ASTM Publishes New Phase 1 Standard—But Will It Matter?

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E1527-13 is an improvement over the prior version. However, until EPA removes the reference to E1527-05 in the AAI Rule, it will remain to be seen if the more costly E1527-13 will gain wide acceptance in the real estate and financial industry.

IN EARLY NOVEMBER, ASTM International (ASTM) published its new version of its "Standard Practice for Environmental Assessments: Phase I Environmental Site Assessment Process" (E1527-13). The new standard revises and replaces the existing Phase 1 standard (known as E1527-05) that was published in 2005.

Although ASTM has characterized the E1527-13 revisions as mere "clarifications" to the superseded E1527-05, a number of these changes are substantive in nature that are likely to increase the costs of Phase 1 reports. E1527-13 also includes a completely revised legal appendix and a new Business Environmental Risk (BER) appendix to help property owners and lenders select the scope of the Phase 1 that best meets their risk tolerance.

BACKGROUND • CERCLA imposes strict liability on four categories of responsible parties including current owners or operators of property for the cleanup of releases of hazardous substances even if the contamination occurred prior to the time the owner acquired title or the operator came into possession of the property. 42 U.S.C.

§9607(a)(1). Past owners or operators may also be liable if they owned or occupied the property at the time of disposal of the hazardous substances. 42 U.S.C. §9607(a)(2).

CERCLA does have a number of affirmative defenses for property owners or operators including:

- The third-party defense. 42 U.S.C. §9607(b)(3);
- The innocent landowner (ILO) defense. 42 U.S.C. §9601(35)(A);
- The bona fide prospective purchaser (BFPP) defense. 42 U.S.C. §9601(40); and
- The contiguous property owner (CPO) defense. 42 U.S.C. §9607(q).

To satisfy the third-party defense, an owner or operator has to demonstrate by a preponderance of the evidence that: (i) the release was solely caused by a third party; (ii) whom the defendant did not have a direct or indirect contractual relationship; (iii) the defendant exercised due care with respect to the contamination; and (iv) took steps against foreseeable acts or omissions of third parties.

Most courts broadly construed a direct or indirect "contractual relationship" to encompass most forms of real estate conveyances so that purchasers or tenants would be barred from asserting the defense even if they acquired title or possession of the property after the contamination occurred.

To minimize this harsh result, Congress added the innocent purchaser defense in 1986 that provided that a landowner would not be considered to be in a "contractual relationship" with the person responsible for the contamination if the landowner performed an appropriate inquiry into the past use and ownership of the property. If as a result of this appropriate inquiry, the landowner did not know or have reason to know of contamination, it would be deemed not to have a contractual relationship but would still have to demonstrate compliance with the due care and precautionary elements of the defense.

The 1986 amendments contained five criteria that courts could use in determining if a landowner had implemented an all appropriate inquiry. Courts did not uniformly apply these criteria and often found that if a property owner did not identify contamination during a pre-acquisition investigation, it probably did not perform an appropriate inquiry and therefore could not assert the defense.

In 2002, Congress amended CERCLA to add the BFPP and CPO landowner liability protections (LLPs). To qualify for the BFPP, a property owner or operator must establish the following pre-acquisition requirements:

- All disposal of hazardous substances occurred before the purchaser acquired the facility. 42 U.S.C. §9601(40)(A);
- The purchaser is not a potentially responsible party (PRP) or affiliated with any other PRP for the property through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that was a PRP. 42 U.S.C. §9601(40)(H);
- The purchaser conducted "all appropriate inquiries" into the past use and ownership of the site. 42 U.S.C. §9601(40)(B). EPA promulgated its AAI rule at 40 C.F.R. 312.

After taking title, a purchaser must comply with number of "continuing obligations" to maintain its BFPP status. The "continuing obligation" relevant to the BFPP cases is the requirement to exercise "appropriate care" by "taking reasonable steps" to:

- Stop any continuing release;
- Prevent any threatened future release; and
- Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance. 42 U.S.C. §9601(40)(D).[1]

[1] The other continuing obligations are complying with all release reporting requirements; cooperating, assisting, and providing access to persons authorized to conduct response actions or natural resource restoration at the property; complying with any land use restrictions established as part of

The CPO defense is available to owners of property that have been impacted by contamination from a contiguous or adjacent property. A CPO will not generally be required to conduct groundwater investigations or groundwater remediation. A person seeking to qualify for the CPO defense must comply with the same pre-and post-acquisition obligations as a BFPP. However, while the BFPP can knowingly acquire contaminated property, a CPO must not know or have reason to know of the contamination after it has completed its pre-acquisition AAI investigation. On the other hand, EPA is authorized to issue assurance letters to CPOs that no enforcement action will be initiated under CERCLA and to provide protection against claims for contribution or cost recovery. If an owner cannot qualify for the CPO defense because, for example, it had knowledge of the contamination from an adjacent property, it may still be able to qualify for the BFPP defense. The CPO may also qualify for any other defense to liability that may be available under any other law.

