

ENVIRONMENTAL DUE DILIGENCE: CURRENT ISSUES AND OPPORTUNITIES

PRESENTED BY:

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OVERVIEW

- ❑ **Changes to ASTM E1527
(Phase ESAs)**
- ❑ **CERCLA Continuing Obligations**
 - ❖ **Introduction**
 - ❖ **Recent legal findings**
- ❑ **Challenges and opportunities**

Update on the Changes to ASTM Standard E 1527

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Universal ASTM Requirements

- ASTM Standards have 8-Year shelf life
 - Prior E1527 publications: 1993, 1994, 1997, 2000, 2005
- Action Options
 - No Action
 - standard will sunset upon expiration
 - Ballot to re-approve with no change
 - Reconvene Task Group, draft revision language, ballot revisions

Significant Revisions to E1527-05

- Simplified Recognized Environmental Condition (REC) Definition
- De minimis extracted as stand-alone definition
- Redefined Historical REC
- Created “new” Controlled REC

Simple REC Explanation

IS A REC

REC

Controlled
REC

IS NOT A REC

HREC

De minimis

Significant Revisions to E1527-05

- Vapor Migration “acknowledged”
 - “migrate/migration” definition includes vapor pathway
 - Soil vapor acknowledged in “Activity and Use Limitations” definition
 - Vapor intrusion now specifically excluded from IAQ (non-scope)

Significant Revisions to E1527-05

- Regulatory File Review “modified”
 - “should” be reviewed for property and adjoining properties
 - If not, “must” explain why
 - May review alternate sources – e.g. interviews w/ regulatory officials

Other Revisions to E1527-05

- User Responsibilities
- Non-Scope Considerations and Appendices
- Conclusions and Recommendations

Status of ASTM E1527 Revision Process

- Final standard submitted to EPA for formal approval (to issue a ruling that the standard is AAI-compliant)
- EPA plans to publish both the proposed rule (with a 30 day public comment period) and the final rule simultaneously in early summer
- **Assuming there are no objections** to the proposed rule, the already published final rule becomes effective 30 days after the public comment period ends
- ASTM would then immediately publish the standard (as E1527-13) and the standard would be effective immediately

What happens If significant objections are recognized by EPA?

- Recent “Inside EPA” article

Comments or Questions?



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CERCLA CONTINUING OBLIGATIONS

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BACKGROUND



CERCLA LIABILITY

- ❖ **Pre-2002 – No CERCLA liability protection for purchasers of contaminated property**
- ❖ **2002 – *Small Business Liability Relief and Brownfields Revitalization Act***



CERCLA LIABILITY ELEMENTS

- ❖ **Caused or contributed to a release**
 - **Active disposal (includes relocation)**
 - **Passive migration**
- ❖ **CERCLA Hazardous Substance**
- ❖ **Response costs incurred**
 - **Remedial or Removal**
 - **Actions consistent with NCP**

- ❖ **Third party defense**
- ❖ **Innocent purchaser defense (1986)**
- ❖ **Government involuntary acquisition (1980, 1992)**
- ❖ **Secured creditor (1986, 1996)**

- ❖ **Contiguous property owner (2002)**
- ❖ **Bona fide prospective purchaser (2002)**



COMMON ELEMENTS



COMMON ELEMENTS

For BFPPs and Contiguous Property Owners:

- ❖ **Conduct All Appropriate Inquiry (AAI)**
- ❖ **Have no affiliations with liable parties**
- ❖ **Comply with continuing obligations**



CONTINUING OBLIGATIONS



CONTINUING OBLIGATIONS

- ❖ **Provide legally required notices**
- ❖ **Cooperate with and assist response actions by others**
- ❖ **Comply with land use restrictions**
- ❖ **Comply with CERCLA information requests**
- ❖ **Take reasonable steps with respect to hazardous substances releases**



