prior Phase 1.

A follow-up interview with prior Environmental Professional revealed that he had conducted "a windshield survey" - he did not leave his vehicle for the majority of the site inspection. He had revealed that he had medical problems that limited his ability to walk and did not climb the ridge.

Analysis of the ash at the dump confirmed elevated levels of arsenic and lead and the land trust was required to clean-up the site, a cost exceeding \$40,000, prior to conveying the property to BLM. Site remediation delayed the transfer of the property for over one year.