

PERFORMING ALL APPROPRIATE INQUIRY UNDER THE ASTM E1527-13

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I. INTRODUCTION

As activity on the real estate transactional front continues to gain momentum, real estate practitioners need to increasingly be aware of due diligence requirements necessary to minimize or avoid liability under federal law—namely, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”). Performing the required due diligence prior to property acquisition is an essential prerequisite for three significant defenses to CERCLA liability—the Innocent Landowner, Bona Fide Prospective Purchaser (“BFPP”), and Contiguous Property Owner defenses—as well as to qualify for CERCLA Brownfield grants.¹ The common thread to each of these CERCLA defenses and grants is the requirement that a purchaser or operator perform “All Appropriate Inquiry” (“AAI”) prior to acquisition.²

Performing AAI is not an idle exercise, as the United States Environmental Protection Agency’s (“EPA”) AAI rule, established at 40 C.F.R. part 312, sets forth specific inquiry requirements that must be met for purposes of CERCLA. These inquiry requirements generally are satisfied by performing a Phase I Environmental Site Assessment in accordance with standards adopted by the American Society for Testing and Materials (“ASTM”)—namely, the E1527-05 standard and its more recent update, the E1527-13 standard.³

This article describes the general importance of AAI with regard to CERCLA liability and provides a general overview of the current requirements for performing AAI.

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1. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601(35), (40), 9604(k)(2)(B), 9607(b)(3), (q)(1)(A), (q)(1)(C) (2012); 40 C.F.R. § 312.1(b) (2014).

2. 42 U.S.C. §§ 9601(35), (40), 9604(k)(2)(B), 9607(b)(3), (q)(1)(A), (q)(1)(C); 40 C.F.R. § 312.1(b).

3. 40 C.F.R. § 312.11.

II. BACKGROUND – WHY IS ALL APPROPRIATE INQUIRY NECESSARY?

A. Overview of CERCLA Liability

AAI is a requirement for a party to avail itself of three specific affirmative defenses to liability under CERCLA: the “Innocent Landowner Defense,” the BFPP defense, and the “Contiguous Property Owner Defense.”⁴ CERCLA imposes strict liability on four separate categories of responsible parties for the costs of remediating or removing hazardous substance contamination. These four categories of responsible parties include:

1. The owner or operator of a facility;
2. The owner or operator of a facility at the time of disposal of the hazardous substance;
3. Any person who arranged for another person to transport or dispose of a hazardous substance; and
4. Any person who accepted a hazardous substance for transport to a disposal or treatment facility from which a release occurs.⁵

If a party falls within one of these four categories, it can be held strictly liable regardless of whether it caused any contamination or disposed of a hazardous substance.⁶ In particular, under the first category of responsible parties, a party can be liable under CERCLA merely by being the current owner or operator of a property.⁷ In other words, liability can still be imposed on the current owner or operator even though all contamination was attributable to a former owner or another property.⁸ Consequently, absent some form of liability protection, “this virtually unlimited imposition of liability” would impose unacceptable risks to prospective purchasers and discourage property transfers and economic redevelopment.⁹

To address the chilling effects caused by imposing strict liability on subsequent property owners for contamination attributable to a predecessor,

4. 42 U.S.C. §§ 9601–9628.

5. *Id.* § 9607(a).

6. *Id.*

7. *Id.*

8. *Id.* § 9607(a)(1).

9. See Steven A. Burns, Esq. & Kerry F. Nelson, Esq., *The New Standard for “All Appropriate Inquiries”*, GP SOLO LAW TRENDS & NEWS (Sept. 2007), http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/allappropriateinquiries.html.

Congress amended CERCLA in 1986 by adding the Innocent Landowner Defense.¹⁰ This defense precludes liability if the property owner “did not know and had no reason to know” that the purchased property had been impacted by a hazardous substance after performing AAI prior to acquisition.¹¹ Sixteen years later, Congress added two additional defenses: the BFPP Defense and Contiguous Property Owner Defense—which also require performing AAI prior to acquisition.¹²

B. Overview of the Three Primary CERCLA Liability Defenses

The three primary CERCLA affirmative defenses—the Innocent Landowner, BFPP, and Contiguous Property Owner defenses—share at least one common requirement: performing AAI prior to purchase. Parties cannot avail themselves of these landowner liability protections if they perform AAI following purchase of the property.

