

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Environmental LAW

New Phase I standard helps manage environmental risk

Prospective purchasers and lessees of commercial real estate, as well as their lenders, generally recognize that they should investigate the environmental condition of property they seek to handle. The development and acceptance of a standard commercial practice for carrying out this investigation serves at least two important purposes.

First, the use of such a standard increases the chances that environmental risks will be identified and evaluated properly, and allows parties to a commercial property transfer to move ahead confidently, to investigate the environmental risks more thoroughly, to modify the terms of the transaction or to disengage.

Second, if approved by the federal Environmental Protection Agency, adherence to such a standard qualifies purchasers to meet the "all appropriate inquiries" requirements necessary to establish the innocent purchaser, bona fide prospective purchaser, and contiguous landowner defenses under CERCLA.

The standard which seeks to meet both of these goals is ASTM International's Standard Practice for Phase I Environmental Site Assessments, known as ASTM E1527. The version of this standard, adopted by ASTM in 2005, ASTM E1527-05, has been approved by the EPA. The version adopted by ASTM in 2013 is in limbo.

Characterizing both versions as substantively equal and sufficient, the EPA first proposed to deem both approved, but in response to criticism that such an approach would be confusing, the EPA withdrew its approval of using either one, leaving ASTM E1527-05 in place.

While the EPA is expected to approve ASTM E1527-13 by the end of this year or the beginning of next year, those involved with commercial real estate should consult with their environmental engineers and attorneys over the differences between the two versions and the consequences of following one or the other.

Perhaps the most significant change in the versions involves "vapor intrusion," which is the process by which chemicals in soil or groundwater migrate into indoor air. Under the ASTM E1527-05 standard, vapor intrusion is generally excluded as an indoor air quality issue. Under ASTM E1527-13, Phase I environmental site assessments must consider vapor intrusion as a possible recognized environmental condition (REC) on the property.

While the new standard does not require a full vapor encroachment screening in accordance with another ASTM standard, E2600-10, it is expected that the additional consideration of vapor intrusion in a Phase I environmental audit will increase the cost of a Phase I report, in a market which is already highly competitive in pricing.

Another change in the versions involves new or revised definitions of terms to better identify historical and current RECs. Under ASTM E1527-05, a historical recognized environmental condition (HREC) is both a condition addressed to the satisfaction of a regulatory agency or meeting the applicable criteria for unrestricted use without required controls, and a condition addressed to the satisfaction of a regulatory agency with residual contaminants allowed to stay in place subject to required controls, such as a deed restriction.

Under ASTM E1527-13, an HREC is only a condition meeting the first prong of the former definition; essentially, a resolved or closed-out condition, while a new term, a controlled recognized environmental condition (CREC), covers the second prong of the former definition; that is, a condition with residual contaminants allowed to stay in place with required controls. Moreover, a "de minimis" condition is defined under the new standard to mean a



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condition which does not threaten human health or the environment and would not be subject to an enforcement action.

The new standard also requires more regulatory agency file and record review. The environmental consultant performing the review should peruse files for potential sources of contamination within the applicable ASTM search databases, and if the consultant determines this search is unnecessary, he must justify his position in the assessment report. This requirement, too, is expected to increase the cost of Phase I assessments.

There are also new requirements on purchasers/users of the new standard. They must review title records for environmental liens and activity or use limitations imposed on the subject property, and the information obtained must be included in the Phase

I report. This activity may be performed by the environmental consultant or a title company, but it remains the responsibility of the purchaser/user to make sure that it is done.

In summary, the adoption and use of the new Phase I standard should lead to more comprehensive, and somewhat more expensive, Phase I reports. During this period of regulatory limbo concerning the 2005 and 2013 versions of the standard, commercial real estate managers should consult both their environmental engineers and attorneys to confirm that the reports they purchase will be fully informative and protect their CERCLA defenses.

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