

Practice Update

Updated Phase I Environmental Site Assessment Standard Approved - Key to Sound Due Diligence

February 6, 2014

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A new Phase I environmental site assessment standard has been approved for use in 2014, providing the most current set of environmental site assessment practices for real estate and many M & A transactions. The new Phase I standard – updated for the first time in 8 years – provides a roadmap for environmental professionals to determine the potential for environmental contamination on real property. Obtaining a Phase I report prepared in accordance with the new standard is the cornerstone to performing sound environmental due diligence prior to any acquisition of real property and the key to properly evaluating a prospective new buyer’s risk of environmental cleanup and liability obligations.

Background

On December 30, 2013, the U.S. Environmental Protection Agency (EPA) approved use of the new ASTM E1527-13 Phase I standard as compliant with EPA’s “all appropriate inquiries” rule, as part of demonstrating eligibility for a range of federal environmental liability safe harbors and protections. While EPA approved – in a compromise move – the continued use of either the previous ASTM E1527-05

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or new ASTM E1527-13 standards for the time being, EPA recommended use of the new ASTM E1527-13 standard as most reflective of current industry practice and announced plans in the near future to propose removing the reference to the previous ASTM Phase I standard.

Key Phase I Changes

The new Phase I standard made several important changes:

- **Vapor Intrusion** - In the most significant change, the new Phase I standard requires that Phase I reports include as part of the investigation an evaluation of potential vapor intrusion into buildings. Vapor intrusion can occur when vapors are emitted from soil or groundwater contamination below ground, which can migrate and find their way inside buildings and present human health risks.
- **Better Identification of Contamination Managed In-Place** - The new Phase I standard provides a new definition, a “controlled recognized environmental condition” (REC) or “controlled REC.” This new term enables environmental professionals to more clearly identify and better describe contamination permitted to remain at sites subject to controls approved by regulators. With the increased acceptance of risk-based environmental closures with institutional controls, this is a common set of facts.
- **Other Key Definitions** The new standard also aligns the Phase I definition of a release, matching it to the federal CERCLA law. It also limits “historical RECs” to only past releases that have been approved to allow for unrestricted property use or without any controls. Overall, these changes will affect the nature and scope of the environmental professional’s findings and potential recommendations for additional assessment.

- **Government Agency File Reviews** The new Phase I standard encourages additional review of environmental agency files, which can include information on the environmental compliance history of a subject site or of adjacent properties.

Effect of New Phase I Standard

We expect Phase I reports under the new standard will more completely evaluate contamination risk and possible pathways, such as from vapor intrusion, and will provide prospective buyers with essential information for making informed property transaction decisions. While more detailed, Phase I reports may also be slightly more expensive and take longer to complete due to the potential need for additional file reviews.

At the same time, the Phase I standard continues to exclude a number of traditional out-of-scope items, such as evaluations of asbestos, wetlands, other natural resource issues, and other potentially hazardous building materials and conditions. Clients should consult with their environmental team to ensure that these issues are appropriately investigated as part environmental due diligence and be included as a supplement to a Phase I report or separately.

Akerman's environmental team is available to assist clients in coordinating environmental due diligence for property transactions, reviewing Phase I reports, evaluating and advising clients on steps to manage environmental risk, and in crafting sophisticated project teams to advance development and cleanup projects across Florida.

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