Environmental Due Diligence in Property Transactions

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Federal Liability Protections
All Appropriate Inquiry &
ASTM Phase I Environmental Site Assessment

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Topics

1. EPA Brownfields Basics
2. Liability Under CERCLA
3. All Appropriate Inquiry (AAI)
4. Typical Contaminants Encountered
5. ASTM E1527-13: Phase I Assessment
EPA Brownfields Basics

Brownfields Definition

“... real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of hazardous substances, pollutants, contaminants, controlled substances, petroleum or petroleum products, or is mine-scarred land.”

- Hazardous Substances
- Petroleum Contamination
- Asbestos & Lead Paint
- Controlled Substances (e.g., Meth labs)
- Mine-Scarred Lands
- Other environmental contaminants
EPA Brownfields Basics
Brownfields Programs

• Assessment Grants
  ✓ Up to $300,000 for assessment & cleanup planning
  ✓ 3-year timeframe
  ✓ Governmental applicants only

• Cleanup Grants
  ✓ Up to $200,000 for cleanup of property owned by the applicant. Can apply for up to 3 properties per cycle.
  ✓ 3-year timeframe
  ✓ Governmental and non-profit applicants
EPA Brownfields Basics
Brownfields Programs

• Revolving Loan Fund Grants
  ✓ Up to $1,000,000 for cleanup loans & subgrants
  ✓ 5-Year timeframe
  ✓ Governmental applicants only
  ✓ Loans to private owners, governmental entities & non-profits
  ✓ Subgrants to governmental entities & non-profits only

• Job Training Grants

• Area-Wide Planning Grants
Prior to the 2002 amendments to CERCLA*, current and past property owners could be held strictly liable for prior contamination at a property.

- **Strict liability:** owners cannot say they were without fault or culpability.
- **Joint and Several liability:** owners can be held accountable individually or collectively.

Any owner within a property’s chain of title could be held liable for contamination at a property, regardless of whether any particular owner caused the contamination.

*Comprehensive Environmental Response, Compensation and Liability Act*
Liability Under CERCLA
Brownfields Amendments to CERCLA

- 2002 Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Law)
- Amended CERCLA and provided liability protections for certain property owners
  - Innocent landowners
  - Contiguous property owners
  - Bona Fide Prospective Purchasers (BFPP)
- Directed EPA to promulgate regulations for satisfying All Appropriate Inquiry (AAI) requirements
- Established EPA’s Brownfields grant program
Liability Under CERCLA
Statutory Requirements for Liability Protections

- BFPP Threshold Criteria:
  ✓ Purchaser is not a responsible party and not affiliated with a responsible party.
  ✓ All disposal of hazardous substances at property occurred before acquisition.
  ✓ Conducted All Appropriate Inquiries prior to purchase.
    - Within 180-days or
    - Within 1-Year if updated after 180-days
    - Phase I Environmental Site Assessment (ASTM E1527-13)
  ✓ Comply with Continuing Obligations after purchase
Liability Under CERCLA
Continuing Obligations

- Required following acquisition
  - Comply with land use restrictions
  - Do not impede effectiveness or integrity of institutional controls
  - Take “reasonable steps” to stop on-going releases
  - Prevent or limit human and environmental exposure to any previous releases
  - Provide cooperation, assistance, and access to property
  - Comply with CERCLA information requests and subpoenas
Liability Under CERCLA
Involuntary Acquisitions

• State or local governments acquiring ownership or control *involuntarily* through *bankruptcy*, *tax delinquency*, *abandonment*, or other circumstances by virtue of its function as sovereign are not considered owners for the purposes of CERCLA liability.

• The involuntary acquisition must take place *after disposal of hazardous substances* and the entity must exercise due care (continuing obligations) with respect to hazardous substances on the property.

• The exclusion from ownership liability does not apply if the state or local government *caused* or *contributed* to the release of hazardous substances.
All Appropriate Inquiry (AAI)

Background

- 2002 Brownfields Law required EPA to promulgate regulations establishing standards and practices for conducting AAI.
- AAI is the process of evaluating a property’s environmental conditions and assessing potential liability for any contamination.
- The AAI Final Rule went into effect on November 1, 2006.
- ASTM E1527-13 (Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process) is compliant with AAI.
All Appropriate Inquiry (AAI)

Who is Subject to AAI Requirements

• All EPA Brownfields funded Phase I assessments must be conducted in compliance with the AAI Final Rule.

• Private and governmental entities seeking protection from CERCLA liability as an innocent land owner, BFPP or contiguous property owner.

