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New Environmental Due Diligence Requirements To Qualify For Purchase Liability Protections

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In November 2013, ASTM International ("ASTM") published "E1527-13 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," ("E1527-13") revising the process for evaluating whether a prospective purchaser of real property has satisfactorily conducted the All Appropriate Inquiry ("AAI") review necessary to qualify for innocent purchaser protections under certain major state and federal environmental laws. A precondition for qualifying for such exemptions is compliance with AAI standards under Section 101(35)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), set forth in 40 CFR 312.20. Under CERCLA, a purchaser who "did not know or had no reason to know" of contamination would not be liable as a CERCLA owner or operator. To establish that s/he had no reason to know of the contamination, a landowner must demonstrate that s/he took "all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices." The revised rule does not represent a game change, but could make due diligence more onerous in certain situations.

AAI Background

The previous standard, E1527-05, published by ASTM in 2005, was the first rule officially approved by the U.S. Environmental Protection Agency ("EPA" or "Agency") that set forth the elements required to satisfy AAI. The Agency's initial consideration of the revised standard, E1527-13, focused solely on whether it was compliant with the AAI rule – in other words, whether it was *at least* as protective as the requirements under E1527-05. Satisfied that E1527-13 was no less stringent, EPA published the revised standard on August 15, 2013 (78 Fed. Reg. 49690). However, on October 29, 2013, (78 Fed. Reg. 64403) the Agency withdrew its publication of the revised standard after receiving adverse public comments, which focused almost exclusively on whether the Agency should allow both E1527-05 and E1527-13 to satisfy AAI (rather than limiting compliance with AAI to E1527-13, exclusively). On December 30, 2013, the EPA completed its rulemaking process and published the revised standard, thereby formally adopting E1527-13 as compliant with the AAI review. The EPA further indicated that it plans to amend the AAI Rule to reflect that the only appropriate standard is E1527-13.

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To comply with the revised AAI requirements, prospective property owners seeking to qualify for CERCLA and comparable landowner liability protections should be aware of the changes to certain key terms and processes under E1527-13: (1) revised definitions of Recognized Environmental Conditions ("RECs"), Historical RECs ("HRECs"), *de minimis* conditions, and the addition of a new term, Controlled RECs ("CRECs"); (2) vapor migration; and (3) regulatory agency file reviews.

RECs, HRECs, CRECs And De Minimis Conditions

- ASTM changed and simplified the definition of a REC. A REC is now defined as follows:

  > [T]he 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 a future release to the environment.

- Further, *de minimis* conditions are not RECs. With this change, the definition of a REC was narrowed so as to more closely align with the definition of a release under CERCLA. The impact of the redefinition will likely be minimal.
- ASTM also revised the definition of an HREC to clarify that this term is limited only to properties that had previously been remediated *and* that satisfied unrestricted land use standards at the time of remediation. An HREC is not a REC; rather, it is a *de minimis condition*. However, prospective landowners should be aware that a property that qualified as an HREC, based on standards at the time, may no longer be an HREC if the applicable standards have changed; in this case, the property would qualify as a CREC.
- CRECs, which are a subset of RECs but independently defined for the first time under E1527-13, cover properties that were previously remediated to the satisfaction

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of a regulatory authority, but where some contamination remains in place. In other words, the prior remediation did not satisfy unrestricted land use standards as some condition(s) remain, even if the condition(s) is/are presently controlled. This category was designed to resolve the ambiguity with regard to completely remedied HRECs (which are *not* RECs), as opposed to conditions that may give rise to future obligations (now defined as CRECs, which *are* RECs). CRECs are particularly important because they specifically address post-acquisition continuing obligations of property owners.

Vapor Migration

• Although E1527-13 does *not* regulate or even address "vapor intrusion," the revised standard adds the definition of "migrate/migration" in reference to "vapor migration," without separately defining what is meant by "vapor migration." Nonetheless, the likely practical implication of E1527-13 is that environmental consultants will need to assess possible indoor air quality impacts from vapor intrusion pathways if/when there is surface soil or groundwater contamination at or even *near* the subject property.

Regulatory Agency File Reviews

The revised standard provides additional guidance on the approach for verifying agency information related to information obtained from key databases. While the new standard does not mandate a review of agency records, environmental professionals "should" search the judicial records in a county clerk's office to locate and report on environmental liens and activity and use limitations, and adhere to heightened reporting requirements regarding regulatory file reviews. The standard requires a detailed explanation if a consultant concludes that a regulatory file review was not needed for a particular assessment. While there are some concerns that this could increase the costs of conducting due diligence, many leading consultants already undertake such regulatory reviews in connection with their assessments and thus the impact of this change is likely to be modest.

Although the changes contemplated in the revised AAI standard are likely to be met with a collective shrug, the practical reality is that going forward, those who rely on the less stringent E1527-05 requirements instead of complying with E1527-13 risk not qualifying for innocent purchaser protections under certain federal and state environmental regimes. Thus, although ASTM E1527-13 will not be officially certified as the only appropriate method for demonstrating compliance with AAI until EPA publishes an amended version of the rule, prospective purchasers should begin relying on E1527-13 as the standard for conducting environmental due diligence and demonstrating compliance with AAI right away, if they are not already doing so.