The party seeking to assert one of the LLPs has the burden of establishing by a preponderance of the evidence that it meets all of the elements of the LLPs. Moreover, the LLPs are self-implementing meaning a property owner can assert the liability protection without formal determination by EPA. As a result, the downside of the self-implementing nature of the LLPs is that a party that thinks it may have achieved one of the LLPs may later learn that a court holds otherwise.

All Appropriate Inquiries And ASTM E1527

ASTM initially published the E1527 standard in 1993 to define "good commercial and customary practice" for establishing the innocent landowner defense.[2] Since then, E1527 has become the accepted industry standard for satisfying the pre-acquisition investigation requirement of the AAI Rule.

As part of the 2002 amendments to CERCLA, Congress also instructed EPA to issue a rule defining what constituted all appropriate inquiries (AAI). Congress provided that until EPA issued its AAI rule, the ASTM E1527 standard would act as an interim standard for conducting AAI. When EPA promulgated its AAI rule in November 2005[3], the agency determined that E1527-05 could be used to satisfy AAI.

In August 2013, EPA published a direct final rule and a proposed rule to add E1527-13 to AAI. However, to the dismay of many in the real estate and financial sectors, the agency declined to delete the superseded E1527-05 standard from the AAI regulation. EPA received adverse comments that the dual standards would cause confusion in the marketplace and make it more difficult to qualify for the already elusive CERCLA liability protections. As a result, EPA subsequently withdrew the direct final rule. On December 30th, the EPA published a final rule in the Federal Register recognizing the new ASTM E1527-13 Phase 1 standard practice as an approved method for complying with the AAI rule. 78 Fed. Reg. 79319. As explained below, while the preamble to the final rule is an improvement to the text that accompanied the August rulemaking since it attempts to address some of the concerns raised in the adverse comments, this action amounts to Band-Aid where surgery was needed to repair the ill-conceived rulemaking exercise.

a response action and not impeding the effectiveness or integrity of any institutional control used at the site; providing access to persons authorized to operate, maintain, or otherwise ensure the integrity of land use controls at the site; and complying with any the EPA request for information or administrative subpoena issued under CERCLA. See 42 U.S.C. §9601(40)(C), (E)-(G).

[2] ASTM initially published E1527 in 1993 (E1527-93). The standard has subsequently been revised in 1994 (E1527-94), 1997 (E-1527-97), 2000 (E1527-00) and 2005 (E1527-05).

[3] The AAI rule was published on November 1, 2005 at 70 Fed. Reg. 66070. It became effective on November 1, 2006. The AAI rule is a performance-based standard while ASTM E1527 is more proscriptive in nature since it tells consultants how to conduct the various required inquiries.

Despite receiving adverse comments to the botched August rulemaking, EPA declined to delete the reference to the now obsolete E1527-05 from the AAI rule. Instead, the agency included language in the explanatory text (the "preamble") encouraging property owners and consultants to use ASTM E1527-13. In responding to some of the adverse comments it received, EPA may have opened the door to retroactive liability to consultants and their clients for previously completed Phase 1 reports that did not evaluate the vapor intrusion pathway.

In response to concerns that the continuing reference to E1527-05 could cause confusion in the marketplace, EPA first said—unconvincingly to this observer—that because it did not propose to remove the reference to E1527-05 in the August rulemaking, such action was "well beyond the scope of today's action." However, to address the concerns that the parties may be confused about the level of due diligence required because of the continuing reference to a historic ASTM standard, EPA said it planned on issuing a future proposal to delete the obsolete ASTM standard from the AAI rule. The agency said it felt that these concerns would be best done through a separate rulemaking process to give the public an opportunity to review and comment on that proposed action. EPA did go on to say that it intends "to monitor the uptake of the new ASTM E1527-13 across the commercial and industrial real estate sector to see if these expectations are borne out."

