

ASTM ISSUES REVISED STANDARDS FOR ENVIRONMENTAL SITE ASSESSMENTS

Phase I environmental site assessments are critical to conducting due diligence. ASTM's Phase I standard has been regarded as the accepted practice of site assessments for many years. Historically the standard has focused on preserving the "innocent landowner defense" for purchasers of property. This year, ASTM significantly revised the standard, maintaining the innocent landowner focus, but giving it a "business risk" flavor. The revised standard expands the criteria that should be considered in conducting due diligence and sets forth some new requirements in documentation. This article highlights those changes and discusses their significance.

231.1175 Introduction

In 1986, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was amended to provide for an innocent purchaser's defense. Since that time, environmental due diligence has played a critical role in corporate and real estate transactions. Yet despite a decade and half of experience conducting due diligence, there continues to be considerable uncertainty about what constitutes an acceptable environmental site assessment (ESA).

Recently, a committee of the American Society for Testing and Materials (ASTM)¹ issued a revision to its *Standard Practice for Environmental Site Assessments: Phase I Site Assessment Process*, which is designated as E 1527-00 (ASTM 1527) and the *Standard Practice for Environmental Site Assessments: Transaction Screen Process*, which is designated as E 1528-00.² This article reviews the changes to the ASTM 1527.

(a) Why Is Environmental Due Diligence Necessary?

Federal and state environmental laws enacted during the past two decades can impose substantial liabilities on a wide range of entities. For example,

*This article was written by Larry Schnapf, a New York City-based environmental lawyer whose practice concentrates on environmental issues associated with business and real estate transactions. Schnapf is also an adjunct professor at New York Law School where he teaches Environmental Problems in Business Transactions. Schnapf is also the author of *Environmental Liability: Managing Environmental Risk in Corporate/Real Estate Transactions and Brownfield Redevelopment*. He has an environmental law Web site at <http://www.environmental-law.net>.

¹ The practice was commissioned by the E-50 ASTM Committee on Environmental Assessments and developed by Subcommittee E50.02 on Commercial Real Estate Transactions.

² The transaction screen is a limited review that is based on the results of a questionnaire completed by an owner or operator of a facility, a cursory site visit based on the responses provided in the questionnaire, and a limited review of government records. The transaction screen may be a useful device for deciding which sites to investigate in a multiparcel transaction, but it is at best an issue-identifying device and should not be used in lieu of a full-fledged Phase I investigation.

CERCLA imposes strict liability for the investigation and cleanup of releases of hazardous substances on four classes of potentially responsible parties (PRPs) including current and former property owners or operators.³ Because PRPs may be jointly liable, property owners or operators may be responsible for the entire cost of a cleanup even though they may not have caused the contamination or there may be other PRPs for the site. Moreover, a PRP may be liable for the cleanup of the contamination even when its actions were lawful at the time. Federal courts have broadly construed CERCLA and have expanded the liability of parent corporations and purchasers of corporate assets under CERCLA.⁴

³ 42 U.S.C. 9607(a)(1)-(4). The other two categories of PRPs are persons who arranged for the disposal of hazardous substances (generators) as well as those entities that transported the wastes (transporters) (42 U.S.C. 9607(a)(3) and (4), respectively). PRPs also may be issued orders to remediate releases of hazardous substances that pose an imminent and substantial endangerment to human health and the environment (42 U.S.C. 9606).

⁴ Traditionally, state law has governed liability of corporations. A basic tenet of corporate law has been that a corporation is a separate entity from its shareholders who are protected from the liabilities of the corporation by a corporate veil. To hold a shareholder liable, plaintiffs have to pierce this corporate veil. To hold a parent liable for the liabilities of its subsidiary, a plaintiff usually had to show that the parent dominated the subsidiary to the point that it had no separate identity and that honoring the corporate form would result in injustice. To ensure uniform enforcement of this federal statute, courts have adopted a more liberal federal common law test. However, in *United States v. Bestfoods*, 118 S. Ct. 1876 (1998), the United States Supreme Court ruled that a parent corporation may be considered a CERCLA "operator" of a subsidiary's facility only if the parent exercises actual control over that facility. The focus for "operator" liability is not on the relationship of the parent to the subsidiary but on the relationship between the parent corporation and the individual facility. A parent also may be held liable as an "owner" of the facility under a "piercing the corporate veil" analysis.

