

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2013

PHILADELPHIA, FRIDAY, NOVEMBER 8, 2013

VOL 248 • NO. 93

An **ALM** Publication

## Revised ASTM Phase 1 Site Assessment Standard Issued

BY JONATHAN H. SPERGEL

*Special to the Legal*

The method by which prospective purchasers of real estate conduct environmental due diligence is about to change. The impetus for this change is the revised American Society for Testing and Materials (ASTM) Standard Practice for Environmental Site Assessments: Phase 1, E 1527-13, that was just finalized and issued by ASTM on Wednesday after several years of development. As purchasers of real estate are well aware, the performance of a Phase 1 assessment has become a prerequisite for nearly all lenders prior to financing the acquisition of commercial properties. In addition, as described in this article, the performance of a Phase 1 prior to property purchase is one way for a prospective purchaser to satisfy some of the necessary elements to asserting a defense to certain federal and state environmental liability. Accordingly, prospective purchasers of real property should familiarize themselves with the changes to the ASTM standard, some of which may make securing acquisition loans for certain types of real estate more difficult.

### LEGAL CONTEXT FOR PHASE 1 SITE ASSESSMENTS

For more than 30 years, environmental due diligence for prospective purchasers of real estate has taken on special importance because of the strict liability schemes that exist under both federal and state environmental laws. Since 1980, the federal Superfund statute, formally known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), has imposed joint and several liability, regardless of fault, on owners and operators of sites where hazardous substances have been released.



**JONATHAN H. SPERGEL**

*is a partner at the environmental, energy, land-use law and litigation firm of Manko, Gold, Katcher & Fox in Bala Cynwyd, Pa. He can be reached at 484-430-2309 or jspergel@mankogold.com.*

Although certain defenses to CERCLA liability have existed since the statute was enacted (with modifications enacted in 1986), these defenses have been limited in nature and difficult to demonstrate. One such defense, the innocent landowner defense, provides that a purchaser of real estate can avoid CERCLA liability if the purchaser can demonstrate by a preponderance of the evidence that, at the time of property acquisition, the purchaser “did not know and had no reason to know” that hazardous substances were released at the property. (See 42 U.S.C. § 9601(35)(A).) To make this demonstration, the purchaser must show that it conducted “all appropriate inquiries” into the prior ownership and uses of the property in accordance with “generally-accepted good commercial and customary standards and practices.”

Although Congress provided some guidance as to what constituted “all appropriate inquiries” in the 1986 amendments to CERCLA, the case law interpreting this standard was often driven by the particular facts and circumstances of a case. In an effort to assist purchasers of real property with performing all appropriate inquiries, in 1993, ASTM developed the Phase 1 Environmental Site Assessment Standard (E 1527) to serve as a blueprint for parties wishing to undertake the investigation in accordance with generally-accepted good commercial and customary standards and practices.

Although the Phase 1 standard has provided purchasers of property with a process for undertaking environmental due diligence in an effort to qualify for the innocent landowner defense to Superfund liability, ironically, if contamination was present at a property, a party complying with the requirements of the Phase 1 standard would almost always come to “know or have reason to know” of the release or threatened release of hazardous substances at that property, thus rendering the purchaser ineligible to qualify for the innocent landowner defense to Superfund liability.

### 2002 CERCLA AMENDMENTS

In January 2002, the Small Business Liability Relief and Brownfields Revitalization Act amended the Superfund statute by, among other things, adding two new defenses to Superfund liability: the bona fide prospective purchaser (BFPP) defense and the contiguous property owner defense. With the addition of the BFPP defense, for the first time a purchaser of property with known contamination could nonetheless avoid CERCLA liability by satisfying all of the criteria of the BFPP defense, including conducting all appropriate inquiries into the previous ownership and uses of the property prior to acquisition (other requirements of the defense include requirements that the purchaser undertake reasonable steps after acquisition with respect to hazardous substances at the property). The 2002 CERCLA amendments also added statutory criteria to what constituted “all appropriate inquiries,” and further required the U.S. Environmental Protection Agency (EPA) to promulgate regulations establishing standards and practices for the purposes of satisfying the requirements for conducting all appropriate inquiries. The EPA promulgated its All Appropriate

Inquiries rule (AAI rule) in 2006, which provided that compliance with the 2005 Phase 1 standard may be used to satisfy the requirements of the AAI rule.

