



Long Term Stewardship Tools and Due Care

Brownfields 2005

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Who: Bona Fide Prospective Purchaser
Contiguous Property Owner
Innocent Landowner

What: "Appropriate Care"
"Due Care"
"Reasonable Steps"
"Continuing Obligations"

Why: Maintain CERCLA Protection

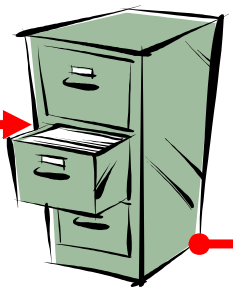
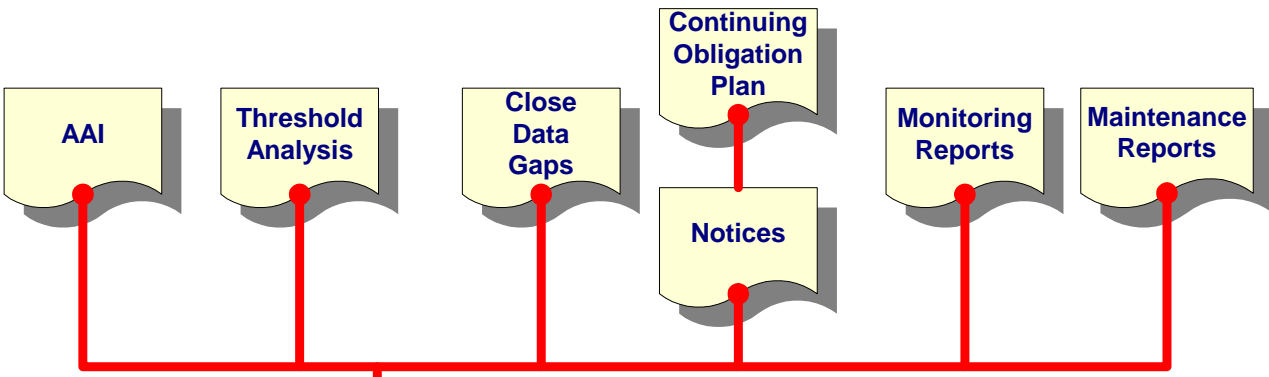
When: Post – Closing Through Term of Ownership

How: Applying Practice Standards
Attending to Recordkeeping

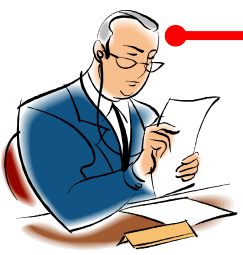
Landowner Obligations for CERCLA Protection



Landowner



Records



CERCLA Defense



Maintaining CERCLA Protection Depends The Landowner's Performance and Documentation

- All Appropriate Inquiry (AAI)
- Threshold Analysis
 - Non-affiliation to the Seller (BFPP, CPO or ILO)
- Continuing Obligations – “Appropriate Care”
 - Compliance with **land use restrictions** and **institutional controls**;
 - **Reasonable steps** with respect to hazardous substances releases;
 - Full cooperation, assistance and access to persons that are authorized to conduct response actions or natural resource restoration;
 - Complying with information requests and administrative subpoenas; and
 - Providing legally required **notices**.



Source: *Common Elements*, March 2003, USEPA

Terminology:

Land Use Restrictions and Institutional Controls

Land Use Restrictions (LURs)

- LURs describe land use or activity limits associated with a response actions. LURs may be documented in:
 - Risk Assessment Documents
 - Remedy Decisions
 - Permits/orders/consent decrees
 - Documents supporting response actions
- Enforcement Standard:
 - “is in compliance with any land use restriction established or relied on in connection with the response action at a vessel or facility” (CERCLA §§ 101 (40)(F)(i))

Institutional Controls (ICs)

- ICs enforce LURs, and include:
 - Governmental Controls (e.g. zoning);
 - Proprietary controls (e.g. covenants, easements)
 - Enforcement documents (e.g. orders, consent decrees);
 - Information devices (e.g. land record/ deed notices)
- Enforcement Standard:
 - “does not impede the effectiveness or integrity of any institutional control at the vessel or facility in connection with a response action.” (CERCLA §§ 101 (40)(F)(ii))

Terminology: “Reasonable Steps”

- Intent is PROTECTION
 - DUE CARE: A Landowner should take some affirmative step(s) when confronted with hazardous substance on its property
 - REASONABLE STEPS: Determination is site-specific, fact-based inquiry with intent to protect human health and the environment
- Intent IS NOT REMEDIATION
 - EPA does not look to landowner to conduct groundwater investigations or install remediation systems.

