

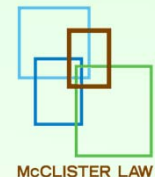
Environmental Diligence 101 and the New ASTM Standard for Phase I Environmental Site Assessments

Presented by

Jenny McClister, Environmental Attorney, McClister Law LLC

and

Kristen Dickey, CPEA, WSP



Presentation Overview

- Environmental diligence in transactions
- New versus old ASTM standards for Phase I environmental site assessments (ESAs)
- New standard's implications for transactions
- EPA approval of the new ASTM standard

Environmental Diligence

- Why do diligence?
 - To know what you are purchasing/leasing/getting as collateral
 - Environmental contamination is a source of liability (cleanup liability, natural resource damages, tort, compliance [sometimes])
 - Environmental contamination can also limit the potential use of property, decrease its value, decrease its marketability
 - If purchasing a business, noncompliance could be a significant source of liability (cost of corrective action, penalties) [not the focus of this presentation]

Environmental Diligence (cont'd)

- Why do diligence?
 - To qualify for defenses to the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA” or “Superfund”) liability
 - CERCLA creates liability for the cleanup of hazardous substance contamination for owners and operators of real property, without regard to fault

Environmental Diligence (cont'd)

- How do you conduct environmental diligence?
 - Hire an environmental professional and an environmental attorney
 - ASTM Phase I ESA is industry standard for identifying potential contamination
 - Environmental compliance audit is used to identify compliance issues [not the focus of this presentation]

Environmental Diligence (cont'd)

- What is “All Appropriate Inquiries” (AAI)?
 - The standard for diligence described in CERCLA that is required to establish any of CERCLA’s diligence-based defenses
 - The EPA promulgated its AAI rule November 1, 2005; sets forth requirements for AAI and states that the use of two ASTM standards may be used to meet AAI:
 - ASTM E 1527-05 – all property
 - ASTM E 2247-08 – rural property

Environmental Diligence (cont'd)

- What are the defenses to CERCLA liability?
 - Innocent Landowner Defense – acquire property without knowledge of contamination
 - Bona Fide Prospective Purchaser Exemption – acquire property after January 11, 2002 with knowledge of contamination
 - Contiguous Landowner Defense – acquire property without knowledge of contamination from neighboring property

ASTM E 1527-13 vs. ASTM E 1527-05

- The ASTM E 1527-13: Standard Practice for Phase I Environmental Site Assessments was issued on November 6, 2013
- Used in most commercial property transactions to identify environmental liabilities, and to obtain protections under the EPA's AAI Rule
- Revised standard intended to clarify language where there was some inconsistency in practice
- We will cover some key changes from ASTM E 1527-13 compared to ASTM E 1527-05

ASTM E 1527-13 vs. ASTM E 1527-05 (cont'd)

- ASTM E 1527-13 revises REC definition to align with AAI Rule:
 - “ ...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 (3) under conditions that pose a material threat of a future release to the environment. *De minimis* conditions are not recognized environmental conditions.”

ASTM E 1527-13 vs. ASTM E 1527-05 (cont'd)

- ASTM E 1527-13 updates the definition of Historical REC:
 - Clarifies that historical REC describes conditions only where past releases were addressed at a property to a level allowing for **unrestricted residential use**.

ASTM E 1527-13 vs. ASTM E 1527-05 (cont'd)

- ASTM E 1527-13 adds “Controlled REC”:
 - Controlled REC describes a condition where previous releases at properties that underwent risk-based closures were addressed, but **contaminants are allowed to remain in place** under certain restrictions or conditions.
 - This is not the same as a *de minimis* condition.

ASTM E 1527-13 vs. ASTM E 1527-05 (cont'd)

- ASTM E 1527-05 updates “migrate/migration” to specifically include **vapor migration** as a pathway of concern
 - The revision clarifies that releases of contaminants that migrate via vapor in the subsurface or soils are RECs.
 - Prospective property owners will have the added assurance that releases that migrate onto a subject property via a vapor pathway will be identified a RECs.

ASTM E 1527-13 vs. ASTM E 1527-05 (cont'd)

- ASTM E 1527-13 added guidance for conducting **regulatory agency file and records reviews** for the target property or adjoining properties identified in the database search
 - Standardizes the framework for verifying information obtained from key databases
 - Clarifies that an environmental professional should make efforts to review and document the validity of information found in database search

ASTM E 1527-13 vs. ASTM E 1527-05 (cont'd)

- ASTM E 1527-13 revises the scope of the “User Obligations.”
 - Clarifies and expands on which aspects of the site assessment investigation may be the responsibility of the user, or prospective property owner, or the user’s chosen representative, and not necessarily the responsibility of the environmental professional.

Transaction Implications

- Prospective property purchasers can expect Phase Is to be:
 - More complete – more comprehensive agency file searches
 - Less ambiguity – clearer definitions around RECs and potential pathways of concern
 - Consistency – clarifications should minimize interpretation inconsistencies in the past
 - Increase in validity of reports
 - Increase in confidence for users and property owners

Transaction Implications (cont'd)

- Some potentially challenging implications:
 - Price increase – for some providers, the agency(s) file review and consideration of vapor as a pathway of concern could increase costs for Phase Is of certain sites (i.e., time, expertise from qualified personnel, etc.)
 - Users need to be familiar with their obligations vs. environmental professional's scope of work.

EPA Approval of ASTM E 1527-13

- In August 2013, EPA issued a direct-final rule and a proposed rule to reference ASTM E 1527-13 in its AAI Rule as a standard that can be used to achieve AAI
- EPA received negative comments on these rules and therefore withdrew the direct-final rule
- EPA is proceeding with its rulemaking pursuant to its proposed rule

EPA Approval of ASTM E 1527-13 (cont'd)

- ASTM has stated that EPA still intends to incorporate ASTM E 1527-13 into the AAI Rule
- Expect a rulemaking in the next 30 to 60 days
- ASTM E 1527-05 has sunsetted, so what standard should you use?

ASTM E 1527-13!!!

The Case for ASTM E 1527-13

- ASTM E 1527-13 better approximates the level of effort needed to know what you are acquiring
- Although it is not expressly referenced in the AAI Rule yet, an assessment conducted under ASTM E 1527-13 can achieve AAI; you just need to compare the assessment to the AAI Rule to ensure that it does
- Once ASTM E 1527-13 is referenced in the AAI Rule, it should be the only choice for diligence

Questions

Jenny McClister, Environmental Attorney

McClister Law LLC

720-379-5313

jenny@mcclisterlaw.com

www.mcclisterlaw.com

Kristen Dickey, CPEA

WSP

303.850.9200

kristen.dickey@wspgroup.com

www.wspgroup.com/usa

