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# Environmental Due Diligence Update: New Phase I ESA Standard

On November 6, 2013, ASTM released ASTM E1527-13, its long-awaited update to the Phase I Environmental Site Assessment ("ESA") standard. In this briefing, we review ASTM's significant revisions to the Phase I ESA standard, including the new requirement to consider potential vapor migration or "encroachment" impacts. We also discuss EPA's proposed amendments to the all appropriate inquiries ("AAI") regulations regarding the use of the ASTM E1527-13 standard to establish defenses to liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Finally, we consider the impact of the revised standard on the due diligence process for prospective purchasers and lenders.

## I. Significant Changes to the Phase I ESA Standard

The ASTM E1527-13 standard largely retains the scope, definitions, and requirements of the prior version of the standard, ASTM E1527-05, with some notable exceptions. Perhaps most significantly, the revised standard requires consideration of potential impacts to indoor air quality caused by vapor migration of hazardous substances. The definition of "migration" has also been revised to include the movement of vapors from hazardous substances or petroleum products in subsurface soil and groundwater. Under the ASTM E1527-05 standard, vapor migration impacts were generally excluded from the Phase I scope as an indoor air quality issue. While the new standard requires consideration of potential vapor migration impacts, ASTM made clear that a full vapor encroachment screening in accordance with the ASTM E2600-10 standard is not required to be conducted under the Phase I standard.

Updated definitions of a recognized environmental condition ("REC"), historical recognized environmental condition ("HREC"), and *de minimis* condition are included in the new standard, and a new defined term, controlled recognized environmental condition ("CREC"), has been added. The updated definition of a REC is shorter and more streamlined than the prior definition, but has not changed substantively. A CREC is a past release that has been addressed to the satisfaction of the state with residual contaminants allowed to remain in place subject to required controls, such as a deed restriction. An HREC now includes only past releases that have been addressed to the satisfaction of the state or meet the applicable criteria for unrestricted use without required controls. *De minimis* condition is now listed as a separate defined term under the new standard to mean a condition that does not threaten human health or the environment and generally would not be the subject of an enforcement action.

Additionally, the new standard requires regulatory agency file and record review, which is intended to make Phase I ESAs more comprehensive. Specifically, the environmental professional is now required to review pertinent regulatory files pertaining to the listing of the subject property or an adjoining property on a state or federal environmental database to determine whether the listing constitutes a REC, HREC, CREC, or *de minimis* condition. If the environmental professional determines that the regulatory file review is not warranted, the justification for omitting the review must be included within the report. This requirement has raised consternation in the environmental consulting community, particularly among those involved in conduit lending due diligence, as the file review requirement will affect pricing in a highly competitive market.

Certain user responsibilities have been clarified under the standard, including the user's responsibility to conduct a title search for environmental liens and activity and use limitations. The revised standard specifies that in jurisdictions where environmental liens or activity and use limitations are only recorded or filed in judicial records, the user must search judicial records to satisfy the AAI requirement. If the user does

not complete its responsibilities under the standard, the environmental professional must note this fact in the report and opine on the significance of the absence of such information on the Phase I ESA.

### II. EPA's Proposed Amendments to the AAI Regulations

In August, EPA proposed to allow the use of either the ASTM E1527-13 standard or the ASTM E1527-05 standard to satisfy the AAI requirement for establishing defenses to liability under CERCLA. EPA determined that "there are no legally significant differences between the regulatory requirements and the two ASTM E1527 standards"; therefore, EPA did not propose to require use of the ASTM E1527-13 standard to satisfy AAI. 78 Fed. Reg. 49,714, 49,716 (Aug. 15, 2013). Commenters have criticized EPA's approach of allowing continued use of the less stringent ASTM E1527-05 standard. EPA expects to finalize the rule before the end of the year. At this time, it is unknown whether EPA's final rule will allow continued use of the ASTM E1527-05 standard to satisfy AAI.

### III. Impact of the ASTM E1527-13 on Due Diligence

Overall, ASTM's revisions will not significantly alter the environmental due diligence process. Because EPA has not yet approved use of the ASTM E1527-13 standard to satisfy AAI, there has not been an immediate shift toward the new standard among users of Phase I ESAs. It is also expected that compliance with the new standard will cost more and take longer due to the requirement to conduct regulatory file reviews. If EPA continues to allow the use of ASTM E1527-05 to satisfy AAI, the prior standard may remain in widespread use, given cost and timing considerations. From a purchaser or lender's perspective, EPA's decision as to what satisfies AAI will be determinative as to what they require of their environmental professionals. Of note, the ASTM E1527-05 standard will not expire at the end of the year and has not been superseded by the ASTM E1527-13 standard; it is simply no longer the current standard.

One element of the new Phase I standard that may cause concern among the "users" of the reports, including purchasers, lenders, and rating agencies, will be how to deal with a finding that a known or threatened release from an adjacent property (e.g., a long-term gasoline station or a drycleaner using chlorinated solvents) constitutes a REC due to the potential for impacts to the property via the vapor migration pathway, where such impacts cannot be verified due to a lack of data or even any evidence of a release. In such situations, users could choose to conduct further due diligence, such as a vapor encroachment screening, or deal with the risk through some other mechanism, such as an indemnity or environmental insurance.

## For more information, please contact:

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