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Phase I Environmental Site Assessments - Limitations, Variability and Data Gaps: Are They Really Telling You Everything You Want to Know? Identification and Consistency in Interpreting the REC Findings among Clients and Consultants

Phase I Environmental Site Assessments (ESAs) conducted on behalf of insurers, banks, or buyers or sellers can often have a high degree of variability in both the quality of the report and the identification of a Recognized Environmental Concern (REC). Often what would be considered a REC by one environmental professional is not always consistent from one consultant to another. In some cases property owners, legal counsel, or misinterpretation of the ASTM Standard definitions also influences whether the determination of the existence of a REC, Historic Recognized Environmental Concern (HREC), or a Controlled Recognized Environmental Concern (CREC) exists or not. This lack of consistency can lead to additional environmental liability and financial exposure for commercial transactions. This article describes some of the potential environmental “pitfalls” that are faced by insurance and financial companies that often rely on Phase I ESAs performed by third parties to determine the level of risk.

Purpose and Recent Updates to the ASTM Phase I (ASTM Standard 1527-13)

The purpose of the ASTM 1527-13 standard is to define a standard practice and procedure for the ESA of commercial real estate properties. This practice identifies the range of contaminants for the ESA as those defined according to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and petroleum products. In summary, the identification of the contaminants on a commercial property allows the user to satisfy one of the requirements to qualify for the innocent landowner limitations under CERCLA liability (hereinafter, the “landowner liability protections,” or “LLPs”): that is, the practice that constitutes all appropriate inquiries (AAI) into the previous ownership and uses of the property.

In 2014, the United States Environmental Protection Agency (EPA) took an important procedural step toward phasing out ASTM E 1527-05 from the AAI rule “...to promote use of the [Phase I ESA] standard currently recognized by ASTM as the consensus-based, good customary business standard...” The effective date for this action is October 6, 2015 after a year of transition. Consultants and environmental professionals (EPs)

performing Phase I ESAs should be using the 1527-13 standard. In that regard, the EPA also included several updates to the standard, the most notable recent changes are listed below:

- Inclusion of vapor intrusion (definition of migrate/migration to specifically include vapor migrations).
- EPA adopted the ASTM standard to comply with AAI and revised the definitions of release and environment to have the same meaning as those defined in CERCLA.
- Clarified the definition of de minimis conditions so that an EP cannot use the term to describe a CREC, which is defined as 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 (for example, by receiving a no further action [NFA] letter or meeting risk-based criteria) **with** hazardous substances or petroleum products allowed to remain in place subject to the implementation of required engineering or institutional controls.
- Updated definition of HREC as a past release of any hazardous substances or petroleum products that has been remediated to unrestricted residential use criteria without any required institutional or engineering controls.
- Required a stronger stance on regulatory file and records reviews, specifically if adjoining property is identified on one or more environmental record (data base) sources, EP should review pertinent regulatory files.

Limitations, Variability and Data Gaps of the Phase I ESA

Some information that may be intended by the client to be included within a Phase I ESA may not be performed during a standard property review as it is a “non-scope” item. Such non-scope items include surveys for asbestos, mold, legionella, radon, radioactivity, operational liabilities, business environmental risks, environmental compliance, permitted or non-permitted discharges (such as air, storm water), and non-owned disposal sites (NODSs) risks associated with historical waste disposal practices. Unless additional services are required for the EP to address non-scope considerations these items might not be reasonably ascertainable conditions and may not be identified as “RECs.”

Another primary limitation of the Phase I ESA is that in many cases a subsurface evaluation of soil and groundwater has not been performed. For example, if bulk hazardous materials or petroleum products were stored at the site over a long operating history and no spills or releases were reported, then in many cases a subsurface investigation is not performed. In this instance, the historical operations may not be categorized as a REC even though the “likely presence” criteria under ASTM E-1527 would arguably be met. Another case may be that the adjacent property is storing leaking drums along the property line, or had operated as a former dry cleaner that has not had a soil or groundwater investigation. As defined under the ASTM E1527-13 standard, a Phase I is not exhaustive, meaning there is only a limited amount of information that can be obtained during the time allowed, and there is a point at which cost and time outweighs the usefulness of information that is being gathered. The site reconnaissance may be as brief as several hours or a day and is often limited by access. In the absence of subsurface soil or groundwater information, a regulatory records search may identify whether a release has occurred on the site or on an adjacent property. While the regulatory database searches could potentially identify some of these issues, these issues often don’t necessarily point to direct impacts to soil and groundwater beneath the site itself. A thorough regulatory search may also identify compliance or enforcement issues that may determine if the previous owner operated with best management practices or had serious operational issues with fines or spills. While the regulatory records search assists in the assessment process, it is not intended to eliminate all uncertainty that a REC may exist given the absence of an obligation for reporting historical releases which occurred long before the enactment of laws requiring such notification to the regulatory agency.

