

“All Appropriate Inquiries”: Update on the Environmental Due Diligence Standard

Environmental due diligence is a critical aspect of any project involving a transfer of real estate. Conducting a compliant Phase I Environmental Site Assessment is typically the first step in that process. This article explains how the Phase I became an industry standard for making “all appropriate inquiry,” and presents changes that are required in light of recent modifications to a key federal environmental statute.

Background



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In 1980, Congress enacted a broad and sweeping environmental law known as the Comprehensive Environmental Response Compensation and Liability

Act (“CERCLA”). CERCLA provides extensive federal authority for governmental agencies to respond directly to releases or threatened releases of hazardous substances into the environment. Specific provisions of

One of the consequences of CERCLA was that purchasers and developers of real estate began to avoid sites associated with historic contamination, also referred to as brownfields, due to the potential significant liabilities.

CERCLA also permit the government to pursue current owners for response costs, even if that owner did not cause the contamination at issue.

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certain liability protections for innocent landowners, contiguous property owners, and bona fide prospective purchasers.

“AAI” and the ASTM Phase I Standard

In order to qualify for CERCLA liability protections, the purchaser of potentially contaminated property must take “all appropriate inquiries into the prior use and ownership at the property.” *40 CFR part 312*. The rule also describes what is required for conducting all appropriate inquiries, or “AAI,” and importantly



recognizes that complying with ASTM 1527-05 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment” satisfies AAI. The American Society for Testing and Materials (“ASTM International”) is a widely recognized private international organization that develops and publishes technical standards for a wide range of industries, materials and products. ASTM 1527-05 itself details the technical requirements for conducting an appropriate Phase I ESA including, among other things, a site inspection, records review, interviews, and the preparation of a written report.

The 1527-05 standard was modified in 2013 after extensive comment and published as 1527-13. U.S. EPA adopted the standard as compliant with AAI and recognized that 1527-13 “reflects evolving best practices, affording prospective owners essential information when making property transaction decisions.”

Initially, U.S. EPA approved the use of either 1527-05 or 1527-13 to comply with AAI. Ultimately however, the agency concluded that AAI should be revised to only reference 1527-13. The change to AAI was made, in part, based on a desire to reduce any confusion associated with referencing a standard no longer recognized as good customary business practice.

The effective date of the change to AAI, referencing only 1527-13 as meeting the standard for CERCLA liability protections, is October 6, 2015. The delay in the effective date is to allow those who may currently be using 1527-05 to complete work and still comply with AAI.

Changes to AAI

ASTM 1527-13 contains several changes, several of which are described below, which are now incorporated into the AAI rule:

- **Vapor Intrusion:** Phase I reports must include an evaluation of potential migration into buildings and structures. Such migration may occur when subsurface contamination moves through the soil and into buildings which could present potential health and exposure risks (*ASTM 1527-35 3.2.56*).
- **Regulatory File Reviews:** Environmental professionals should review regulatory files if the subject site or adjacent property is identified in the governmental database records. A review of the physical files is meant to assist with confirming if environmental impacts actually exist at the site associated with the listing (*ASTM 1527-13 8.2.2*).
- **Controlled Environmental Conditions:** The Phase I standard includes a category for “controlled recognized environmental conditions.” This added term allows an environmental professional to identify with greater particularity those situations where a site has been cleaned up, but some contamination was allowed to remain in place subject to controls (i.e., activity use limitations, engineering controls, institutional controls, etc.) to the satisfaction of the regulatory authorities (*ASTM 3.2.18*). This update is helpful with the more and more impacted sites conducting “risk based” closures.

Conclusion

Performing a Phase I Environmental Site Assessment is an important step in any real estate transaction. Such work not only provides important information about history, limitations, and potential liability associated with a site but also can be used to establish a defense to CERCLA liability. Buyers, sellers, and lenders should be aware of the changes to AAI and its effective date as well as revisions to the Phase I standard which are reflected in ASTM 1527-13. Additionally, contracts, policies, and agreement forms should be updated to reference the updated ASTM standard.

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