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Providing Insight into the Contours of Emerging Insurance Coverage and Environmental Issues

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Old Wine in a New Bottle: EPA's Final "Final" Rule on ASTM Phase I Environmental Site Assessments

For insurers, lenders and those in the real estate business, Phase I Assessments have often been used as a gatekeeper for commercial transactions. This gatekeeper role originated in 2002, when CERCLA was amended to limit liability for bona fide prospective purchasers and contiguous property owners, and to clarify CERCLA's innocent landowner defense. In 2005, EPA promulgated the All Appropriate Inquiry Rule (AAI Rule) to establish standard practices that qualified for these new protections from CERCLA liability. At that time, the AAI Rule referenced ASTM standard E1527-05 – Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process - and authorized its use to comply with the AAI Rule.

In August 2013, EPA issued a direct final rule to amend its AAI Rule to reference a new ASTM standard - E1527-13. At that time, EPA also invited comments on the final rule, and advised that it would withdraw the rule if it received adverse comments. In response, many commenters objected to the fact that the final rule references *both* ASTM standards. In October 2013, EPA withdrew its final rule.

As a parting gift to 2013, on December 30, 2013, EPA issued its "final" final rule that politely suggests using E1527-13, and foretells of a golden age when all users of Phase I Assessments will merrily embrace E1527-13. Waxing Dickensonian, EPA, however, could not resist the urge to thrust upon us a visit from the standard from Site Assessments Past (E1527-05). EPA's AAI Rule will continue to reference E1527-05, until some unspecified future time.

In laymen's terms, EPA really, really likes E1527-13, but simply could not bear to purge E1527-05 from the AAI Rule. EPA appears to be in no rush to bury poor E1527-05, since in its view, everyone else will really, really like E1527-13, and by the way, ASTM is going to put the dreaded "historical standard" stamp on E1527-05. And just in case we are not enraptured by E1527-13, EPA warns that if we all don't start using it, EPA may just have to "explicitly require" us to use the "enhanced activities provided for in the updated ASTM-13 standard."

So which standard applies? Well, according to EPA, maybe both, or neither? Confused? In response to comments regarding its August 2013 final rule, EPA stated that while an ASTM standard can be used to comply with the AAI rule, the actual standard ***is*** the AAI Rule – 40 CFR 312.11. In other words, before

you bet the farm on a Phase I report based on either ASTM standard, ensure that any doubts as to the sufficiency of the site investigation pass muster under Part 312.11.

So what's new? E1527-13 is similar to E1527-05 in format, process and areas of coverage. According to both EPA and ASTM, however, E1527-13 provides "clarification" to E1527-05, and additional guidance to assist in determining if there are releases or threatened releases of hazardous substances at a site. Here's the lowdown on the significant changes:

- **Vapor Releases** – the "migrate/migration" definition was revised to specifically include vapor migration – however, indoor air quality is still a non-scope item for Phase I Assessments. The revised definition is meant to clarify that releases that migrate via vapor in the subsurface or soils are a "recognized environmental condition" (REC). EPA went out of its way here to clarify in its preamble to the rule that assessment of vapor releases was *always required under E1527-05*, despite the fact that some commenters noted that historically, assessments under E1527-05 either overlooked or did not consider vapor releases when conducting Phase I Assessments. Some fear that these comments will open a Pandora's Box of litigation against consultants who failed to assess vapor migration in assessments performed under E1527-05.

  Do you need to be concerned about EPA's comments in a *preamble* to a rule? Courts look at the following factors to determine if a preamble is binding: (1) the agency's own characterization of the action; (2) whether the agency published the action in the federal register or CFR; and (3) whether the action has binding effects on either private parties or the agency. *See Florida Power & Light Co. v. EPA*, 145 F.3d 1414 (D.C. Cir. 1998) (finding preamble to *proposed* regulation under RCRA not binding*); Louisiana Env't Action Network v. EPA*, 172 F.3d 65 (D.C. Cir. 1999) (Preamble to apparent final rule binding where agency published material in federal register and EPA characterized preamble as "regulation"); *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996) (no categorical bar to judicial review of preamble but review must await application in "concrete case").

  Since there does not appear to be a bright line test for determining if a preamble is binding, you may not want to cavalierly ignore EPA's comments about vapor intrusion under E1527-05. But before you reach for the Tums and your old Phase I Reports, it may be that any potential for vapor releases under E1527-05 were captured in an analysis of other types of releases or threatened releases at a site. If other types of releases were not captured, then you may have more to worry about than vapor issues.

  Going forward, make sure an assessment of vapor migration is on your Phase I checklist.