REASONABLE STEPS

- ❖ **Stop continuing releases**
- ❖ **Prevent threatened future releases**
- ❖ **Prevent or limit human, environmental, or natural resource exposures**



RECENT LEGAL FINDINGS



ASHLEY II OF CHARLESTON v. PCS NITROGEN

❖ Environmental conditions

- Widespread lead and arsenic
- Carcinogenic PAHs
- Metals mobilized by low pH conditions throughout site that
- Site covered with limestone barrier

❖ Ownership

- 1906 – 1987 Fertilizer manufacturers
- 1987 – 2002 Developer I
- 2003 – present Developer II (Ashley II)
 - Acquired from Developer I
 - Indemnified Developer I

❖ Environmental

- Site is RCRA Corrective Action facility
- 1992 – 1999 Developer I builds storm water management systems without approval to avoid cleanup
- 1993 – 2001 EPA performs assessments

❖ Environmental (cont)

- **2003 Phase I ESA and Ashley purchase**
 - REC - Deteriorating site cover and cracks in concrete floors
 - REC – Sumps and pits containing contaminated material
 - REC – Debris piles
 - Recommended addressing each REC
- **2004 - 2005 Ashley demolishes above-grade structures**

❖ Environmental (cont)

- 2008 EPA files actions to force Ashley II and Developer I to remediate site contamination
- 2008 Ashley asks EPA not to pursue Developer I whom it has indemnified

❖ The litigation

- 2005 Ashley II sued fertilizer manufacturer to recover \$195,000 in response costs
- Fertilizer manufacturer sued Ashley II and Developer I under CERCLA for contribution

❖ The decision

- Developer I is a PRP
 - Exacerbated contamination by spreading contaminated soil during construction of trenches and storm water basin

❖ The decision (cont)

■ Ashley II is a PRP

- Failed to prove no disposal after taking title
- Failed to exercise “appropriate care”
 - Failed to clean sumps and pits
 - Demolished building without sealing slab
 - Failed to address debris piles
 - Failed to address site cover deterioration
- Had improper “affiliation” with Developer I, a PRP
 - Indemnification
 - Request to EPA to not pursue Developer I



SALINE RIVER PROPERTIES (SRP)

- ❖ **Johnson Controls, Inc. (JCI) used site for auto parts manufacturing, then closed it**
- ❖ **Site is contaminated and JCI is PRP**
- ❖ **Sold to Developer I, who defaulted on loan in 2001**

- ❖ **SRP acquired in 2006 for condo project**
 - **Obtained state environmental liability protection, but did not fully comply with AAI**
 - **Chlorinated solvent contamination identified under the building**
- ❖ **SRP demolished the building in 2007 – 2008 using state brownfield grant**

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 - **Obtained state environmental liability protection, but did not fully comply with AAI**
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SALINE RIVER PROPERTIES (SRP)

- ❖ **SRP sued JCI to force cleanup that was delaying redevelopment**
- ❖ **Court ruled in JCI's favor that SRP exacerbated contamination by removing the building and slab**
- ❖ **SRP could not claim innocent purchaser (knew of contamination) or BFPP defense (failed "appropriate care")**

- ❖ **Owner performed due diligence, entered state VCP, drained USTs, but did not remove USTs for 2 years (Connecticut) – satisfied due care**
- ❖ **Owner acquired shopping mall with dry cleaner and demolished building (Vermont) – failed due care**



THINGS THAT CAN GET A DEVELOPER IN TROUBLE

- ❖ **Not following recommendations in Phase I ESA and other reports (due care)**
- ❖ **Indemnity agreements at time of purchase (improper “affiliation”)**
- ❖ **Site development actions**
 - **Demolishing buildings and slabs, exposing contamination**
 - **Moving contaminated soil**



BIG UNKNOWN

**How much due care is
enough?**

ISSUES AND DISCUSSION

- ❑ ASTM 1527 changes
- ❑ Continuing obligations

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