## CHANGES TO ASTM STANDARD

A draft of ASTM's revised standard was made available by the EPA as part of its Aug. 15 "Notification of Proposed and Final Rulemaking" to revise the AAI rule. Under this planned rulemaking, the EPA sought to modify the AAI rule to provide that performance of the newly revised ASTM standard could also be used to satisfy the AAI rule, meaning that a party seeking to qualify for the innocent landowner or BFPP defense to Superfund liability could either perform a Phase 1 complying with the 2005 standard or the new proposed standard to satisfy "all appropriate inquiries." Although the rule was scheduled to automatically become final Nov. 15, because of numerous negative comments received by the EPA about the proposed rule change, the EPA withdrew the proposed amendment Oct. 29. Many commenters expressed concerns over confusion that might be created by having the option of choosing between two different Phase I standards. Because the BFPP and innocent landowner defenses are ultimately determined by courts, concerns were expressed that judges might conclude that, regardless of the EPA's rule, a party opting to comply with the 2005 standard when a revised standard exists may not be determined to have performed its investigation in accordance with generally-accepted good commercial and customary standards and practices, thus disqualifying the party from successfully asserting a defense to Superfund liability.

## KEY REVISIONS TO PHASE 1 ASTM STANDARD

Below is an overview of the key changes that ASTM has made to the Phase 1 standard. As discussed below, some of these changes may complicate a buyer's ability to secure acquisition loans for certain types of property.

### • Revisions to the definition of recognized environmental condition.

To satisfy the objective of enabling a user to satisfy "all appropriate inquiries," the ASTM standard created the term "recognized environmental conditions" or RECs. The 2005 standard

defines REC as 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 such substances at the property. The revised standard refines and simplifies the definition of REC to more closely align with the language currently contained in EPA's AAI rule.

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*Prospective purchasers of real property should start assessing the potential impacts the new standard may have on their planned real estate transactions.*

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### • Revisions to the definition of historical recognized environmental condition.

The 2005 standard contains a definition for "historical recognized environmental conditions" or HRECs. The 2005 standard defines HRECs as conditions where there was a past release of hazardous substances or petroleum that was subsequently remediated, resulting in a determination by the responsible regulatory agency that no further action was required. Under the 2005 standard, environmental professionals have the discretion to conclude that an HREC no longer constitutes a REC. The revised standard limits the definition of HREC to only those situations where regulatory closure for a remediation was achieved based upon an unrestricted use standard. By way of example, a site where residual contamination remains and regulatory closure was achieved through the use of some type of activity or use limitation (such as an engineering or institutional control) would no longer qualify as an HREC under the new standard. This is a key change because many brownfield and urban sites are remediated utilizing risk-based remediation standards that rely on some type of engineering or institutional control, such as a requirement to maintain a cap over impacted soils.

### • Addition of the term "controlled recognized environmental condition."

The proposed standard adds the new term "controlled recognized environmental condition" or CREC to fill the gap created by the new standard's narrower definition of HREC. The proposed standard defines CREC as contamination that has been remediated to the satisfaction of a responsible regulatory agency, but that relied in part on the use of some type of activity or use limitation, such as an engineering or institutional control. Importantly, the revised standard requires a CREC to also be identified as a REC in the Phase I. This change may have the most significant impact on certain types of real estate transactions. Many risk-adverse institutional lenders are reluctant to provide financing for properties with identified RECs in a Phase I report. Given that the new standard would automatically designate a CREC as a REC, it may initially become more difficult for prospective purchasers of properties that have undergone risk-based cleanups relying on engineering or institutional controls to secure acquisition financing.

### • Vapor migration.

The revised standard includes the newly defined terms "migrate/migration." The standard defines these terms to specifically include vapor migration in the subsurface. Although this added definition is only intended to clarify the scope of the ASTM standard, it likely will result in environmental consultants identifying with much more frequency in Phase I reports the potential for vapor intrusion issues at properties.

Regardless of the EPA's timing on re-issuing an amendment to the AAI rule, ASTM's revised standard has now been issued, and will need to be considered by purchasers and lenders. Prospective purchasers of real property will need to familiarize themselves with the scope of this new standard, and should start assessing the potential impacts that it may have on their planned real estate transactions. •

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