



ASTM'S NEW CONTINUING OBLIGATIONS STANDARD: HELPFUL GUIDANCE FOR PARTIES SEEKING TO ESTABLISH DEFENSES TO CERCLA LIABILITY

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On January 11, 2002, then-President Bush signed into law the [Small Business Liability Relief and Brownfields Revitalization Act](#) (“Brownfields Amendments”), which amended the [Comprehensive Environmental Response, Compensation and Liability Act](#) (“CERCLA”) by, among other things, adding the [bona fide prospective purchaser](#) (“BFPP”) defense and the contiguous property owner defense to CERCLA’s joint and several liability. With the addition of the BFPP defense, for the first time a party could knowingly purchase contaminated property and still qualify for a defense to CERCLA liability. To satisfy the statutory criteria for this defense, a party would have to demonstrate through a preponderance of evidence that it conducted “all appropriate inquiry” prior to property acquisition, and that it had complied with certain “continuing obligations” after property acquisition. These “continuing obligations” must also be satisfied by parties seeking to establish the contiguous property owner defense as well as the innocent purchaser defense to CERCLA liability. While the Brownfields Amendments directed the U.S. Environmental Protection Agency (“EPA”) to promulgate regulations to clarify what was meant by “all appropriate inquiry” (and EPA did in fact promulgate these regulations in 2005, as discussed below), no such directive existed for promulgating regulations to clarify what was meant by “continuing obligations.”

Although EPA issued its interim [Common Elements guidance document](#) in 2003 to help clarify what was required to satisfy continuing obligations, significant [uncertainties](#) still remained in the regulated community. In July 2011, after fifteen draft iterations, the [American Society for Testing and Materials](#) (“ASTM”) issued [Standard E2790-11 Standard Guide for Identifying and Complying with Continuing Obligations](#) (the “Continuing Obligations Standard”), which was developed to further assist parties seeking to establish CERCLA defenses to satisfy certain continuing obligations requirements. Because CERCLA places the burden on the parties seeking to qualify for liability defenses to demonstrate that they have satisfied all the criteria for the defenses, a party’s ability to document compliance with its continuing obligations will be critical in the ultimate success of any asserted defense to CERCLA liability. The new Continuing Obligations Standard should prove helpful to parties seeking to satisfy this burden of proof and establish CERCLA defenses.

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The continuing obligations specified in the Brownfields Amendments consist of the following:

1. Compliance with any land use restrictions established or relied upon in connection with a response action at a property;
2. Not impeding the effectiveness or integrity of any institutional controls employed in connection with a response action;
3. Taking "reasonable steps" with respect to releases of hazardous substances, including stopping continuing releases, preventing threatened future releases and preventing or limiting human, environmental or natural resource exposure to prior releases of hazardous substances;
4. Providing full cooperation, assistance and access to persons who are authorized to conduct response actions or natural resource restoration at a property;
5. Complying with information requests and administrative subpoenas; and
6. Providing legally-required notices with respect to releases of any hazardous substances at a property.

The Continuing Obligations Standard does not address all of the continuing obligations specified in the Brownfields Amendments, but only addresses obligations relating to land use restrictions, institutional controls, and reasonable steps relating to releases of hazardous substances at a property.

As identified above, the Brownfields Amendments required EPA to adopt regulations to clarify what constitutes all appropriate inquiry. EPA promulgated the all appropriate inquiry rule on November 1, 2005, which became effective on November 1, 2006. Under the rule, parties following the procedures of [ASTM E1527-05 Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process](#) are deemed to have complied with EPA's all appropriate inquiry rule. Not only did the Brownfields Amendments not require EPA to promulgate regulations clarifying what constituted "continuing obligations," many of the new terms in the Brownfields Amendments, such as "reasonable steps," "land use restrictions," "continuing releases," and "institutional controls" were not defined in the statute. In some respects, EPA's 2003 Common Elements Guidance raised more questions for the regulated community on what a party must do to satisfy its continuing obligations requirements.

The stated primary purpose of ASTM's Continuing Obligations Standard is to assist parties attempting to qualify for defenses to CERCLA liability to satisfy their continuing obligations requirements. To this end, the Continuing Obligations Standard identifies a four-step process for parties to follow in an effort to demonstrate that they have satisfied their continuing obligations:

1. Initially determine whether continuing obligations exist at all at a property;
2. Collect, review and analyze existing information concerning the property, and evaluate whether additional investigation needs to be performed in order to determine the nature and scope of a party's continuing obligations;
3. If continuing obligations are identified, formulate a continuing obligations plan for the property; and
4. Conduct and document the ongoing performance of the identified continuing obligations.

The standard provides a helpful framework for parties to identify, and document compliance with, their continuing obligations. In fact, the standard contains model forms to assist parties in generating documents to demonstrate compliance with their continuing obligations. As the Continuing Obligations Standard properly notes, the generation of documentary evidence will likely be critical to a party's success in establishing a

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CERCLA defense to liability, given that the burden of proof is on the party seeking to avail itself of a CERCLA defense to liability.

While the Continuing Obligations Standard should prove helpful to parties in developing documentary evidence if their claimed defense to CERCLA liability is subject to legal challenge, the new standard does not address a number of uncertainties associated with the continuing obligations requirements. By way of example, the standard does not identify what, if any, investigation or remedial activities must be performed with respect to hazardous substances at a property in order to satisfy the "reasonable steps" continuing obligation. As noted in the Continuing Obligations Standard (and in the [Common Elements Guidance](#)), because each site is different, the ultimate determination of whether a party's continuing obligations have been satisfied will be a fact-dependent determination, made after evaluating site-specific circumstances. This observation has been validated by the few federal district court opinions that have considered whether a party has satisfied its continuing obligations, with the courts making determinations that were very fact-specific, and which were made after lengthy trials. See, e.g., *Ashley II of Charleston, LLC v. PCS Nitrogen*, 791 F. Supp. 2d 431 (D.S.C. 2011); *3000 E. Imperial, LLC v. Robert Shaw Controls Co.*, 2010 WL 5464296 (C.D. Cal. 2010).

The Continuing Obligations Standard does nothing to cure the inherent flaws contained in the CERCLA liability defenses created by the Brownfields Amendments, namely, that the parties seeking to establish the defenses bear the burden of proof in making detailed, fact-specific demonstrations to show that they have satisfied all the criteria of the defenses. Notwithstanding the new ASTM standard, parties seeking to avoid CERCLA liability by establishing one of the defenses established by the Brownfields Amendments may nonetheless need to endure lengthy and costly litigation before ultimately prevailing.