In announcing this decision, EPA reminded the regulated community that while E1527 may be used to comply with AAI, "ASTM standards do not comprise a federal regulation or standard, nor are they incorporated by reference into the federal regulation. Parties may use industry standards to comply with Part 312, but the standard for compliance is the AAI rule itself." In its specific responses to comments the agency reviewed key due diligence case law that EPA said stood for the proposition that courts look to the "quality of the investigation and reasonableness of the conclusions reached as a result of the investigation" in determining the adequacy of a particular Phase 1 report. EPA said it believed "that site-specific circumstances and conditions would continue to inform the courts' review of the strength and satisfactoriness of parties' conduct of all appropriate inquiries, under both the ASTM standard and the all appropriate inquiries rule."

Because of the case law and the fact that parties seeking to assert one of the CERCLA landowner liability protections have the burden of establishing that they qualify for those defenses, EPA said it believed that parties conducting AAI for this purpose have a strong incentive to ensure that the investigation is done thoroughly and properly. As a result, the agency indicated that it "anticipates that those conducting or relying on the ASTM International standard for the conduct of All Appropriate Inquiries will generally adjust to using the updated standard, particularly in light of the fact that ASTM International will label the ASTM E1527-05 Standard a historical standard and establish that the revised standard, the E1527-13 standard, is the only standard reflecting the current consensus of the responsible ASTM International technical committee."

In recognizing the new ASTM standard, EPA said it believed that ASTM E1527-13 "improved upon the previous standard" and "reflected the evolving best practices" that would provide prospective purchasers with the necessary and essential information that is required to satisfy AAI as well as meet their "continuing obligations" under the CERCLA liability protections. This statement is another indication of how even though Phase 1 reports are usually ordered to satisfy AAI, the reports may have implications for satisfying post-acquisition appropriate care/continuing obligations.

KEY CHANGES TO ASTM E1527-13 • Among the key changes to E1527-13 are new and revised

definitions, expanded regulatory file review obligations and clarifying the role of vapor pathway assessments in Phase 1 reports.

Revised Definition: Recognized Environmental Condition (REC)

The goal of a Phase 1 is to identify if Recognized Environmental Condition (REC). This term does not appear in CERCLA but was developed by ASTM to help consultants distinguish minor spills from conditions that would be required to be investigated or remediated. Unfortunately, the REC definition was not artfully drafted and has led to much confusion. As a result, it is not unusual for a property owner or its counsel to disagree with an environmental consultant if a certain condition rises to the level of a REC.

To minimize such disagreements, the REC definition has been streamlined so it more closely tracks the CERCLA definition of release. E1527-13 § 3.2.77 The revised REC definition now refers to "the presence or likely presence of any hazardous substances or petroleum products in, on or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of future release to the environment."

Revised Definition: Historical Recognized Environmental Condition (HREC)

The term Historical Recognized Environmental Conditions (HREC) was added to E1527 in 2000 for sites where contamination was remediated to applicable standards. Instead of labeling the former contamination as a REC, consultants could now identifying the former spill as an HREC, confirming that it has been remediated and no longer poses a risk to human health of the environment.

Although the HREC term can be a useful tool, many consultants were unclear on when they could make an HREC determination. Some made HREC determinations without verifying the cleanup standard used in the past was still valid and that the remedy (i.e., engineering or institutional controls) was still protective and functioning as designed. Other consultants, meanwhile, maintained that the continuing presence of residual contamination was a REC notwithstanding regulatory approval. This was a significant concern since most cleanups now employ risk-based approaches where some remnant of contamination is allowed to remain so long as institutional or engineering controls are used to prevent unreasonable exposure to the residual contamination.

This confusion partially stemmed from the awkward REC definition. Despite the fact that the ASTM task force amended the definition of "Release" in E1527-13, the HREC definition was amended so that it now only applies to contamination that has been remediated to an unrestricted cleanup standard. E1527-13 § 3.2.41. If the cleanup utilized engineering or institutional controls such as deed use restrictions or prohibiting use of groundwater, the consultant may no longer use HREC but instead use the new term Controlled Recognized Environmental Conditions (CRECs).