The liability for purchasers of corporate assets also has been expanded. The traditional rule has been that a purchaser of stock assumes all of the liabilities associated with a corporation, but an asset purchaser does not incur liability unless the purchaser assumed those liabilities, the transaction constitutes a de facto merger, the new corporation is a continuation of the old corporation, or there is fraud. Because plaintiffs have had problems imposing liability on successor corporations under these four exceptions, federal courts have established a new test for impos-

[§231.1175(a)]

There are only three statutory defenses to CERCLA liability: act of war, act of God, and the third party defense.⁵ The most commonly asserted defense is the third party defense. Under this defense, a defendant must show that the release of hazardous substances was solely caused by a third party who was not in a contractual relationship with the defendant.⁶ This defense generally has been unavailable to purchasers when the seller caused the contamination since the sales agreement would qualify as a "contractual relationship." Likewise, landlords also may be unable to assert the defense when a tenant caused the contamination since the lease constitutes a "contractual relationship." Even if a defendant can get past the "contractual relationship" barrier, there are two additional hurdles it must satisfy before it could assert a third party defense. The owner would have to show that it took reasonable precautions against the acts or omissions of third parties and that it exercised due care regarding the hazardous substances at the property. In other words, the purchaser cannot allow previously deposited drums to deteriorate or allow ground water contamination to continue to migrate if it wants to be able to assert this defense.

Because the third party defense was largely unavailable to new landowners who did not cause the contamination at a site, Congress enacted the innocent landowner's defense, which provides that a purchaser will not be considered to be in a "contractual relationship" and thus be able to assert the defense if the purchaser could establish that it did not know or had no reason to know about the contamination.⁷ To establish that it had no reason to know, the purchaser would have to show that it undertook a reasonably appropriate inquiry into the past uses and practices of the property that was consistent with good commercial and customary practices. In determining whether "all appropriate inquiry" was made, a court is required to examine "any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property

ing liability under CERCLA. Under this doctrine known as the Continuity of Enterprise theory, an asset purchaser may be liable for the liabilities of its predecessor if the purchaser merely continues the same business operations. Among the factors courts will examine to determine if a purchaser should be considered a successor corporation will be if the new business retains the same officers, uses the same facilities, makes the same products, and retains most of the workforce. (*United States v. Mexico Feed and Seed Co. Inc.*, 980 F.2d 478 (8th Cir. 1992)).

⁵ 42 U.S.C. 9607(b).

⁶ 42 U.S.C. 9607(b)(3).

⁷ 42 U.S.C. 9601(35)(A).

in an uncontaminated state, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection."⁸ However, very few defendants have been able to successfully assert this defense because most courts have ruled that if the purchaser did not discover the contamination prior to the transaction, it probably did not conduct a sufficient inquiry.⁹

In addition to CERCLA, owners or operators of facilities that treat, store, or dispose of hazardous wastes also may be required to take corrective action to remediate soil and ground water that is contaminated with hazardous wastes and their constituents under the federal Resource Conservation and Recovery Act (RCRA).¹⁰ These corrective requirements apply to areas of a facility that are currently being used to treat, store, or dispose of hazardous wastes as well as hazardous waste management units that are about to be closed. Corrective action orders may be issued to current owners of facilities to remediate contamination in areas where hazardous wastes or their constituents were managed or disposed in the past. Most states have enacted their own versions of CERCLA and RCRA.

(b) Evolution of Environmental Due Diligence Practices

Neither CERCLA nor the EPA's guidance documents interpreting the scope of the innocent purchaser's defense precisely described what constituted an "appropriate" inquiry.¹¹ The few courts that ad-

⁸ 42 U.S.C. 9601(35)(B).

