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Practice Update

New Standard for Phase I Environmental Reports to Take Effect in 2023

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In February 2023, a new Phase I environmental site assessment standard will take effect and govern environmental due diligence for parties that wish to satisfy "all appropriate inquiries" and obtain federal environmental liability defenses before acquiring a contaminated site. This is particularly important for buyers of real property who want to preserve the bona fide prospective purchaser (BFPP) defense, which can serve as a critical shield and protection against strict federal environmental liability for pre-existing contamination.

On December 15, 2022, the United States Environmental Protection Agency (EPA) published a final rule (87 Fed. Reg. 76578) updating the standards for satisfying "all appropriate inquiries" under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). The final rule, which takes effect on February 13, 2023, provides that purchasers of commercial property conduct a Phase I environmental site assessment (ESA) that is consistent with a new and updated standard established by ASTM International, denoted as ASTM E1527-21, in accordance with generally accepted good commercial and customary standards and practices. ASTM E1527-21 replaces the prior iteration of the standard, ASTM E1527-13. Under the

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final rule, reliance on an ESA conducted in accordance with the 2013 version of the ASTM standard will no longer satisfy the "all appropriate inquiries" provisions under CERCLA as of February 2024. The final rule provides needed clarity in this regard, as environmental practitioners had been employing various approaches as to which ASTM standard to apply. A separate ASTM standard applies to environmental site assessments of forestland or rural property.

New Phase I Standard

The new Phase I standard modifies a number of important elements of the standard. Key among these are revised, more detailed definitions of recognized environmental conditions, controlled recognized environmental conditions, and historic recognized environmental conditions. The new Phase I standard also includes additional explanation and illustrating examples. These three conditions are the heart of the Phase I analysis.

For hazardous substances that are found, to establish CERCLA liability defenses, the landowner must exercise "appropriate care" following closing by taking "reasonable steps" to stop any continuing releases, prevent threatened future releases, and prevent or limit exposures to any previously released hazardous substances. The landowner must also comply with all legally required notices; provide full cooperation, assistance, and access to persons authorized to conduct response actions; comply with any land use restrictions established or relied on; and not impede the effectiveness or integrity of an institutional control.

The new Phase I standard also clarifies that the key elements of the ESA must each be completed no earlier than 180 days (six months) before the transaction by which the interest in property is obtained, with all other components being current or updated within one year. In addition, PFAS – an emerging contaminant that has drawn intense state

and federal scrutiny in recent years but is not yet a CERCLA hazardous substance – is not required to be evaluated at this time but can be included as part of a Phase I report.

CERCLA Liability Protections

CERCLA (42 U.S.C. § 9601 et seq.) imposes strict, joint and several federal liability on property owners for the costs of remediating contamination caused by releases of hazardous substances emanating from their property, irrespective of whether those releases were caused by them or by previous owners or operators. In some cases, CERCLA liability can be significant and expensive. Parties with CERCLA liability can face direct EPA action or CERCLA cost recovery or contribution claims brought by third parties.

CERCLA contains a few limited defenses to liability, including for innocent landowners (42 U.S.C. § 9607(b)(3)), continuous property owners (42 U.S.C. § 9607(q)), and bona fide prospective purchasers (42 U.S.C. § 9607(r)). All three of these defenses require purchasers of property to have conducted "all appropriate inquiries" into environmental conditions of property prior to the time that their transactions close. A principal element of such inquiry is conducting the ESA. Purchasers (which include lessees) and lenders have long engaged professional environmental consultants to prepare ESAs as part of their pre-acquisition or pre-lending due diligence.

Implications

Preserving federal CERCLA defenses takes a careful, nuanced approach. Because this process is self-executing, it is up to the party or user to establish the landowner defenses and to comply with these various pre- and post-closing provisions. Beyond preparation of an ESA that complies with the ASTM standard, CERCLA imposes a number of post-closing obligations that are important to follow, including exercising appropriate care and taking reasonable

steps to stop or address releases identified. Obtaining the ESA is a critical step – but not the only one – in seeking to preserve valuable CERCLA defenses.

Members of Akerman LLP's national Environment and Natural Resources Practice are available to discuss any questions you may have or guidance sought in meeting these new Phase I provisions and preserving CERCLA's defenses.