New Definition: Controlled Recognized Environmental Condition (CREC)

If a cleanup does not meet the unrestricted cleanup standards and relies on engineering or institutional controls, the consultant must now identify this remediated spill as a CREC. E1527-13 § 3.2.18. This new term is technically a type of REC and must be listed in the "Findings" section of the Phase 1 report.

A CREC will not require further action so long as the "controlled" conditions remain in effect. At first glance, this would seem to provide comfort to lenders and purchasers. However, E1527-13 states that consultants do not have to confirm the adequacy or continued effectiveness of the control when making its CREC determination. This undermines

the usefulness of the CREC since the client will not know if the remedy is protective or if further action is required. This limitation also appears to conflict with the revisions to the file review obligations (discussed below). As a result, purchasers and lenders should consider requiring consultants to confirm the effectiveness of controls before making a CREC determination.

New Definition: De Minimis Conditions

The original definition of REC provided that de minimis conditions were not RECs. This statement was moved from the revised REC definition and made into a new separate definition. E 1527-13 § 3.2.22. A de minimis condition applies to Releases that do not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.

Clarification Of Role Of Soil Gas/Vapor Migration Pathway

Since vapor intrusion became a concern a decade or so ago, there has been much confusion in the environmental consultant community if vapor intrusion had to be evaluated as part of the standard Phase 1 scope of work. The confusion stemmed from the fact that the E1527-05 definition of a REC included releases into "structures" while the E1527-05 list of non-scope considerations in section 13 included "indoor air quality."

E1527-13 attempts to clarify the role of the soil gas pathway in Phase 1 reports in a number of ways. First, a new definition "migrate/migration" was added that refers to vapors in the subsurface. E1527-13 § 3.2.55. The definition also states that the soil gas pathway does not have to be evaluated using the ASTM protocol to satisfy AAI. E2600 Vapor Encroachment Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions. The revised legal appendix discusses EPA guidance documents that describe when CERCLA authority may be used for indoor contamination. Finally, the new Business Environmental Risk (BER) appendix explains that the indoor air quality non-scope item does not include impacts to air quality relating to CERCLA releases.

Thus, under E1527-13 consultants are only obligated to express an opinion if there is a soil gas condition that qualifies as REC and determine if that pathway poses an actual risk to human health. Indeed, in many cases, the mere presence of contaminated vapors in soil gas may simply be a de minimis condition. Sub-slab or indoor air sampling to confirm if the vapor pathway is completed (exposures are occurring) or to determine the indoor air contaminant concentrations is outside the scope of E1527-13.

Again, the job of the consultant is to identify RECs. If the source of the contaminated vapors is an on-site source, that condition will be flagged as a REC. Thus, from a practical standpoint, identifying the vapor pathway as a REC will usually only be an issue when contaminated vapors are migrating onto the property from an off-site source.

In the preamble recognizing ASTM E1527-13, EPA said that one of the important revisions contained in ASTM E1527-13 was clarifying that "all appropriate inquires and phase I environmental site assessments must include, within the scope of the investigation, an assessment of the real or potential occurrence of vapor migration and vapor releases on, at, in or to the subject property." The more potentially troubling statement for consultants and property owners was the statement that "In the case of vapor releases, or the potential presence or migration of vapors associated with hazardous substances or petroleum products, EPA notes that both the All Appropriate Inquiries Rule and the ASTM E1527-05 standard **already call for the identification of potential vapor releases or vapor migration at a property,** to the extent they are indicative of a release or threatened release of hazardous substances."[Emphasis added]

In the response document that is in the regulatory docket, EPA said that "Some users of the ASTM E1527-05 standard and some who submitted comments in response to EPA's August 15, 2013, proposed rule raised concerns that potential vapor releases on, at, in or to a property are often not considered or may be overlooked by many practitioners when conducting all appropriate inquiries. **EPA wishes to be clear that, in its view, vapor migration has always been a relevant potential source of release or threatened release that, depending on site-specific conditions, may warrant identification when conducting all appropriate inquiries....**" [Emphasis added]

The agency then went on to say " In the case of the ASTM E1527-05 standard, users and environmental professionals are required to identify recognized environmental conditions that include the presence or likely presence of hazardous substances or petroleum products under conditions that indicate an existing release, a past release, or a material threat of a release. **Neither the All Appropriate Inquiries Rule nor the ASTM E 1527-05 standard excludes the identification of vapor releases as a possible type of release.**" [Emphasis added]

These statements seem to reinforce the fears of many lawyers and property owners expressed to this author as chair of the legal sub-committee that was working on the ASTM revision process. There was consensus that the role of vapor intrusion had to be clarified in the E1527 revisions but not in a way that could call into question the adequacy of Phase 1 reports prepared prior to the ASTM revisions. The principal concerns were if such evaluation required sampling and if the evaluation of the vapor pathway would be a prospective obligation so that it only applied to transactions that closed after the publication of E1527.

