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Real Property Pre-Purchase Due Diligence: Impact of ASTM's New Phase I Environmental Site Assessment Standard

Prospective property buyers and their environmental professionals are treading in uncertain territory when conducting due diligence these days. Here's why:

Background. On November 1, 2005, the US Environmental Protection Agency ("USEPA") issued its All Appropriate Inquiries Rule ("AAI Rule"). This rule sets forth standards and practices for conducting Phase I environmental site assessments ("Phase I ESA") to establish the innocent landowner, contiguous property owner and bona fide prospective purchaser defenses to liability (collectively, "innocent landowner defense") under the Comprehensive Environmental Response, Compensation and Liability Act. (See 40 CFR Part 312) The AAI Rule expressly states that by following the ASTM (American Society for Testing and Materials) E 1527-05 standard for a Phase I ESA, the AAI Rule is satisfied. (See 40 CFR Part 312.11)

On November 1, 2013, ASTM replaced the ASTM E 1527-05 ("previous") standard with the ASTM E 1527-13 ("new") standard. It is unclear whether following the new standard to conduct a Phase I ESA satisfies the AAI Rule. It is also unclear whether following the previous standard will be sufficient, as it is no longer considered good current commercial practice by the ASTM.

The USEPA tried to defuse the issue in August 2013 by enacting a rule which would have allowed either version of the standard to be used to comply with the AAI Rule. After receiving criticism, the USEPA withdrew the rule in late October 2013 and announced that it intended to address the comments and re-issue the rule in the future.

As a result, the question remains as to whether, in attempting to satisfy the innocent landowner defense, to conduct a Phase I ESA following the previous standard, which still complies with the AAI Rule but has been declared obsolete by the ASTM, or alternatively, to follow the new standard, which the ASTM has declared current commercial practice but does not yet have the official blessing of the USEPA. Are the standards sufficiently alike so that a consultant can conduct a Phase I ESA that complies with both versions of the ASTM standard? While compliance with both standards may be cumbersome, it may be the best way to satisfy the innocent landowner defense while the USEPA considers the issue.

Differences Between the Previous and New ASTM Standards.
Most of the differences between the two standards relate to changes in definitions and the scope of inquiry. The definitional changes were made, for the most part, to be more consistent with definitions in the AAI Rule. New definitions have been added, in part, to distinguish between the types of environmental conditions identified by a Phase I ESA.

1. Recognized Environment Conditions ("REC")

The previous definition of an REC was "the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property, or into the ground, ground water or surface water of the property. The term includes hazardous substances or petroleum products even under conditions in compliance with laws."

The definition of an REC under the new standard is somewhat broader. It aims to identify releases and threatened releases on, at, in or to the subject property, including vapor intrusion. The new standard defines a REC as "the presence or likely presence of any hazardous substances or petroleum products in, on or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of future release to the environment. De minimis conditions are not recognized environmental conditions."

2. Historical Recognized Environmental Conditions ("HREC")

The previous standard used a very broad definition for HRECs. It included environmental conditions "which may or may not be considered a REC currently" and gave wide discretion to the environmental professional conducting the Phase I ESA. It, therefore, left some uncertainty as to whether an identified condition was a REC requiring additional inquiry or was an HREC not requiring further investigation. The new standard limits an HREC to past releases that have been remediated to unrestricted use criteria.

3. Controlled Recognized Environmental Conditions ("CREC")

The new standard adds the term CREC to cover past releases that have been addressed to less-than-unrestricted standards. It is defined as "a REC that results from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority (for example, as evidenced by the issuance of a no further action letter or equivalent, or meeting risk-based criteria established by the regulatory authority), with hazardous substances or petroleum products allowed to remain in place subject to the implementation of required controls (for example, property use restrictions,

activity and use limitations, institutional controls, or engineering controls)." The new standard notes that a CREC should be listed as a CREC in the finding section and as a REC in the conclusion section.

4. De Minimis Conditions

Under the previous standard, de minimis conditions identified during a Phase I ESA were those that were not subject to environment actions. The new standard limits a de minimis condition to one "that generally does not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental authorities."

5. Migrate/Migration

The new standard revised the migration definition to include vapor migration. This is in part due to the recent emphasis by the USEPA and most state environmental and health agencies on vapor intrusion and indoor air issues.

Other differences between the two standards impact the roles of the environmental professional and user (i.e., the environmental professional's client). Under the new standard, the user must review title and judicial records for environmental liens and use restrictions and should provide this information to his/her environmental professional. Thus, a buyer and the buyer's attorney need to make sure the title search is comprehensive and includes not just the typical title documents, but also searches judicial records for environmental documents. This is separate from the environmental professional's search for institutional and engineering controls, which are still required as part of the Phase I ESA.

Another difference is that the new standard notes that recommendations are not required to be included in a Phase I ESA report. The new standard, however, cautions that the user should consider whether recommendations are desirable in order to fully quantify the environmental risk of a property. In practice, if there are findings that warrant further investigation, the environmental professional will recommend a scope of work for these findings.

In conclusion, it seems the best course of action is to make sure pre-purchase due diligence activities are consistent with both the previous and the new standards while we wait for the USEPA's decision on accepting the new standard as being compliant with the AAI Rule.