Additional limitations may exist regarding off-site properties with known conditions, which some consultants broadly sweep away because the off-site property is not up-gradient from the site. In most cases, the groundwater gradient is presumed to follow topography which may be difficult to ascertain in the absence of previous groundwater assessment data. Other scenarios may be that an investigation was performed but was limited in scope and extent, or site and regulatory conditions may have changed since the initial investigation was performed.

During the performance of the Phase I ESA, it is critical that the User Questionnaire be completed by property owner or the result could be deemed to not comply with AAI. In some cases, the current property owner may not know of the complete site operating history, including pre-existing conditions such as abandoned underground storage tanks (USTs), chemical and waste storage activities, or former landfills. If the site is an undeveloped "green field" property, this may be less of an issue, however, the point remains that a Phase I ESA is for "reasonably ascertainable information," the level of inquiry at a specific site is variable and not every property will warrant the same level of assessment.

When determining the level of environmental risk for commercial properties with multiple Phase I ESAs, there is frequently a high degree of variability in the timing, accuracy, consistency and quality among different Phase I ESA prepared by consultants. In some cases, consultants are stating that there are no RECs at the site but upon reviewing the report appendices in more detail, there may be historical aerial photographs that identify historic tanks or other known conditions. Sometimes, the Phase I ESA author does not recognize that an active vapor mitigation system or on-site groundwater use restrictions is considered a CREC. In one case, a Phase I ESA performed on a 1-acre parcel did not identify a single-walled petroleum UST abandoned in place with no tank closure assessment information as a REC. In such situations, if only the executive summary were read, the reviewer may conclude that there are no RECs and the site represents a low risk when clearly this is not the case. Frequently, due diligence for property transfers may include Phase I ESAs that are not current. The ASTM standard specifically requires determining the appropriateness of information older than one year which requires the EP to account for the possibility that site conditions may have changed either on site or on an adjacent property. According the ASTM Standard, a Phase I ESA must be completed within 180 days prior to the date of acquisition of the property to satisfy the AAI criteria.

Potential conflicts of interest may be encountered by EPs and consultants preparing the Phase I ESAs due to the influence of competing interests among third parties, including property owners, legal counsel, or other parties. In some cases, the party requesting the Phase I requests to review or edit the Phase I ESA and potential conflict of interest may also arise when property owners, legal counsel, or other parties attempt to influence or negate the findings in the Phase I ESA. These instances may represent an inherent conflict of interest and alter the professional intent of the ESA. Cases have been reported that third parties may have requested to review or edit the findings in the draft Phase I ESA prior to final publication. These cases represent both a potential conflict of interest and could materially change the professional intent of the ESA.

Summary

Commercial property transactions are a complicated process with multiple parties including legal and financial lenders overseeing a merger or acquisition. Under ASTM E1527-13 Phase I ESAs are required to obtain only commonly known or reasonably ascertainable information and will often contain data gaps that are not included in the scope of work outlined in the ASTM standard or identify conditions which are interpreted by the EP as not constituting a REC. Other actions may be taken to mitigate potential data gaps by including non-scope items such as reviewing other regulatory site compliance records or performing additional database searches at the state level, such as California Department of Toxic Substances Control (DTSC) GeoTracker or Florida Department of Environmental Protection (FDEP) OCULUS. Depending on the age of the commercial property, asbestos or lead

base paint surveys may be deemed appropriate. If the site reconnaissance identifies that site improvements were not properly maintained, such as evidence of leaking roofs or poorly maintained HVAC systems, a water intrusion or mold survey may be needed. Site conditions or RECs identified in the Phase I ESA such as historic USTs, a potable well or on-site waste water disposal system (septic tanks or drain fields) may warrant the commissioning of a limited Phase II ESA to collect soil and groundwater samples. Another option to provide protection against unknown pollution conditions is through the use of liability insurance, which can be obtained as an alternative, cost effective risk management solution to minimize risk. Ultimately, the commercial real estate purchaser or developer needs to weigh out if the additional costs associated with further assessment is needed or if there is another risk management technique available to avoid or minimize risk from historic environmental liabilities.

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