New ASTM E1527-13 Standard for Phase I Assessments

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• The federal Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) holds current and former owners and operators of contaminated properties strictly liable for cleanup costs.

• In 2002 CERCLA was amended. The amendments:
  – Clarified one of the third party defenses to CERCLA and added two more.
  – Required that EPA establish standards and practices for all appropriate inquiries (“AAI”).
CERCLA Third Party Defenses

1. **Innocent Purchaser** (release or threatened release of hazardous substances occurred *before* the innocent landowner acquired the property and landowner performed AAI before acquisition)

2. **Contiguous Property Owner** (contamination on the person’s property was due solely to migrating contamination from a contiguous property and person landowner performed AAI before acquisition)

3. **Bona Fide Prospective Purchaser** (a purchaser who otherwise could be considered the “owner” or “operator,” but A) disposal of all hazardous materials occurred before acquisition; and B) person conducted AAI before acquisition)
All Appropriate Inquiries ("AAI")

- AAI is, essentially, conducting a Phase I Environmental Site Assessment.
- A Phase I is a non-invasive assessment of property performed to:
  1. Understand the environmental issues at the property;
  2. Comply with standard commercial real estate practices; and
  3. Demonstrate that AAI has been conducted.
Elements of a Phase I

- Site inspections.
- Interviews.
- Reviews of historical sources.
- Reviews of government records.
- Consideration of “commonly known” information.
- Search for environmental cleanup liens.
- Consideration of “specialized knowledge.”
- Consideration of relationship of purchase price to fair market value of property, if not contaminated.
- Consideration of “degree of obviousness of contamination.”
The Former ASTM Standard

- EPA announced the AAI Final Rule in 2006.
  - This was the first official federal standard for AAI, effective November 1, 2006.

  - EPA specifically stated in the 2006 AAI Final Rule that compliance with ASTM E1527-05 satisfied AAI.
Revising the ASTM Standard

• In 2012 and 2013, the former ASTM standard was revised, resulting in the new ASTM E1527-13 standard.

• On December 30, 2013, EPA issued its Final Rule, stating that the new ASTM E1527-13 is compliant with AAI.
  – The Final Rule went into effect immediately. As of December 30, 2013, ASTM E1527-13 is the most current standard for Phase I reports.
What About the Old Standard?

• EPA “recommended” that the new ASTM E1527-13 standard be used for all Phase I ESAs going forward.
  – But EPA also said that a Phase I ESA that complies with the 2005 standard still meets AAI. That’s confusing.
• EPA specifically noted that it intends shortly to issue another rule withdrawing the 2005 standard.
  – This will make ASTM E1527-13 the only viable AAI standard.
  – Best practice is to follow the new standard now.
What’s New About the New ASTM Standard?

• Revised definitions of key terms.
• New definition.
• Vapor migration assessment requirements clarified.
• Additional assessment related to regulatory file review.
Revised Definitions

• “Recognized Environmental Condition” has been streamlined.
  – An REC is the presence of likely presence of any hazardous substances or petroleum products in, on or at a property:
    1. Due to a release to the environment;
    2. Under conditions indicative of a release to the environment; or
    3. Under conditions that pose a material threat of a future release.
  – The meaning is unchanged, the language has been simplified.
Revised Definitions

• “Historical Recognized Environmental Condition” has been clarified.
  – An HREC is a “past release of hazardous substances or petroleum products” where remedial measures allow for unrestricted use of the property, without the use of any controls.
  – “Unrestricted use” is based upon current standards.
    • Since standards change over time, this may require additional analysis by the EP.
  – Before, this definition was very convoluted.
New Definition

• “Controlled Recognized Environmental Condition” (CREC).
  – A CREC is a past release where contamination remains in place and property use is contingent on institutional controls.
  – For example, a property subject to an Environmental Covenant that prohibits the use of groundwater at the property.

• A CREC must be identified as an REC in the Phase I report.
Vapor Migration Assessment

- The ASTM Standard has always required assessment of potential “migration” of contaminants.
  - There was confusion, however, as to whether this included evaluation of vapor migration/intrusion.

- The definition of “migration” in the new standard was amended to include “vapor in the subsurface.”
  - Note that there is also an ASTM standard for vapor migration assessment, but using that standard is not required for AAI.
Regulatory File Review

• The section on regulatory file review has been amended to require further analysis from the environmental professional.

• Now, the standard makes clear that if a property is identified in the environmental database report the EP must either:
  1. Perform a **regulatory file review** (e.g., going to EPD to look at the records there); OR
  2. Provide a **justification** for not performing that review.
Effects of the New Changes

• Potential increased costs.
  – There are some additional analyses required of the EP.

• Additional time required to perform the Phase I.
  – Consideration of, for example, vapor migration may add time to the consultant's review.
  – As consultants adjust to the new standard, it may take some time, and revisions, to ensure that reports are in compliance.

• Focus on vapor intrusion.
  – EPA recently reopened some sites because of vapor issues.
Continuing Obligations

• The Phase I is just the first step in qualifying for CERCLA liability protection.
  – After acquisition, to maintain that liability protection, the owner must abide by the “continuing obligations.”

• Continuing obligations are post-purchase reasonable steps that the owner must take to ensure that any restrictions on land use are met, and that releases of hazardous materials are prevented.
Continuing Obligations

• Another ASTM standard, E2790-11, was prepared for continuing obligations.

• ASTM E2790-11 sets forth a 4-step process for identifying and complying with continuing obligations.
  – Review Phase I.
  – Review environmental conditions and AULs at the property.
  – If continuing obligations exist, prepare a "continuing obligations plan.”
  – Confirmation of performance of ongoing continuing obligations.
Federal v. State Liability

• Very few contaminated sites become CERCLA sites.
  – Example: Atlantic Station, a well-known environmental redevelopment project involving massive remediation efforts, was not a CERCLA site.

• Many sites become state superfund/hazardous sites.
  – In Georgia, our state superfund is the “Hazardous Site Inventory,” or HSI.
  – All other states have some similar mechanism/list.
Why are Phase Is Important?

• Demonstrates compliance with industry standards for commercial real estate transactions.

• Helps to identify environmental issues that could present problems with respect to state environmental remediation liability, or third-party lawsuits.
  – Provides a pre-purchase opportunity to, for example, enter the Brownfields program or evaluate necessity of vapor mitigation measures in development.

• May be required by lenders.

• Helps to assess true value of property.

• Ensures compliance with state and local laws and regulations on a going-forward basis.
Georgia Environmental Laws

Hazardous Site Response Act
• Requires notification by a property owner of certain soil or groundwater contamination.
• Requires soil and groundwater cleanup.

Hazardous Site Reuse & Redevelopment Act – Brownfield Program
• Only available to prospective purchasers.
• No cleanup of groundwater is required; delineation is required.

Voluntary Remediation Program Act
• Current property owners eligible.
• If property was listed just due to soil score, groundwater does not have to be cleaned up.
Questions?

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