

It's All About that Baseline

By Stephen E. Fauer

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732-469-8888



If you've been anywhere near a radio or a teenager this past year, you've heard Meghan Trainor sing "*I'm all about that bass.*" Throughout the song, Ms. Trainor affirms, "No treble." In my line of work, I say, "It's all about that baseline. No trouble."

Environmental baseline studies are an important form of protection in many commercial real estate situations. However, people offer various reasons for failing to perform baseline studies. Common reasons include these:

1. "Why should I spend the money to investigate? I really don't want to know what is there because if I find something I will have to report it."
2. "I already paid for due diligence. Why isn't that sufficient?"
3. "The prior owner (or tenant) just remediated the site, and they've received official closure and clearance. Therefore, we know the site is clean."

Each reason appears legitimate, and I will address each of them. Simply put, failure to perform a baseline study can come back to haunt you. Baseline studies might be more palatable if people viewed them as a form of protection, akin to a single-premium insurance policy. Other people look at a baseline as a "belt and suspenders" approach. The bottom line is this: a baseline study can prevent litigation. Or when litigation is unavoidable, the baseline provides either a great defense or powerful evidence to prosecute a successful claim.

Who should perform baseline studies? They should be considered by landlords when they are about to lease their property to a new industrial tenant. There are also situations where the tenant will want to perform their own baseline study so they are not liable for pre-existing issues that are rightfully the landlord's responsibility. A baseline becomes especially important when someone is leasing a property with an option to buy. Less commonly, buyers of industrial and commercial properties may find that a baseline makes sense depending upon their intended use of the property.

Baseline Studies Defined

The purpose of a baseline study (or more accurately, a Baseline Environmental Survey – "BES") is to gather environmental information and data for a building or part of a building against which change can be monitored relative to the occupancy of those premises. A BES is an invasive investigation, meaning that samples are taken and analyzed. (This is contrasted against due diligence that is, by definition, non-invasive.) Baseline studies protect parties from being held responsible for environmental impacts that they did not cause. Or, looking at it from the landlord's side, baseline studies can be used to ascribe responsibility relative to the use and actions upon those premises by a tenant.

A BES can be defined as *a site survey and or investigation conducted to establish environmental conditions prior to new ownership or tenancy so that one can discern and discriminate between impacts caused before and after a given date. BES's are normally used to ascribe blame or responsibility for environmental impacts discovered after the baseline has been conducted. The BES is based on existing environmental information related to storage, release, treatment, or disposal of hazardous substances or petroleum products on the property to determine or discover the obviousness of the presence or likely presence of a release or threatened release of any hazardous substance or petroleum product.*

Here are a few common situations where Baseline Environmental Surveys are typically utilized. In each situation an attorney (preferably one with environmental expertise) needs to assist with negotiations and contract language.

- A commercial property owner is getting a new tenant. The property owner needs to understand the nature of the tenant's operation; specifically, what do they make, what kinds of chemicals are stored, used, or manufactured on site, where are the chemicals stored, and where on the property will these activities take place? Are the floors intact? Are there any floor drains? This is then compared to the current and historic use of the site. And if necessary, baseline sampling is performed to demonstrate and document that the target chemicals and compounds do not currently exist in the soil or groundwater. The landlord ultimately wants to hold the tenant accountable for contamination attributable to their actions. And this situation can also be examined from the tenant's perspective.
- Tenants do not want to be liable for environmental impacts they did not cause. For example, suppose a prospective tenant is soon to occupy a new building. The tenant knows that their business is operated in a clean, reliable, and environmentally conscientious fashion. But the tenant does not know much about the history of the landlord's property. The tenant wants to know what other businesses operated there prior to its occupancy. And more specifically, did any of those prior tenants operate a business with chemicals similar to theirs? Based upon their findings, the tenant may want to initiate an investigation of the subject property prior to finalizing their lease. And it is possible that the landlord could object to this request.
- What if someone is buying a business but not the property? In a recent case to which ESA was privy, someone with an ongoing auto body business was buying another auto body shop. They will occupy the auto body operation being bought, and lease the premise with an option to buy the property. Thus, the purchaser will be operating his business on the very site where the former business (identical to that being operated there now) operated. Because the businesses are identical, it is critical that the purchaser establish a baseline to determine if there are pre-existing impacts to the soil or groundwater that could be attributable to his operation.

The Baseline Process

The BES process utilizes both due diligence and environmental sampling.

Often it makes sense to perform due diligence first. Due diligence can often determine if potential environmental risks are likely to be found. An ASTM Phase I study will suffice unless you are in New Jersey, in which case you have the option of performing either a Phase I or a Preliminary Assessment. (Please refer to ESA's prior article: *Due Diligence: What It is and How to Deal with It* -- http://www.askesa.com/enewsletters/enewsletter_0612.pdf.) The due diligence report takes up to one month to produce and will list recommendations for further investigation. And, accordingly, one has the option of performing Phase II sampling, or not.

What does environmental sampling entail? It almost always involves soil sampling and, to a lesser degree, groundwater sampling. When soil sampling is performed, you need to allow at least a month to schedule the work and receive analytical results from the laboratory. Upon receipt, there could be a need for more sampling and a final report. So in total, the process could take two to three months. What parameters should one look for during laboratory analysis? Analytical parameters are selected based upon the nature of the company soon to be a tenant, and less commonly, upon the site history.

Objections Overruled

Earlier, I presented three theoretical sets of objections from people who do not want to perform a baseline study. Here's what I might say in each instance. In every instance I strongly encourage the reader to seek the advice of an environmental attorney before making a final decision because, frankly, the stakes can be very high.

1. "Why should I spend the money to investigate? I really don't want to know what is there, because if I find something I will have to report it." *ESA has heard this objection many times. And to those who feel this way ESA says, "Caveat emptor – let the buyer beware". What you don't know could come back to haunt you. In addition, buyers of property in New Jersey normally have no reporting obligations whatsoever.*
2. "I already paid for due diligence. Why isn't that sufficient?" *Due diligence identifies potential areas of concern on a property. It does not tell you if those potential areas are in fact impacted. You need to examine the real estate deal and the players from all sides to determine your degree of potential environmental risk.*
3. "The prior owner (or tenant) just remediated the site, and they've received official closure and clearance. Therefore, we know the site is clean." *There are too many instances to recount where a site that has received clearance and proper closure actually still harbored environmental impacts. Remediating one series of impacts does not mean that other impacts do not exist.*

A Baseline Environmental Survey is designed to prevent trouble. That's why ESA is all about that BES, 'bout that BES: No Trouble.

Environmental Strategies & Applications, Inc.
495 Union Avenue
Suite 1D
Middlesex, NJ 08846
732-469-8888
sfauer@askesa.com