• Banks and lenders have protection from CERCLA liability through the secured creditor exemption. In order to further protect themselves, banks and lenders should encourage their borrowers to conduct AAI before acquiring a property.
Typical Contaminants Encountered
Not all contamination is created equal

- Chlorinated Solvents (PCE and TCE)
- PCBs
- Petroleum Products (USTs, ASTs)
- Heavy Metals
- PAHs
- Asbestos/Lead Paint
- Pesticides/Herbicides

- Dry Cleaners
- Scrap Yards
- Machine Shops
- Manufacturing
- Auto Repair/Auto Body
- Gas Stations
- Wood Treatment
Typical Contaminants Encountered

Contaminant Exposure Routes

- Direct contact
- Inhalation
- Ingestion
- Absorption
ASTM E1527-13: Phase I Assessment

Objectives (Performance Factors)

• Identify conditions indicative of releases or threatened releases of hazardous substances & petroleum.
  ✓ Uses and occupancies of property
  ✓ Uses of hazardous substances and petroleum
  ✓ Waste management activities
  ✓ Investigations, corrective actions and response activities
  ✓ Institutional and engineering controls
  ✓ Nearby and adjoining properties with environmental conditions

• Information that is publically available, and obtainable in reasonable time and cost.
ASTM E1527-13: Phase I Assessment

Key Phase I Regulatory Requirements

1. Reviews of historical sources of information
2. Reviews of federal, state, tribal, and local government records
3. Interviews with past and present owners, operators, and occupants
4. Visual inspections of the facility and of adjoining properties
ASTM E1527-13: Phase I Assessment
Key Phase I Regulatory Requirements

• User & Environmental Professional (EP) Responsibilities
  ✓ Reviews of environmental liens and activity & use limitations (user responsibility)
  ✓ Relationship between purchase price vs. value of property, if not contaminated (user responsibility)
  ✓ Specialized knowledge (user responsibility)
  ✓ Commonly known and reasonably ascertainable information (user & EP responsibility)
  ✓ Degree of obviousness of contamination and ability to detect by additional appropriate investigation (user & EP responsibility)
Recognized Environmental Conditions

- The presence or likely presence of any hazardous substances or petroleum products *in, on, or at* a property due to:
  1) 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.”

- De minimis conditions are not at REC.
• Historic REC (HREC)

✓ A *past release* of hazardous substances or petroleum products in connection with the property that *has been addressed to the satisfaction of the applicable regulatory authority* or meeting unrestricted residential use criteria (e.g., no property use restrictions, AULs, institutional controls, or engineering controls).

✓ Before calling the past release an HREC, the EP *must determine whether the past release is a REC at the time the Phase I ESA is conducted* (e.g., if there has been a change in the regulatory criteria).
• Controlled REC (CREC)

✓ A REC resulting from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority (e.g., as evidenced by the issuance of a NFA letter or equivalent, or meeting risk-based criteria established by regulatory authority).

✓ Hazardous substances or petroleum products allowed to remain in place subject to the implementation of required controls (e.g., property use restrictions, AULs, institutional controls, or engineering controls).

✓ A CREC shall be listed in the Findings Section of the Phase I ESA report, and as a REC in the Conclusions Section of the…report.”
ASTM E1527-13: Phase I Assessment

“De Minimis” Conditions

• Condition does **not represent a threat to human health or the environment**; and

• Condition would **not be subject to enforcement action if brought to the attention of regulatory agency**.

• A De Minimis condition is **NOT** a REC or CREC
ASTM E1527-13: Phase I Assessment

Report Format

• Executive Summary
• Introduction
• Site Description
• User Provided Information
• Records Review
• Site Reconnaissance
• Interviews

• Findings
  ✓ Identifies all known or suspected RECs, Controlled RECs, historical RECs and de minimis conditions

• Opinion
  ✓ Any identified conditions indicative of releases or threatened releases
  ✓ Data Gaps
  ✓ Additional appropriate investigations

• Conclusions
  ✓ Specific statement regarding evidence of recognized environmental conditions
ASTM E1527-13: Phase I Assessment

Report Format

- Deviations
- Additional Services
- References
- Signature of EP
- Qualifications of EP
- Appendices
ASTM E1527-13: Phase I Assessment
Non-Scope Considerations

- Asbestos
- Lead-based paints
- PCBs in building materials
- Mold
- Radon
- Lead in drinking water
- Endangered species
- Indoor Air Quality (not related to hazardous substances & petroleum)
- Regulatory Compliance (including health and safety)
ASTM E1527-13: Phase I Assessment
Buyer’s (Lender’s) Perspective

Higher

• No Phase I
  ✓ Buyer becomes PRP & assumes all risk

• Phase I Only
  ✓ Qualifies as BFPP, assumes all continuing obligations and potential risk due to uncertainty

• Phase I + Phase II
  ✓ Reduces risk with greater understanding of continuing obligations

• Phase I + Phase II + Cleanup Planning
  ✓ Minimizes risk and begins to approach cost certainty

Risk in Purchasing

Lower
ASTM E1527-13: Phase I Assessment
Seller’s Perspective

Risk in Selling: Higher → Lower

- **No Phase I**
  - Desirable, but unknown risk for potential liability from 3rd party lawsuit

- **Phase I Only**
  - Helps establish baseline risk for marketing property, and lowers potential risk from 3rd party lawsuit

- **Phase I + Phase II**
  - Further reduces risk to seller and buyer, but may result in reportable concentrations which may require further seller responsibilities

- **Phase I + Phase II + Cleanup Planning**
  - Minimizes risk, property value understood, improves decision making and bargaining position
ASTM E1527-13: Phase I Assessment
REC or Not?
ASTM E1527-13: Phase I Assessment
Eliminating Uncertainty

Phase I Photo

Phase II Photo
Resources

- Brownfields Law
- CERCLA Liability Protections
- All Appropriate Inquiry (AAI)
- EPA Brownfields
Contacts

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