The ASTM task force satisfactorily addressed the first concern by explaining that vapor intrusion was like any other exposure pathway and that sampling to confirm that the pathway was completed was typically outside the scope of a Phase 1 and more properly addressed as part of a Phase 2 investigation.

Unfortunately, EPA's statements that the vapor pathway should have been considered all along raises the very risk that many lawyers and property owners feared—namely that parties who thought they had qualified for the CERCLA landowner liability protections because they had performed an AAI-compliant investigation may now suddenly not qualify as a BFPP because they did not consider the vapor intrusion pathway. Of course, this concern would only be for sites where vapor intrusion is or becomes a problem. However, the uncertainty created by EPA's statements in the preamble and response document is going to be unsettling to some property owners. It will also provide ammunition to plaintiffs' counsel who could use these statements as evidence that the defendant property owner breach a duty it owned to plaintiffs and was therefore negligent by failing to comply with a regulatory requirement. In some states, failure to comply with a regulatory standard is considered negligence per se while in others can be used as evidence of a duty.

Moreover, EPA's statements in the preamble and response document could be used by clients in malpractice or breach of contract against consultants who failed to evaluate the vapor pathway in a prior Phase 1. Of course, each situation will be highly fact dependent. Vapor intrusion will have to be a concern at the site and the plaintiff will have to show some nexus between the consultant's failure to flag the vapor pathway and the damages the client has incurred to be successful. Nevertheless, these statement do potentially expose consultants to the retroactive liability through a backwards looking lens where hindsight is always 20-20 or a classic "Monday morning quarterbacking" scenario (or whatever other aphorism the reader prefers). The EPA may not have been the Grinch that stole

Christmas but this certainly was not a good New Year's Eve present for property owners and environmental professionals.

Regulatory Agency File And Records Review

Agency files can contain critical information about historic contamination and adequacy of the cleanup. However, many consultants have exploited ambiguities in E1527-05 and have not routinely include file reviews in the standard Phase 1 scopes of work. Instead, they have been charging clients an additional fee for this work as an additional task.

In what may be the most significant change to the ASTM standard, E1527-13 now creates a presumption that consultants should review agency files when the property or adjacent properties are identified on one of the standard databases that are required to be searched to determine if a REC, CREC, HREC or de minimis condition exists at the property. A consultant that believes a file review is not required must provide a detailed explanation why the review was not performed. Alternatively, the consultant can rely on records provided from other sources (e.g., user-provided records or interviews with regulatory officials) to determine if there is sufficient information for identifying RECs and thereby avoid the time and cost of reviewing regulatory files. Depending on the accessibility of state files and their size, the agency file review may result increased Phase 1 costs and delays.

An example of the importance of agency file reviews was illustrated in *Southern Wine & Spirits of New York vs. Impact Environmental Consultants*, 2013 N.Y. App. Div. LEXIS 2081 (App. Div.-1st Dept 3/28/13), which involved a common source of contamination in Long Island and other suburban areas of New York City dry wells and septic systems. The parties have yet to begin discovery but based on the motion papers filed so far, the lawsuit will include some interesting legal issues such as the application of the economic loss doctrine, the standard of care for non-licensed professionals and if compliance with ASTM satisfies that scope of that duty. Because discovery has not yet started, the factual recitation is based on the pleadings and motion papers.

Southern Wine & Spirits of New York ("Southern") operated a wine and alcoholic beverage storage and distribution facility at 345 Underhill Boulevard in Syosset, Long Island. Southern Wine was considering purchasing the site it was using as well as the adjacent parcels located at 313, 323, and 325 Underhill Boulevard to expand its facility.

In November 2005, Southern retained Impact Environmental Consultants, Inc (IEC) to perform a Phase 1 on the four parcels. Pursuant to the "proposal for services" letter, Southern acknowledged receipt of the IEC standard terms and conditions. Interestingly, Southern was identified as the "client" while Commerce Bank was identified as the "user." The bank did not execute the proposal.