⁹ Compare *In Re Hemingway Transport Inc.*, 993 F.2d 915 (1st Cir. 1993); *Chesapeake and Potomac Telephone Co. v. Peck Iron and Metal Co.*, 814 F. Supp. 1269 E.D. Va. 1992; *Washington v. Time Oil Co.*, 687 F. Supp. 529 (W.D. Wash. 1988), and *International Clinical Laboratories, Inc. v. Stevens*, 30 ERC 2066 (E.D.N.Y. 1990) with *U.S. v. Serafini*, 706 F. Supp. 346 (M.D.Pa. 1988); 711 F. Supp. 197 (M.D.Pa. 1988); No. 86-1591 (M.D.Pa., Dec. 28, 1990), reconsideration denied (M.D.Pa., Aug. 22, 1991) and *Fallowfield Development Corp. v. Strunk*, 1993 WL 157723 (E.D. Pa. 1993).

¹⁰ 42 U.S.C. 6924(u), (v), 42 U.S.C. 6928(h); 42 U.S.C. 6973. Private parties may seek injunctive relief requiring persons contributing or have contributed to the handling, storage, treatment, transportation or disposal of solid or hazardous wastes presenting an imminent and substantial endangerment to human health or the environment to cleanup the contamination. 42 U.S.C. 6972(a)(1)(B).

¹¹ "Announcement and Publication of Final Policy Toward Owners of Property Containing Contaminated Aquifers," 60 FR 34790 (July 3, 1995); Announcement and Publication of Guidance on Agreements With Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement," 60 FR 34792

dressed the issue have not consistently interpreted the meaning of that phrase and EPA has often taken the position that if an audit failed to detect contamination, it was not an appropriate inquiry. Moreover, many of the 40 states that have enacted their own versions of CERCLA have established their own criteria for satisfying the state innocent purchaser's defense.

A practice emerged in the late 1980s of performing environmental due diligence in phases since this was often the most cost-effective methodology. The Phase I ESA usually consisted of a site inspection and a review of public records and preparation of a written report.¹² However, in the absence of any standards, the scope and quality of Phase I ESAs varied considerably among environmental consulting firms.

In May 1993, the ASTM published its first version of ASTM 1527. The practice was limited to "commercial real estate" including undeveloped land, property used for industrial, retail, office, agricultural, and other commercial, medical, or educational purposes. The term also included residential property containing more than four dwelling units and residential property with less than four dwelling units that is used for profit such as rental property. The practice also applied to "commercial real estate transactions" which encompassed transfers of title or possession of commercial real property and receipt of a security interest in such property. While it did not include purchases of lots to construct a dwelling for the purchaser, the term did apply to property purchased or leased by entities in the business of building or developing dwelling units.

ASTM 1527 has proven to be useful to the extent that it provided the regulated community with standard definitions, identified the minimum elements that should be covered in a scope of work, and also established a standard format for reporting the results of the investigation. However, it has had a number of significant limitations. First, the practice was only designed to satisfy the "all appropriate inquiry" standard for the CERCLA's innocent purchaser defense. It did not establish a standard to comply with

(July 3, 1995); "Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property," 54 FR 34235 (Aug. 18, 1989)).

¹² If the Phase I ESA revealed areas of environmental concern, a Phase II ESA could be performed to further investigate the areas of potential environmental concern identified in the Phase I ESA. The Phase II ESA usually involved collecting soil, ground water, and possibly surface water samples monitoring, and stack emission sampling.

the CERCLA third party defense or other federal or state environmental laws. Furthermore, non-CERCLA liability issues such as asbestos-containing materials, lead-based paints, lead in drinking water supplies, or wetlands were not normally covered.

Moreover, ASTM 1527 made it clear that it was designed to reduce but not eliminate uncertainty regarding recognized environmental conditions (RECs). It also indicated that it did not require an "exhaustive inquiry" of property but simply an appropriate inquiry that balanced time and cost considerations against the needs for gathering information on unknown conditions. ASTM 1527 also stated that the level of inquiry would vary with the type of property, the expertise and risk tolerance of the user, and the information developed during the course of the inquiry.