- Enforcement Standard
 - “the person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to
 - (i) Stop any continuing release
 - (ii) Prevent any threatened future release, and
 - (iii) Prevent or limit human, environmental or natural resource exposure to any previously released hazardous substance”

Source:

- BFPP - CERCLA § 101 (40)(D)
- CPO - CERCLA § 101 (q)(1)(a)
- ILO - CERCLA § 101 35 (B)(II)

Terminology: *“Notice” Requirements*

- Intent is to inform environmental oversight agencies of hazardous substances releases in a timely manner.
 - Applicable to federal, state and local laws.
 - Applies to releases that would have been caused by previous landowners.
 - Land owner must ascertain what notices are required in a given instance and comply with the requirements.
 - Providing required notices is an ongoing obligation, and is a very murky area.

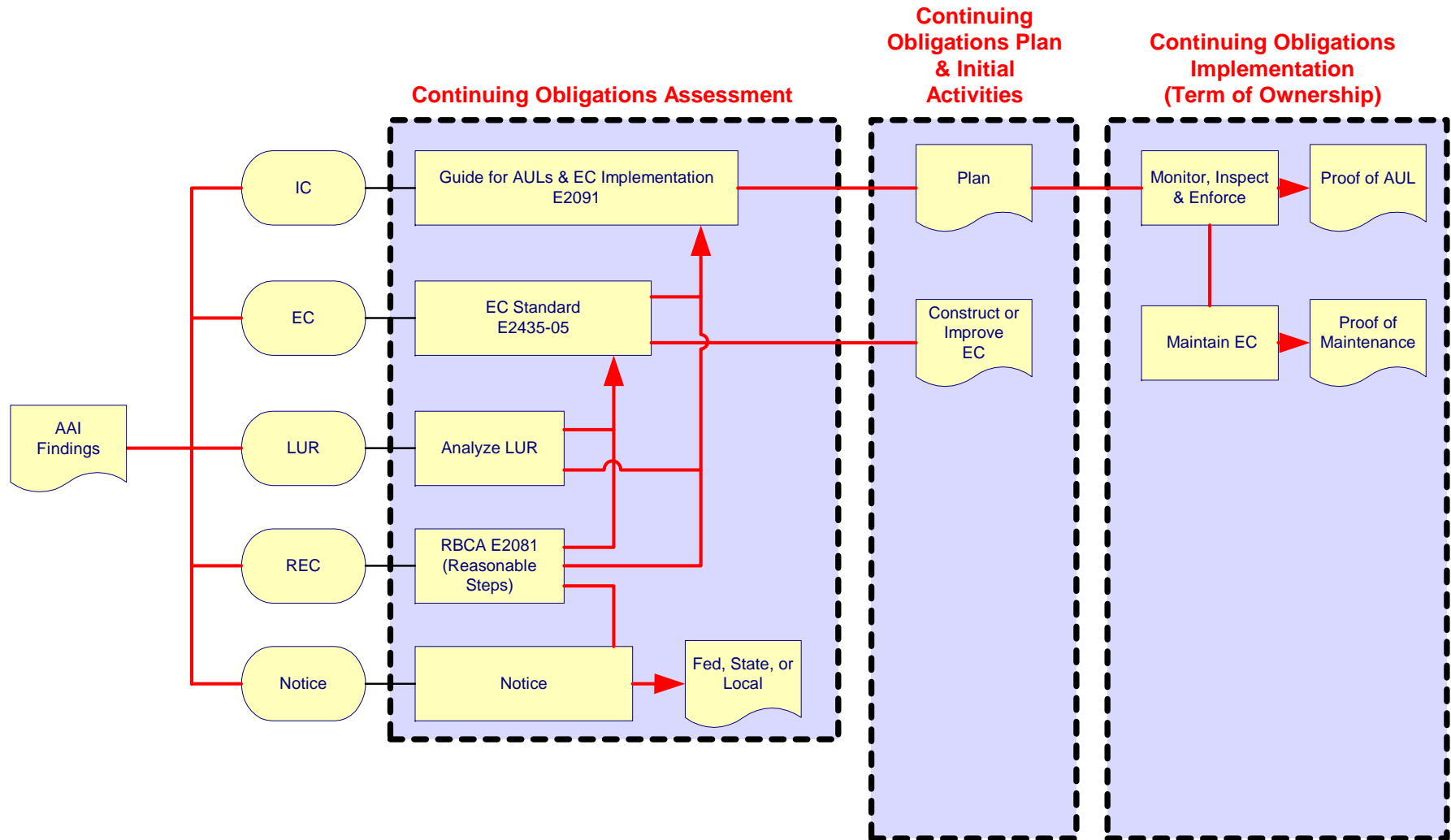
- Enforcement Standard

- “the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility”