The IEC Phase 1 identified three 10,000-gallon closed underground storage tanks (USTs) used to store gasoline and diesel for fleet fueling and four active USTs. IEC also stated the Property was serviced by 30 dry wells and nine drainage structures (catch basins) that did not have any visual signs of contaminations. While the property was currently connected to the county sewer system, IEC noted that there were two on-site sanitary systems that had been abandoned in 2001.

According to IEC Phase 1, a 1999 Phase 1 of 313-323 Underhill Boulevard reported that these parcels had been serviced by an on-site sanitary system and fuel oil USTs. The Phase 1 recommended sampling of the dry wells, former septic system, the former UST as well as near the transformers and railroad tracks. The 1999 Phase II detected contaminants that were either below the regulatory levels or were determined to not have the potential to impact the groundwater quality of the subject property. Accordingly, the Phase 2 concluded no further action was required.

IEC's historical review also included a 2004 Phase 1 of 345 Underhill Boulevard. The 2004 Phase I revealed four USTs had been used at the property and that two of the USTs had been removed from the property 1996 and 2001. The report noted that the Nassau County Department of Health did not observe the UST removals.

The IEC Phase 1 indicated a review of the records of the Nassau County Department of Health (NCHD) that had been performed in connection with the January 2005 Phase 1 IEC concluded that no further work appeared to be required for the abandoned septic systems. However, the NCHD had told IEC in January 2005 that an inventory of the dry wells should be submitted to EPA since the stormwater dry wells were considered Class V Underground Injection Wells (UIWs). IEC indicated that this inventory had been completed. It appears that IEC had filed a new request to review the NCHD files but had not received a response when it had prepared the Phase 1 report.

IEC also reviewed the building department records and reported the parcels had been used for light manufacturing since 1960 and discussed various permits for the on-site sanitary systems along with installation of USTs.

Because of the historic use of the property, the absence of documentation for the closed USTs and the use of on-site sanitary leaching pools in the past, IEC recommended a Phase 2 for 325-345 Underhill Boulevard parcels but not the 313-325 lots. Southern authorized the additional investigation which included a targeted GPR survey that identified the presence of one septic tank, seven parking lot storm water catch basins that discharged to a recharge basin, six storm water dry wells and two leaching sanitary cesspools. IEC collected soil samples and elevated levels of contaminants in four dry wells and a former sanitary leaching. The IEC Phase 2 dated January 6, 2006 recommended these structures be remediated in accordance with the NCDH requirements.

Based on the IEC reports, an affiliate of Southern acquired the property in September 2006. During construction activities to expand the warehouse, Southern encountered a dry well field under the northeast parking lot of at 345 Underhill Boulevard containing 38 dry wells that had not been disclosed in IEC's Phase 1 report. Southern had to submit a dry well closure plan to the NCDOH and the investigation detected concentrations of Semi-Volatile Organic Compounds (SVOCs) and cadmium in soil/sludge exceeding applicable standards. Southern ultimately incurred $1 million to properly abandon 53 dry wells.

Southern then filed a complaint against IEC asserting two causes of action for negligence (including gross negligence) and breach of contract for failing to disclose the existence of 38 dry wells and another stormwater conveyance box. Southern alleged that if IEC had identified the undisclosed dry well field, Southern would have negotiated an adjustment in the purchase price of the Property or may have declined to proceed with the transaction.

The Complaint also alleges that IEC failed to properly review public documents pertaining to the Property. Specifically, Southern contended IEC's Phase 1 referenced construction permits in the municipal building department files but to review those documents. Southern alleged that files included letters with hydraulic calculations and describing the need to install the 39 dry wells as well as a 1986 survey plan depicting eight manhole covers and an underground storage tank at the site. Southern also contended that the public records contained a building permit that referenced drainage system. Southern argued that these documents were reasonably ascertainable and practically reviewable by Impact. As a result, Southern asserted that IEC failed to conform with the requirements of the ASTM E1527 Phase I standard. Southern also alleged that IEC erroneously identified stormwater dry wells as catch basins Southern asserted that the IEC failed to conform to ASTM E1527

when it failed to discuss and identify on the site map physically observable drop inlet grates that lead to the dry wells .

