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New Standard for Phase I Environmental Assessment Presents Alternative to EPA Final Rule

In November 2005, the United States Environmental Protection Agency issued its final rule defining the scope of "all appropriate inquiry" that must be conducted prior to the acquisition of property to qualify for certain defenses under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund)¹. This rule applies to acquisition of any interest in real estate, including financings. As discussed in a previous Management Alert which can be accessed by clicking here, the EPA Final Rule imposes significantly more burdens on the prospective purchaser of property to investigate past uses and possible releases of hazardous substances than the burdens imposed by current practice. The EPA Final Rule, however, provides that the requirements of the Final Rule may also be satisfied by compliance with ASTM Standard E 1527-05. 40 CFR § 312.11.

Most current Phase I environmental assessments are performed in compliance with ASTM Standard E 1527-00, published in 2000. The revised standard, ASTM E 1527-05, published late in 2005, is at least as effective as the EPA Final Rule in identifying environmental risks, while avoiding some of the more onerous requirements of the EPA Final Rule, and thus the revised ASTM standard presents a preferred alternative to those conducting property assessment.

Significant differences between the 2005 ASTM standard, the EPA Final Rule, and the 2000 ASTM standard are as follows:

- ♦ **Scope:** The 2005 standard is intended to satisfy the all appropriate inquiry standard necessary to qualify for all of the defenses to liability under CERCLA: the innocent landowner, contiguous property owner, and bona fide prospective purchaser defenses.
- ♦ **Data Gaps:** The 2005 standard incorporates the concept of data gaps from the EPA Final Rule. A data gap is the failure to obtain information required by the standard despite good faith efforts by the environmental professional to gather the information. In his or her report, the environmental professional must identify and comment upon "significant" data gaps that affect the ability of the environmental professional to identify recognized environmental conditions also identify the sources of information that were consulted to address the data gap. The 2005 standard is explicit that "a data gap by itself is not inherently significant," but is significant only "if other information and/or professional experience raises reasonable concerns involving the data gap." The existence of a data gap does not, however, necessarily prevent the environmental professional from rendering an opinion regarding the presence or absence of recognized environmental conditions on the site. This is a significant difference between the ASTM Standard and the EPA Final Rule: the EPA rule states that, to qualify for the CERCLA defenses, the report prepared by the environmental professional must include an opinion whether the inquiry has identified conditions indicative of a release or threatened release of hazardous substances. 40 CFR § 312.21(c)(1). As noted in our previous management alert on the EPA Final Rule, if a data gap prevents the environmental professional from rendering the opinion required by the final rule, then the purchaser has not qualified for the CERCLA defenses and the entire exercise is futile. The 2005 ASTM

¹ The EPA Rule is codified at 40 CFR Part 312

standard, on the other hand, allows the environmental professional more leeway in rendering his or her opinion despite the presence of data gaps. Thus, compliance with the ASTM standard should be easier than compliance with the EPA Final Rule.

- ♦ Interviews: The EPA Final Rule is (perhaps not unexpectedly) much more imperative about interviews than the voluntary ASTM standard: the EPA Final Rule states that “[i]nterviews with owners, operators, and occupants of the subject property *must* be conducted ... [t]he inquiry of the environmental professional *must* include interviewing the current owner and occupant ... [i]f the property has multiple occupants, the inquiry of the environmental professional *shall* include interviewing major occupants.” 40 CFR § 321.23(a) and (b)(emphasis supplied). The 2005 ASTM standard, on the other hand, states that “a reasonable attempt” shall be made to interview a “key site manager” (a person identified by the owner with “good knowledge of the uses and physical characteristics of the property”), and a reasonable attempt shall be made to interview occupants, including major occupants and those whose operations are likely to indicate recognized environmental conditions. Thus, the ASTM standard gives the environmental professional more flexibility in choosing whom to interview, and, assuming that the environmental professional is able to determine the presence or absence of recognized environmental conditions, compliance with this aspect of the ASTM standard should be easier than compliance with the counterpart provision of the EPA Final Rule.
- ♦ Compliance with Activity and Use Limitations: Activity and Use Limitations (AULs) are legal or physical restrictions on the use of, or access to, a site or facility, and include both institutional (e.g., deed restrictions) or engineering (e.g. physical cap) controls. The 2005 ASTM standard notes that parties wishing to qualify for the CERCLA defenses will need to know whether they are in compliance with any AULs that apply to the property, yet any determination of the sites compliance with AULs is not included in the scope of ASTM 1527-05. Thus, parties wishing to qualify for the CERCLA defenses will have to add such a determination to the scope of services to be performed by the environmental professional, or will have to make such determination outside the environmental assessment. Institutional controls are typically recorded in the chain of title to the property, and thus a title search should reveal the existence of such institutional controls. Some, but not all, states also have registries of

AULs, which should be consulted as part of any Phase I environmental assessment. Parties contracting for Phase I environmental assessments should also note that a number of issues that they may want to know about remain excluded from the scope of ASTM 1527, including asbestos-containing building materials, radon, lead-based paint, wetlands, indoor air quality, mold, and other issues. Persons contemplating the purchase of a facility should consider whether non-scope issues may be present at the property and add investigation of such issues to the scope of the environmental professional's services.

In general, compliance with ASTM Standard E 1527-05 should not impose significantly more burdens upon prospective purchasers than were imposed by ASTM Standard E 1527-00. Although compliance with the ASTM standard is likely to be both faster and cheaper than compliance with the equivalent provisions of the EPA Final Rule, the revised ASTM standard should be at least as effective as the EPA Final Rule in identifying environmental risks. For example, the EPA Final Rule requires interviews with the owner of the property, who may be oblivious to environmental issues on the site; ASTM Standard E 1527-05 requires a reasonable attempt to interview a “key site manager,” who is defined as someone with good knowledge of current and past uses of the property.

ASTM Standard E 1528-05 is the current effective standard; parties contracting with environmental professionals should ensure that the contract holds the environmental professional to the revised standard. Prospective purchasers should note two additional important issues:

- ♦ Sellers frequently attempt to get buyers to accept older environmental reports, both in the interests of time and to eliminate the risk of identifying additional problems. Older reports will probably not comply with ASTM Standard E 1527-05 (or will at least not be certified by the environmental professional to meet that standard) and so will not satisfy the requirements of the EPA Final Rule.
- ♦ As noted above, the ASTM standards exclude consideration of many environmental issues that may have consequences for the purchaser of property; prospective purchasers need to consider carefully the type of property they are evaluating, the environmental issues likely to be present at those types of properties, and any available information regarding the property in question, and to add non-scope considerations to the contract with the environmental professional based on that information.

If you have any questions regarding the content of this alert, please contact the Seyfarth Shaw attorney with whom you normally work or any Environmental, Safety and Toxic Torts attorney on our website at www.seyfarth.com.

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