Source:

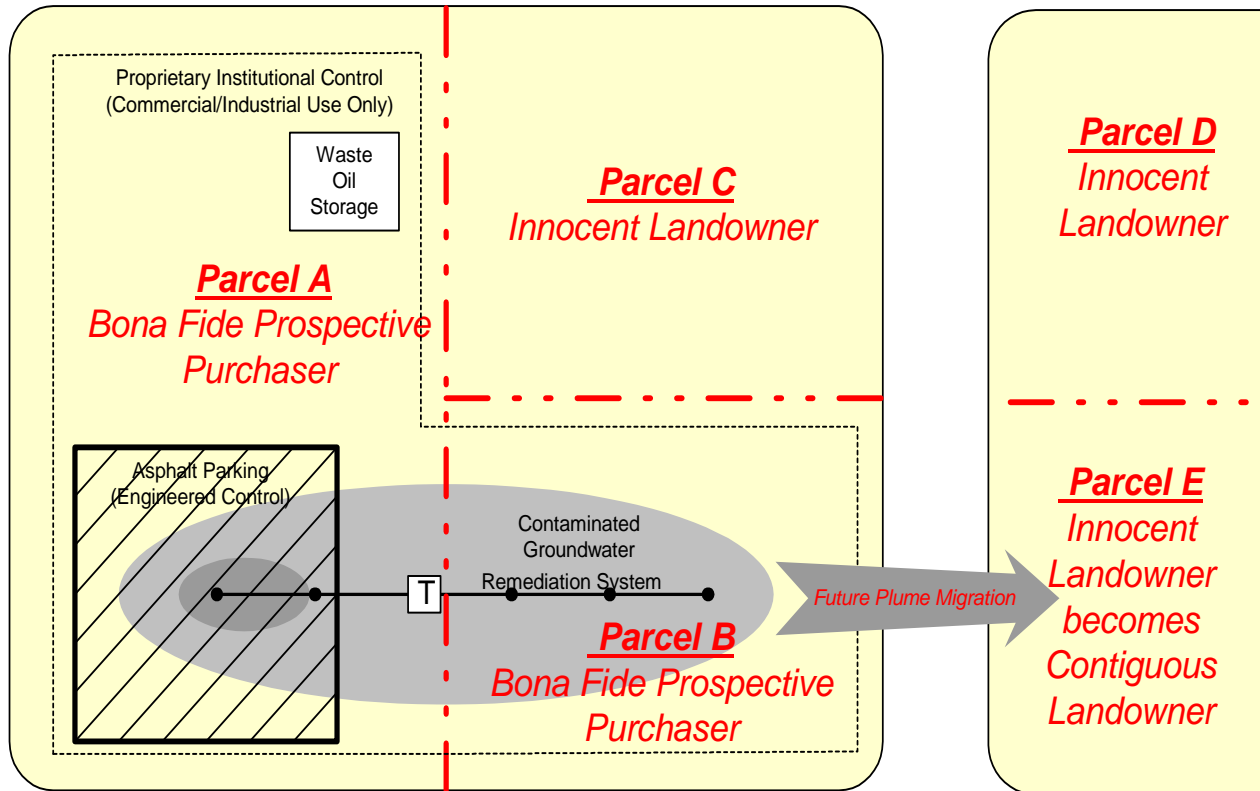
- BFPP - CERCLA § 101 (40)(C)
- CPO - CERCLA § 107 (q)(1)(A)(vii)