- **Post Remedial Care** – Many sites undergo cleanup that leaves certain levels of contaminants in place, but protects the public and environmental by use of various deed restrictions and engineering/institutional controls. The definition of "historical recognized environmental conditions" (HREC) has been clarified so that it refers *only* to prior releases that have been remediated to unrestricted residential use, i.e., no actionable levels of contaminants remain. A new term, Controlled Recognized Environmental Condition (CREC) has been added to describe sites where a release was remediated, but contaminants remain in place, subject to restrictions/controls. A CREC falls within the "recognized environmental condition" definition.

Note, however, that E1527-13 does not require the consultant to confirm the integrity of the control. Since the liability protections afforded by undertaking AAI may be forfeited if a purchaser fails to prevent or limit exposure to any previously released hazardous substance, care should be taken to monitor and comply with any post remedial care plan that is in place, and ensure that if applicable, a viable party remains obligated, via an indemnity and/or filed Uniform Environmental Covenant, to maintain any preexisting controls. To the extent you would like your consultant to comment or make recommendations as to any existing controls, see the bullet below regarding "recommendations."

- **Records Review (Yes, Please)** – Many Phase I Reports completed under E1527-05 advised that the consultant has requested a review of state or federal records for the particular site, but as of the report's date, the agencies had not responded. So the party relying on the report may need to decide to either pull the trigger on a transaction absent a file review, or seek to extend a due diligence period (and perhaps pay an additional consulting fee) to have a file review performed.

  Section 8.2.2 now states that if a site or adjoining site is identified in one or more of the standard environmental record sources, e.g., commercially available environmental databases, pertinent regulatory files *should* be reviewed, unless the consultant provides a written justification for not conducting the review. Alternatively, the consultant can review files/records from other sources, such as on-site records, user provided records, local government records, or conduct interviews with regulatory officials or other individuals knowledgeable about environmental conditions. The end result is the cost and time to complete a Phase I assessment may increase, but so too may the quality of the assessment.

- **Other Revised Definitions** – Most important among various revised definitions is the new REC definition: "the presence or likely presence of any 'hazardous substances' or 'petroleum products' in, on, or at a 'property': (1) due to release to the environment; (2) under conditions indicative of a 'release' to the 'environment' or under conditions that pose a 'material threat' of a future "release" to the 'environment'. 'De minimis conditions' are not 'recognized environmental conditions.'" This streamlined definition is more in line with what the AAI Rule requires insofar as assessing releases, and attempting to minimize disputes over what is and is not an REC.

  In revising the "de minimis conditions" definition, ASTM makes it clear that such conditions are not a REC *or* a CREC. In addition, the ASTM added definitions of "release" and "environment" to the standard that are verbatim to the CERCLA definitions.

- **No Recommendations, Please** – Section 12.15 states that the standard does not require recommendations, and that the user should consider if recommendations are needed. Recommendations are characterized as an "additional service that may be useful in the 'user's' analysis of [landowner liability protections] or 'business environmental risk.'" Sometimes, less is more. If a consultant makes certain written recommendations, and they are not followed, you may open the door to forfeiting your AAI liability protection. Therefore, it may be advisable to set forth any recommendations in a separate document and in a format that is more properly suited for other types of sensitive due diligence information that may be subject to non-disclosure or privilege protections.

- **Who's Job Is It Anyway?** – Both ASTM Standards differentiate which party, the consultant (environmental professional) or the user (the party seeking liability protection) is responsible for obtaining certain information, such as environmental liens levied on the site. Section 6.2 clarifies that the user – not the consultant – is responsible for determining if environmental liens or use limitations have been placed on a particular site by way of searching title or judicial records. The Standard states that a user should retain a title company, real estate attorney or title professional to conduct such searches.

What does it all mean?

As of now, it appears that a user can rely on a Phase I Assessment that is performed using either standard, so long as the Assessment satisfies the requirements of 40 CFR 312.11. My take on this is that since the new standard merely "clarifies" the old standard, an Assessment performed today under the old standard should yield the same outcome as one performed under the new standard – a convergence of standards if you will.

As a result, it can be argued that a consultant cannot ignore the clarifications set forth in E1527-13, even if it conducted an Assessment using E1527-5, least it be exposed to liability for not following the "clarified" standard. Users should also expect the same type of information to be provided to it under either standard, now that EPA has told us that the information required to be assessed in E1527-13 was supposed to be assessed under E1527-5 in the first instance.

But in our consumer-oriented society, why would you buy old, when you can buy new? For consultants and users alike, it seems preferable and cleaner simply to adopt E1527-13 as EPA politely suggests, or else EPA will "expressly require" the regulated community to do so, along with eating a daily requirement of broccoli. A copy of the December 30, 2013 Rule is attached.

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