The IEC standard terms and conditions (TOC) that applied to both IEC Phase 1 and the Phase 2 reports. The TOC contained a Limitation of Liability (LOL) clause the capped IEC's aggregate liability for damages arising out of negligence or breach of contract to the total amount of fees paid to Impact for the project. The TOC also expressly provided that IEC would not be liable for any consequential damages. Southern had paid IEC $3,500 for the Phase 1 and $22,950 for the Phase 2 for a total of $26,450.

Finally, the TOC contained a contractual condition precedent for Southern to bring a claim for professional negligence. This clause provided that Southern could not make a claim for professional negligence unless it first provided IEC with a written certification executed by an independent design professional, which identified each act or omission that the professional contended was a violation of the standard of care identified in the Agreements. The certification had to be provided to Impact no less than 30 days prior to the institution of any judicial proceeding.

Southern filed its Summons and Verified Complaint with the court on December 11, 2008 which was within the three year statute of limitations (SOL) for professional negligence and the six-year SOL for breach of contracts. However, Southern did not serve this complaint on the defendants. Instead, Southern filed and served an amended complaint which contained the certification on March 31, 2009. The trial court dismissed the amended complaint without prejudice in an order dated November 5, 2009 for failing to serve the expert certification prior to filing the original Complaint. Southern filed another complaint that was virtually identical to the original complaint on February 3, 2010 pursuant to the New York rules of civil practice that allows a plaintiff to file a new action until six months after the date of dismissal. Southern then appealed the dismissal of the amended complaint, arguing that the date for purposes of the SOL should relate back to the filing date of the original complaint.

In January 2011, the appeals court affirmed dismissal of the amended complaint. *Southern Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC,* 915 N.Y.S.2d 541(App. Div.-1st Dept. 1/20/11). The court ruled that the "relation-back" doctrine could only be used for a valid preexisting action. Because Southern failed to submit the required certification prior to commencing its action, the court ruled that Southern could not use the relation-back doctrine to cure the defective initial complaint.

IEC then filed a motion for summary judgment seeking dismissal of Southern's claims for negligence and gross negligence on the grounds that the claims were barred by SOL, Southern had failed to allege a duty independent from the contract, had failed to allege an injury to property and that IEC's alleged negligence did not rise to the level of gross negligence. As part of its argument, IEC claimed the SOL should have started when it completed its site visit and not the date of its report.

In its April 2012 opinion, the trial court denied defendant's motion to dismiss the negligence claim. *Southern Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC,* No. 650083/2010 (Sup. Ct.-New York, 4/13/12). The court held that the SOL for the negligence claim began to run on the date of the report since IEC's obligations included issuing a report. The court also ruled that the savings clause of the New York rules of civil procedure automatically extending the SOL by six months applied since the action was dismissed due to a procedural flaw and from a ruling on the merits of the case.

The court also found that IEC owed a legal duty to Southern independent of its contractual relationship, holding that while New York did not recognize a cause of action for negligent performance of contract, professionals could be independently

subject to tort liability for failure to exercise reasonable care. The court also said that the economic loss rule was not applicable to cases involving failure to perform a professional duty.

IEC argued it could not be liable for professional malpractice because its employees were not professionals since that they were not licensed and did not require special training to perform Phase 1 reports. The court rejected this notion, relying on a prior decision that held that environmental consultants could be subject to malpractice claims because the nature of the work had a significant public interest and the breach of those duties could have dramatic consequences. As further support, the court pointed out that IEC's TOC provided its services would be "rendered in accordance with prevailing professional standards…" and "…will be conducted in a manner consistent with the level of care and skill standard to the industry under similar conditions." Based on the contractual language, the court said IEC implicitly recognized that it was bound to exercise "prevailing professional standards." The court found that Southern had clearly relied on IEC's environmental expertise to discover existing problems on the Property. Given such reliance on this expertise as well as the potential dangers and the public interest involved in environmental contamination, the court ruled it was appropriate that IEC be held to the standard of professionals in this matter.

On the application of the LOL, the court said that while a contractual provision absolving a party from its own negligence or limiting its liability was generally enforceable, New York public policy forbids a party from insulating itself from damages caused by grossly negligent conduct. IEC urged the court to find that the failure to report the existence of the dry wells was not gross negligence as a matter of law. However, the court said that a jury could reasonably infer that Impact misrepresented to plaintiffs that it had examined the relevant records, when in fact, it had not done so. Accordingly, the court held that it was an issue of fact if IEC was grossly negligent in failing to perform its obligations under the Phase I Agreement that prevented granting of summary judgment. Finally, the court did dismiss claims against affiliates of IEC since they were not parties to the agreement with Southern as well as claims asserted by affiliates of Southern that also were not parties to the agreement. The appellate division unanimously affirmed the 2012 ruling in its entirety.

