



## When a Phase I ESA is Not Enough to Claim the Superfund BFPP Defense

On March 30, 2020, the federal district court for the Southern District of Indiana weighed in on what it really takes for a property owner to claim the bona fide prospective purchaser (BFPP) defense to Superfund liability based on a Phase I Environmental Site Assessment (ESA). And in so doing, the court gave additional support to those of us who pay attention to not just whether a Phase I ESA report does or does not find a Recognized Environmental Condition (REC) at a property, but also when and how the environmental professional (EP) reached his or her conclusions.

The case is *Von Duprin LLC v. Moran Elec. Serv.* No. 16-cv-01942 (S.D. Ind., March 30, 2020). Briefly summarized, it stands for two propositions.

First, a tenant who leases property for commercial or industrial use needs a recent Phase I ESA (no more than 180 days old) before signing the lease to later be able to claim the BFPP defense if pre-existing contamination is found at the property. And if that tenant goes on to purchase the property, getting a new Phase I ESA before taking title will not give it a second bite at the BFPP apple.

Second, a Phase I ESA report needs to be issued to the entity that will hold title, must at least attempt to ask the current and prior owners about their use of the property, and has to include an Environmental Professional's certification that follows the AAI regulatory requirements.

### Background

Beginning in 2013, Plaintiff Von Duprin spent \$3.2 million responding to trichloroethylene (TCE) and perchloroethylene (PCE) solvent contamination

associated with a parcel of real estate in Indianapolis, Indiana that it had sold in 1986, plus commingled TCE and PCE contamination coming off of three nearby parcels it never owned or operated. Von Duprin filed suit to recover its response costs against the past owner of one of the other three parcels (Moran Electric Service), and against two companies who currently owned and operated all three of the parcels (Major Holdings and Major Tool and Machine, together known as the Major Defendants).

The Major Defendants responded by asserting the federal CERCLA (a/k/a Superfund) BFPP defense, as codified at Sections 107(a)(1), 107 (r)(1), and 101(40) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9607(a)(1), 9607(r)(1), and 9601(40).

The court disallowed application of the BFPP defense for two of the three parcels. At one of these two disallowed properties, Major Holdings acquired title on October 4, 2005, based on a stale Phase I ESA from December of 2004. At the second parcel, Major Tool began leasing the property in November of 2007, based on an expired Phase I ESA from September of 2006. Major Tool then went on to purchase that parcel in January, 2013 after obtaining a new Phase I ESA.

### **No BFPP defense for the leased, then purchased, parcel**

Regarding the leased-then-owned parcel, the court held that a tenant who leases property based on an expired Phase I ESA, and then later purchases that same property cannot “cure” the pre-lease expired Phase I by obtaining a new, timely Phase I prior to taking title. In such circumstances, the former tenant (and now current owner) will have liability for the site’s environmental history without the benefit of any BFPP status or defense.

More specifically, the court observed:

“At trial, the Major Defendants offered into evidence a Phase I ESA dated September 8, 2006, and argued that this 2006 Phase I ESA complied with the AAI requirements. (Tr. Tr. Ex. 1166.) Major Tool performed its Phase I ESA pursuant to the ASTM Phase I Environmental Site Assessment Standard (E1527-05), which meant it had to have been completed or updated within 180 days of and prior to the lease in order to be considered valid. 40 C.F.R. § 312.20(b). (Tr. Tr. Ex. 1166.)

Major Tool entered into a 99-year Lease on November 16, 2007. (Tr. Tr. Ex. 1021.) Accordingly, the September 6, 2006 Phase I ESA does not satisfy the AAI requirements because it was not completed or updated within 180 days of and prior to the Lease. 40 C.F.R. § 312.20(b)....”

*Von Duprin LLC v. Moran Elec. Serv.* No. 16-cv-01942 (March 30, 2020), at 27. For those who like precision, the Phase I ESA was 434 days old when Major Tool signed the 99 year lease.

### **Same result for the second parcel because of AAI deficiencies**

As for the parcel which the Major Defendants acquired based on a stale Phase I ESA, the court determined that the ASTM engineering practice guide (a standard used by environmental consulting companies when performing Phase I ESAs) is a necessary, but not sufficient, component of an AAI process. To secure the BFPP defense, new owners also must comply with the AAI regulatory standards found at 40 CFR Parts 312.21 and 312.22.

“These sections establish federal standard and practices for conducting all appropriate inquiries into the previous ownership and uses of a property and are not satisfied by adhering to the procedures of ASTM International Standard E2247. 40 C.F.R. §§ 312.11.”

The court had ruled in 2019 (in response to a summary judgment motion) that in addition to being stale, the Phase I ESA for this parcel also violated the AAI regulations because:

“(1) it was prepared for Major Tool and Machine even though Major Holdings was the nominal owner of the [parcel]; (2) it did not make the necessary and required inquiries with the owner of the parcel required by 40 C.F.R. § 312.22 et seq.; and (3) it does not have the required Environmental Professional certifications required by 40 C.F.R. § 312.21(d).”

*Von Duprin LLC v. Moran Elec. Serv., Inc.*, No. 16-cv-01942 (S.D. Ind. Feb. 11, 2019), at 31-32.

The court’s March 30, 2020 post-trial ruling confirmed that the Major Defendants had not offered evidence at trial to refute these AAI deficiencies, and held that the BFPP

defense failed for this parcel as well. *Von Duprin LLC v. Moran Elec. Serv.* No. 16-cv-01942 (March 30, 2020), at 28.

## **The BFPP defense succeeds for a third parcel**

The court accepted the Major Defendants' BFPP defense for the third parcel of property, because title to that parcel transferred on January 31, 2007 in reliance on a Phase I ESA dated November 16, 2006 which fully complied with both the AAI regulations and the applicable ASTM standard. *Id.* at 7.

## **What did all this cost the defendants?**

Finally, what did these AAI and Phase I ESA timing defects cost the Major Defendants? The court's decision does not list their expenditures for litigation, including attorneys' fees, experts' fees and costs, or internal lost time, costs, and effort.

However, we do know that the court entered a \$510,000 award against them, plus a declaratory judgment requiring them to pay 20% of all future cleanup costs not inconsistent with the National Contingency Plan.

## **So what do we do with this information?**

**DO:** Get a Phase I ESA before leasing or taking title to commercial or industrial property.

**DO:** Check those Phase I ESAs to make sure they are not stale or expired before signing the lease or closing the real estate acquisition.

**DON'T:** Ignore the person who tells you that an EP's certification is missing or does not follow the required AAI language; or the EP's qualifications are not attached to the report; or the current owner/operators, past owner/operators, or prospective purchaser has not responded to questions. All of these elements, and more, are required under the AAI regulations, and you and your client/purchaser/borrower do not want a lawsuit instead of a BFPP defense.

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