1. The Innocent Landowner Defense

The Innocent Landowner Defense precludes liability if a landowner can demonstrate it did not know or have reason to know of hazardous substance contamination at the time of acquisition after performing AAI. To be eligible, a party asserting the defense must establish that:

- The landowner acquired the property after all hazardous substances were disposed of;
- Prior to the acquisition date, the landowner conducted AAI into the previous ownership and uses of the facility;
- The landowner did not know, or had no reason to know, of the hazardous substance contamination at the time of purchase;
- The landowner complied with all continuing obligations after acquiring the property; and
- The landowner took adequate precautions against foreseeable acts or omissions of any such third party.¹³

10. Superfund Amendments and Authorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986); Burns & Nelson, *supra* note 9.

11. Superfund Amendments and Authorization Act of 1986, *supra* note 10; Burns & Nelson, *supra* note 9.

12. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002); Burns & Nelson, *supra* note 9.

13. 42 U.S.C. §§ 9601(35), 9607(b)(3) (2012).

2. The BFPP Defense

Unlike the Innocent Landowner Defense, the BFPP Defense applies even if a purchaser has knowledge of contamination at the property at the time of acquisition.¹⁴ Nevertheless, the defense still requires a purchaser to perform AAI into the previous ownership and uses of the property prior to acquisition.¹⁵ To be eligible for this defense, a landowner must establish by a preponderance of the evidence that:

- All hazardous waste disposal at the facility predates the landowner's ownership;
- The landowner performed AAI;
- The landowner provided all appropriate notices regarding any discovered contamination;
- The landowner exercised "appropriate care" with respect to hazardous substances found at the facility by taking reasonable steps to contain and prevent contamination;
- The landowner fully cooperated with all authorized remediation personnel;
- The landowner complied with all required institutional controls;
- The landowner responded to all subpoenas and information requests; and
- The landowner is not affiliated with any prior owner or operator.¹⁶

A BFPP also must acquire the property after January 11, 2002 and cannot impede the performance of any response action.¹⁷

3. The Contiguous Property Owner Defense

The Contiguous Property Owner Defense precludes liability for contamination attributable to a release of a hazardous substance from a neighboring property. To claim the defense, a responsible party must show:

- The landowner did not cause, contribute to, or consent to the release of the hazardous substance;

14. *Id.*

15. *Id.* §§ 9601(40), 9607(q)(1)(C).

16. *Id.*

17. *Id.*

- The landowner performed AAI into the previous ownership and uses of the purchased property;
- The landowner did not know or have reason to know that the purchased property could be contaminated by a release from the contiguous property;
- The landowner provided legally required notices with respect to the discovery or release of hazardous substances at the facility;
- The landowner took reasonable steps with respect to hazardous substances found at the facility to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substance;
- The landowner provided full cooperation, assistance, and access to authorized persons conducting response actions;
- The landowner complied with all applicable institutional controls;
- The landowner complied with all information requests; and
- The landowner person is not otherwise potentially liable or affiliated with any person that is potentially liable for response costs at the facility.¹⁸

III. EPA'S ALL APPROPRIATE INQUIRY STANDARD—40 C.F.R. PART 312.

EPA's requirements for performing and meeting AAI for purposes of CERCLA are codified at 40 C.F.R. §§ 312.23 through 312.31. Specifically, these regulations identify several specific investigation requirements that must be undertaken by an environmental professional to be deemed to have satisfied AAI.¹⁹ These inquiries include, but are not limited to, reviewing historical property information, performing a visual inspection, and interviewing former property owners.²⁰ Alternatively, parties can meet AAI by complying with certain published standards for the performance of a Phase I Environmental Site Assessment.²¹ Currently, EPA deems a Phase I ESA performed in accordance with the one of the following standards to have met AAI:

18. *Id.*

19. 40 C.F.R. pt. 312 (2014).

20. *Id.*

21. *Id.* § 312.11.

- ASTM Standard E1527-05, entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process”;
- ASTM Standard E1527-13, entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process”; or
- ASTM Standard E2247-08, entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property”.²²

Until recently, the industry standard amongst environmental professionals was ASTM E1527-05. As described further below, EPA also now accepts ASTM’s newest published standard, E1527-13, as meeting AAI.²³ EPA intends to revise 40 C.F.R. § 312.11 in the near future to eliminate the E1527-05 standard for meeting AAI, leaving the E1527-13 standard as the primary vehicle to achieve AAI.

