

Environmental Assessment 2014

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Most of us can't afford to waste \$50,000; or if we can afford to waste this much, the money would be better spent

elsewhere, but, when contamination is discovered property owners can find themselves liable for costs associated with investigation and cleanup. Legal fees, disruption of site activities, finance and delays, loss of tenants and other considerations can significantly add to costs, sometimes far exceeding the underlying real estate or business value.

The property owner's cash flow can also be disrupted, affecting their ability to meet loan payments, provide payment to suppliers, etc. The current owner of real estate can be responsible for these costs under federal and state laws - even if they didn't cause the contamination or own the property when it occurred.

There are protections from liability for cleanup costs which apply in different situations. So long as they do not participate in management of the property, real estate lenders are generally exempt from direct cleanup liability, though the contamination may still impact the borrower's ability to repay the

loan or the lender's ability to recover loan funds in the event of foreclosure. Some federal and state laws allow real estate owners, to qualify for protections from liability by completing All Appropriate Inquiries, commonly referred to as AAI, before purchasing property. In 2005 EPA published requirements defining AAI and acknowledged that, though not required to satisfy AAI, the completion of investigations defined by ASTM Standard Practice E1527-05 satisfy requirements for AAI. After several years of review and discussion, this Practice was recently updated by ASTM E1527-13.

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Though requirements for the completion of all appropriate inquiries can be satisfied without using either Practice, EPA has acknowledged that Phase 1 Environmental Site Assessments (ESA's) performed in accordance with either E1527-05 or E1527-13 will satisfy requirements for AAI. In general, the market is expected to adopt the newer Practice, but either can provide useful information to help buyers and lenders understand the potential for contamination.

In the newer version of the standard, ASTM E1527-13, revisions were made which may increase the time and cost to complete ESA's, and may result in the identification of more issues of concern which the Practice refers to as Recognized Environmental Conditions.

Recognized Environmental Condition (REC)

In simplified form a REC occurs when a release of hazardous

substances or petroleum products is likely to have occurred. The prior definition of a release seemed to limit releases to those affecting soil, groundwater and surface water. In E1527-13, references to soil, groundwater and surface water were replaced with a reference to "the environment". The change was intended to make the Practice more consistent with EPA terminology and clarifies that the migration of contamination in soil vapor may constitute a release.

This change could result in the identification of RECs in a greater number of reports. This can result in additional time and cost, though requirements for additional assessment will vary depending on client needs.

Controlled Recognized Environmental Condition (CREC)

This new term describes situations in which a known release has been mitigated according to regulatory requirements, but contamination was left in place above residential cleanup thresholds. This can be important because the presence of contamination above residential levels may require property owners to maintain engineering controls, or limit the future use of the property, which may impact the property value. Under the 05 Practice, this condition may have been described as a Recognized Environmental Condition, Historical Recognized Environmental Condition, or as a de minimis condition, depending upon the interpretation of the consultant. The new definition

should help to standardize the characterization of this issue.

This term can be misleading, since it implies that the consultant has verified that required controls and that use limitations are in effect; however, the ESA consultant is only responsible to determine whether controls exist. If verification of controls is needed, additional assessment would be required.

Since Controlled Recognized Environmental Conditions have been defined as a type of Recognized Environmental Condition, more ESA's are likely to conclude the presence of Recognized Environmental Conditions. This may be problematic since many clients look for the identification of Recognized Environmental Conditions as an indicator of active concerns. When CRECs are found, the appropriate action may vary depending on the client's risk tolerance, objectives, and use of the property; but in general maintaining engineering controls and adhering to activity and use limitations should be adequate where no excavation, construction, or change in use has occurred or is planned.

Historical Recognized Environmental Condition (HREC)

The definition of HREC was revised to apply only when contamination has been discovered, mitigation has been completed and any remaining contamination is below residential cleanup thresholds. Some consultants have misused the term Historical Recognized Environmental



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Condition to refer to historical operations which are likely to have resulted in a release, even when no cleanup has taken place. The revised definition should help to prevent continued misuse of the term.

Review of Regulatory Files

The revised practice also requires the consultant to review documentation, conduct interviews, or otherwise evaluate likely impacts to the property when the review of a regulatory database reveals certain types of records for the subject or adjoining properties. This addition to the scope of ESAs applies only to specific records, could result in increased costs to review information, and extended time required to complete the ESA.

User Responsibilities

In addition to the phase 1, AAI requires anyone relying on CERCLA defenses to liability to independently evaluate certain conditions. For example; purchasers who are aware of contamination, receive a discount in the purchase price which may indicate contamination, or purchase properties at which contamination is commonly known to exist may not qualify for defenses to liability. The 05 practice required clients to disclose the results of their independent evaluation to the consultant, but the revised practice makes it clear that this disclosure is optional, and that no additional evaluation is required unless the assessment is intended to support the CERCLA defenses to liability.

Release to Soil Vapors

Since the definition of REC was revised to clearly include impacts to soil vapor, consultants will be required to consider potential subsurface vapor migration in the ESA. The revised practice references another standard, ASTM E2600-10, as one means of evaluating the potential for paper impacts. The E2600 standard defines a tiered process for the evaluation of vapor migration. Consultants frequently rely on some elements of the Tier 1 screening level of assessment in completion of ESA's; however, additional costs will generally apply when a full tier 1 assessment is needed.



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