There appear to be a handful of interesting issues that remain to be resolved. One is if an environmental professional with ordinary skill and training should have discovered the presence of the 38 dry wells particularly given how often these structures are responsible for contamination in Long Island.

A related question is if IEC failed to conform to the professional standard of care for environmental professionals by failing to review the building department files that would have revealed the presence of the 38 dry wells. The duty to perform file reviews was a much debated issue during the recent round of discussions for reauthorization of E1527 standard. The E50 task force chose to clarify the language so that the environmental professional has to provide an explanation when it does not perform a file review. Of course, local custom can influence the standard of care and it may turn out that Southern might be able to introduce evidence showing that an environmental consultant should have reviewed the building records where a property with manufacturing past and was only recently connected to the public sewer. Then again, IEC did obtain a letter from the NCDOH indicating that no further action was required for the abandoned on-site sanitary systems.

Unless new information is developed, the LOL issue seems to be an easier question. Remember that to defeat the LOL, Southern would have to show that IEC was grossly negligent. Reading between the lines, it appears that the court was looking for something more than simply failing to discover the dry wells to support a claim of gross

negligence such as a misrepresentation. While IEC's agreement did state that IEC would review appropriate records, the Phase 1 indicated that IEC had reviewed the standard NCDOH files in January 2005 but had not received a response from the NCDOH or building department. Presumably, this statement coupled with the fact that the records still need to be commercial available and practicably reviewable suggests that Southern might have heavy lifting convincing a court to ignore the LOL. Southern might end up with a Pyrrhic victory where the court finds that IEC was negligent but upholds the LOL.

Lien And Institutional Control Searches

Under AAI and E1527, the persons seeking to assert the liability protections (users) are responsible for providing certain information to the environmental consultant. Revised section 6 now provides that environmental liens and AULs searches must be examined not only in land title records but also in judicial records for those jurisdictions where that information is maintained. E1527-13 § 6.2.1. Users may want to ensure that judicial records are searched in those jurisdictions when ordering title searches.

Recommendations Are Not Required

E1527-13 clarifies that recommendations are not required. E1527-13 § 12.15. All the consultant is required to do is to express an opinion and conclusion on the presence or potential presence of a REC or CREC.

Many users, particularly lenders, often require a consultant to include a recommendation in the Phase 1 report. However, failure to comply with recommendations can cause a property owner to be deemed to have failed to comply with its post-acquisition "appropriate care" obligations and fail to qualify as a BFPP or satisfy the "due care" requirement of the third party defense. *Voggenthaler v. Md. Square LLC*, 2013 U.S. App. LEXIS 15307 (9th Cir. 7/26/13) (see blog post at http://www.environmental-law.net/2013/07/9th-circuit-finds-shopping-center-owner-did-not-establish-bfpp-status-for-dry-cleaner-contamination/ for full discussion of this case); *PCS Nitrogen v Ashley II of Charleston*, 2013 U.S. App. LEXIS 6815 (4th Cir. 4/4/13) (see blog post at http://www.environmental-law.net/2013/04/fourth-circuit-affirms-ashley-rulings/ for full discussion of this case). Thus, if a client wants a recommendation, it should be prepared to timely implement the recommendation or risk losing its BFPP status. The better approach would be to have all recommendations (including those involving any non-scope items addressed by the report) contained in a separate letter addressed to counsel.

CONCLUSION • By characterizing the changes in E1527-13 as mere "clarifications" to obtain EPA approval, ASTM may have unwittingly exposed consultants to retroactive liability for past Phase 1 reports where file reviews were not performed or the vapor pathway was not considered. The Webster dictionary defines "clarify" as "to make understandable" or "to free of confusion." This would suggest that consultants had these obligations all along and that E1527-13 is just making their obligations more understandable. It is unclear if a court will interpret these "clarifications" as restatements of the existing duties under E1527-05 or as new prospective obligations. If the latter, then EPA's rationale for retaining E1527-05 as an acceptable method for satisfying AAI would seem to be without merit.