A. General Inquiries Required by ASTM E1527-05 and E1527-13

The ASTM E1527-05 and E1527-13 standards require a licensed environmental professional to perform a series of inquiries into the environmental condition of a particular property. The goal of these assessments is to ascertain the potential existence of past or present releases impacting the site, which are deemed “recognized environmental conditions” (“RECs”) and/or historical RECs (“HRECs”).²⁴ As part of the assessment, the ASTM standards require the environmental professional to undertake a series of inquiries that generally consist of the following: a records review of federal and state environmental databases; a site reconnaissance; interviews with property owners/occupants and local government officials; and preparation of a report summarizing the consultant’s conclusions and findings.²⁵ Based on this inquiry, the

22. *Id.*

23. *Id.*

24. ASTM E1527-05 STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS (Am. Soc’y Testing & Materials Int’l 2005), available at <http://www.astm.org/DATABASE.CART/HISTORICAL/E1527-05.htm>; ASTM E1527-13 STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS (Am. Soc’y Testing & Materials Int’l 2013), available at <http://www.astm.org/Standards/E1527.htm>.

25. ASTM E1527-05 STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS (Am. Soc’y Testing & Materials Int’l 2005), available at <http://www.astm.org/DATABASE.CART/HISTORICAL/E1527-05.htm>;

consultant will also determine whether further investigation such as soil and groundwater sampling should be taken to determine the existence or extent of any potential release.

1. EPA's Acceptance of ASTM E1527-13 as Meeting AAI

Currently, EPA accepts both ASTM's former E1527-05 standard and its recently published ASTM E1527-13 standard as meeting AAI. Curiously, EPA has not yet removed the existing reference to the prior E1527-05 standard. In fact, EPA specifically provided that "today's rule does not require that any party use this standard."²⁶ Rather, the new rule, at least for an interim period, provides an additional method to achieve AAI without altering the existing requirements or otherwise mandating new requirements.²⁷ Consequently, until future rulemaking, either standard will be accepted as satisfying AAI.²⁸ EPA confirmed that the future rulemaking likely would eliminate the ability to utilize ASTM E1527-05 to satisfy the AAI rule.²⁹

In its final rule, EPA recommends use of the updated 2013 standard as being more rigorous in identifying potential and threatened releases of hazardous substances at commercial and industrial properties.³⁰ In evaluating future property purchases, prospective buyers should be aware of the amended standard and are strongly encouraged to conform to its requirements in the conduct of required due diligence activities.

2. Modifications to the Phase I Environmental Site Assessment Standard in ASTM E1527-13

ASTM revised the definition of a HREC to clarify that the scope and application of a HREC is limited only to those past releases that have been addressed sufficiently to allow unrestricted use of the property.³¹ The

ASTM E1527-13 STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS (Am. Soc'y Testing & Materials Int'l 2013), available at <http://www.astm.org/Standards/E1527.htm>.

26. Amendment to Standards and Practices for All Appropriate Inquiries Under CERCLA, 78 Fed. Reg. 79,319, 79,322 (Dec. 30, 2013).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 79,321.

31. ASTM E1527-13 STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS (Am. Soc'y Testing & Materials Int'l 2013), available at <http://www.astm.org/Standards/E1527.htm>.

amended definition of HREC requires that the past release of any hazardous substances or petroleum products that occurred in connection with the subject property be addressed to the satisfaction of the applicable regulatory authority or otherwise meet unrestricted use criteria established by the regulatory authority without subjecting the property to any engineering or institutional controls or activity and use limitations.³² If the environmental professional considers a past release to be a recognized environmental condition at the time of the Phase I, it must be included in the conclusions section of the report as a recognized environmental condition and not a HREC.³³

ASTM's new standard also includes a new term, the "controlled recognized environmental condition" ("CREC"). A CREC refers to a past release that the applicable regulatory authority deems to have been satisfactorily addressed—as evidenced by a no further action letter or otherwise by meeting approved risk-based criteria—while subject to the implementation of land-use controls.³⁴ For example, the new standard observes that if a leaking underground storage tank is remediated to a commercial use standard, but does not otherwise meet unrestricted residential remedial guidelines, it would be considered a CREC, not a HREC.