A "Working" Practice Standard for Landowner Continuing Obligations



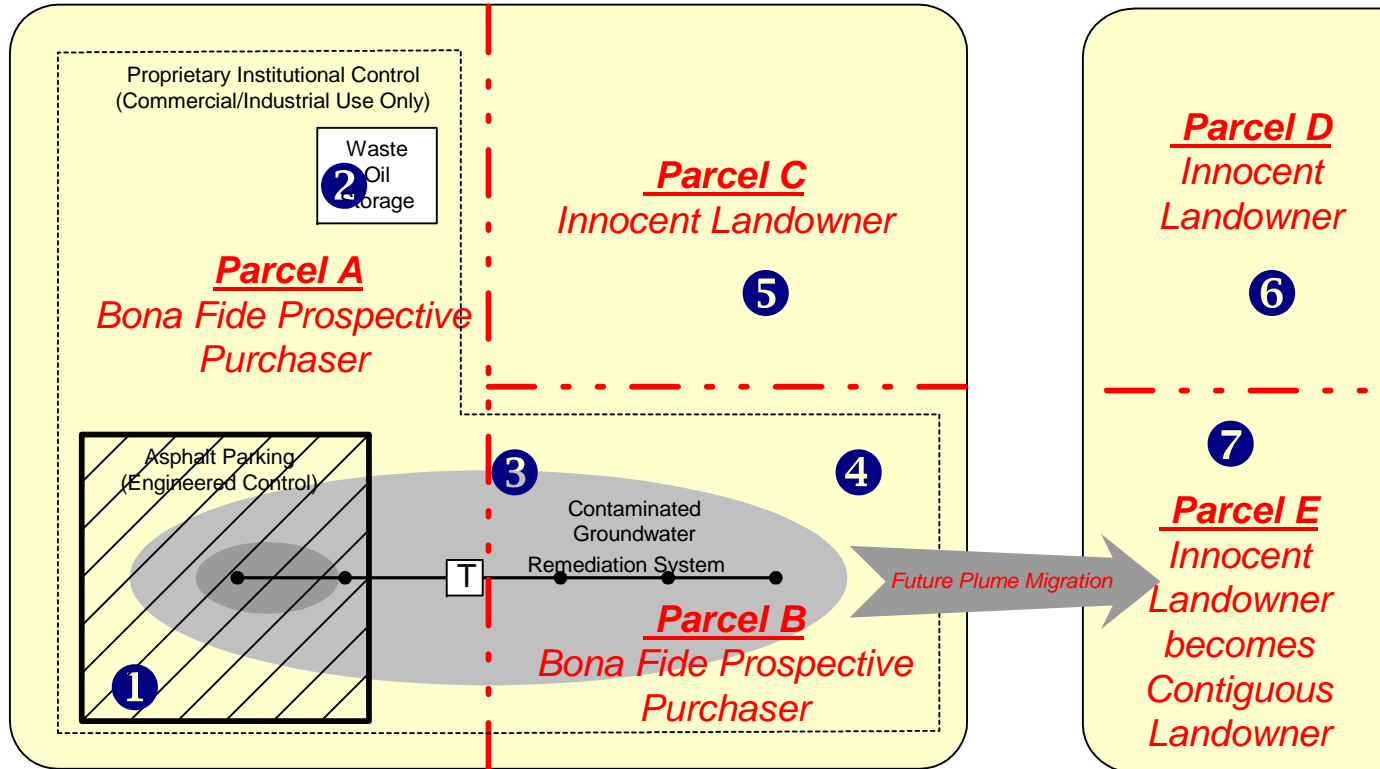
Key: AAI-All Appropriate Inquiry, ILO- Innocent Landowner, BFPP - Bona Fide Prospective Purchaser, CLO- Contiguous Landowner, IC- Institutional Control, EC- Engineering Control, LUR - Land Use Restriction, REC-Recordable Environmental Condition, RBCA - Risk Based Corrective Action, AUL - Activity & Use Limitation.

Hypothetical Analysis of Continuing Obligations



1. Institutional Controls
 - Proprietary Control
2. Engineering Controls
 - Asphalt Parking
 - Remediation System
3. Recordable Environmental Condition
 - Groundwater Contamination
4. Notice Obligation
 - Discovery by CPO of contamination

Hypothetical Losses of CERCLA Protection



1. Owner Excavates Asphalt
2. Owner Fails to Maintain Waste Oil Storage
3. Owner Damages Wells
4. Owner Develops Residential Housing
5. Owner Installs Construction Drainage
6. Owner Denies Access to Regulatory Agency
7. Owner Fails to Notify of Contaminant Discovery

A Practice Standard for Continuing Obligations

- ASTM Working Item WK9354
 - “ Standard Practice for Landowner Appropriate Care of a Contaminated Property”
- Why A Practice Standard?
 - Continuing Obligations and Appropriate Care Affect All Sites Seeking CERCLA protection
 - Practitioners and Landowners Need A Practice Standard Before they Appear in Court providing a CERCLA Defense
 - EPA can only issue Comfort Letters on the few thousand sites they oversee; however, hundreds of thousands of properties are subject to CERCLA.
- Next Steps
 - Marketplace of Ideas at Brownfield 2005
 - Friday 2:30 PM Room 703
 - Join ASTM Task Force
 - Technical Contact: Bob Wenzlau, bob@terradex.com
 - Technical Resources: <http://backroom.terradex.com/share/ASTM/>