One other significant revision to the former standard that could potentially add expense and time to the environmental due diligence process is the clarification of regulatory file and records review requirements. Under the new standard, an environmental professional must review regulatory files if the subject property or any adjoining property is identified on one or more standard environmental records sources.³⁵ In its final rule adopting the new ASTM standard, EPA observed that these types of inquiries generally would enhance the quality of Phase I reports and the level of confidence that users or prospective property owners will enjoy.³⁶ Although the new standard maintains the environmental professional's discretion to decline a review of regulatory records, it nevertheless imposes other requirements on the professional to explain in the report why its decision not to review is warranted.³⁷ Further, if the environmental professional reviews records, it

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Amendment to Standards and Practices for All Appropriate Inquiries Under CERCLA, 78 Fed. Reg. 79,319, 79,321 (Dec. 30, 2013).

37. ASTM E1527-13 STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS (Am. Soc'y Testing & Materials Int'l 2013), available at <http://www.astm.org/Standards/E1527.htm>.

must include a summary of the information obtained and state its opinion on the sufficiency of the information to evaluate the environmental conditions of the property.³⁸

Clearly, the timing and expense of Phase I reports conducted under the new standard will be impacted by factors including the responsiveness of a regulatory agency to record requests and the amount of material to be reviewed in those records. Consequently, those involved in real estate transactions would be wise to contemplate longer due diligence inspection periods to allow sufficient time to complete the reviews. Additionally, those parties should consider the possibility of increased due diligence costs related, at least in part, to potentially larger scale records review. In addition to these changes, perhaps the most significant amendment to the 2013 standard is a requirement that a vapor intrusion pathway must be considered.³⁹ More particularly, the definition of “migrate” under the new standard now includes releases that migrate in the subsurface as vapor.⁴⁰ Environmental professionals are required to assess possible indoor air quality impacts from vapor intrusion pathways if there is subsurface soil or groundwater contamination at or near the property.⁴¹

EPA observed that the prior ASTM standard already required the identification of potential vapor releases or vapor migration at a property to the extent that they might be indicative of a release or threatened release of hazardous substances.⁴² EPA further observed that some commenters to the rule raised concerns that potential vapor releases are often not considered or sometimes overlooked in the AAI process.⁴³ EPA stated that “vapor migration has always been a relevant potential source of release or threatened release that, depending on site-specific conditions, may warrant identification when conducting all appropriate inquiries.”⁴⁴

The Agency noted that the new ASTM standard defined migration to include surface and subsurface vapors, and stated its anticipation that future AAI would contemplate all conditions indicative of releases and threatened releases of hazardous substances and that the revised standard and final rule would help reduce confusion on conducting thorough AAI.⁴⁵ The new standard provides greater clarity with respect to vapor intrusion and vapor

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Amendment to Standards and Practices for All Appropriate Inquiries Under CERCLA, 78 Fed. Reg. 79,319, 79,322 (Dec. 30, 2013).

43. *Id.*

44. *Id.*

45. *Id.*

migration, making it clear that subsurface vapor migration pathways must be evaluated in order to qualify as having conducted AAI. In this regard, although not officially adopted by EPA, ASTM E2600-10 Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions provides one acceptable guideline for assessing vapor intrusion.⁴⁶ Again, however, neither the new standard nor EPA requires that vapor migration be evaluated solely pursuant to this standard.

IV. CONCLUSION

Conducting AAI is a necessary step to avail of statutory defenses to CERCLA liability. Consequently, parties engaged in real estate transactions should be mindful of the AAI requirements, including the recent changes to the federal rule and corresponding ASTM standard. Although both the current and former standard may be used until new final rulemaking occurs, removing the reference to the ASTM E1527-05 standard, it seems prudent to acknowledge the requirements of the E1527-13 standard and to begin to conform to them even though the E1527-05 standard remains effective for a limited future period.

46. ASTM E2600-10 STANDARD GUIDE FOR VAPOR ENCROACHMENT SCREENING ON PROPERTY INVOLVED IN REAL ESTATE TRANSACTIONS (Am. Soc'y Testing & Materials Int'l 2010), available at <http://www.astm.org/Standards/E2600.htm>