As a result, ASTM 1527 frequently did not meet the needs of many users who were concerned about environmental risks other than CERCLA. There are many reasons why a business may want to perform environmental due diligence. For example:

- A purchaser may be concerned about the third party defense. Unless a purchaser thoroughly examines a site, it may not become aware of contamination and thus may not take the steps necessary to successfully assert the defense.
- A purchaser can use the information to "draw a white line" around the facility to show what conditions existed prior to the closing. In this way, the purchaser could not only demonstrate in any future litigation what contamination it knew about but also what contamination was not attributable to its operations.
- If environmental due diligence is performed early enough in a transaction, the parties can use information to allocate liabilities identified during the investigation, draft indemnities, or perhaps re-price the deal. The information also may be used to obtain environmental insurance that may be used to help allocate environmental liability.
- Some states have financial assistance programs that can help pay for contamination associated with underground storage tanks (USTs) or dry cleaners. Parties who are aware of these sources of contamination can determine the availability of funding sources and use this information in the contractual allocation of these liabilities.

[§231.1175(b)]

- Nearly 70 percent of corporate acquisitions fail to achieve the business objectives that were anticipated when the purchaser agreed to enter into the transaction. One of the principal reasons for the poor performance is post-acquisition integration. The environmental practices of a seller often differ from those of the purchaser. Pre-acquisition due diligence can help the purchaser identify the probable environmental costs of these changes and plan operational changes that may be necessary.
- A purchaser must evaluate the various facilities to be acquired in an effort to understand how the new business will fit into its current structure. The purchaser may find itself with excess production capacity and obsolete plants and will have to develop a plan for streamlining or restructuring operations and closing obsolete plants. Comprehensive pre-acquisition environmental due diligence will help the purchaser understand the environmental implications of these choices and help it avoid or minimize unnecessary environmental costs.
- EPA and nearly two-dozen states have implemented self-reporting auditing policies under which companies that voluntarily disclose violations discovered during due diligence or an audit can obtain significant reductions in penalties.¹³ If a purchaser uncovers violations during its due diligence, it may be able to take advantage of these policies. However, if the EPA or state agencies perform a site inspection after the purchaser takes control of the business and discover violations, the purchaser of the business will no longer be able to take advantage of the penalty reduction policies.
- Similarly, the federal Securities and Exchange Commission (SEC) has begun to insist on more comprehensive disclosures of environmental liabilities in the disclosure statements that publicly traded companies are periodically required to file. A purchaser who conducts comprehensive environmental due diligence can also use this information to assess its SEC disclosure obligations without having to conduct another expensive environmental compliance audit after the acquisition.

¹³ *Incentives for Self-Policing; Discovery, Disclosure, Correction and Prevention of Violations*, 65 FR 19618 (April 11, 2000).

- Partly because SEC rules may require sellers to reflect indemnities on their balance sheets, sellers are increasingly reluctant to provide purchasers with environmental indemnities. Accordingly, it is important that the purchaser understand the liabilities associated with the business so that those risks are adequately reflected in the purchase price or other consideration given in the transaction.

- There has been an increase in bodily injury and property damage claims for persons and property exposed to hazardous substances. The parties to a transaction should be aware of the possibility of ground water contamination migrating off-site or air emissions that could lead to such liability.

While many lawyers and users began ordering so-called "ASTM Plus" ESAs that addressed areas not covered by ASTM 1527, market forces began to emerge in the 1990s that contributed to a relaxation of due diligence standards. During the late 1980s and early 1990s, banks had served as surrogate regulators and had been insisting that their borrowers perform ESAs. However, with the passage of the CERCLA lender liability amendments in 1996, many lenders became less concerned about environmental issues. As a result, many financial institutions began loosening up or dropping their environmental due diligence requirements in response to increased competition from Wall Street and to expedite the time it takes to process loans.

During this same period, the environmental consulting business became very competitive and resulted in the appearance of so-called "commodity-style" ESAs, which often cost from \$1,500-\$2,000 per site.¹⁴ Compounding this trend was the fact that the insurance industry began targeting the Phase I ESA market. The carriers developed environmental insurance products designed to address environmental risks associated with corporate and real estate transactions that were priced to compete with the "com-

¹⁴ These reports generally consist of a desk-top records review and a cursory inspection of the premises usually by an inexperienced employee who may not be familiar with industrial operations. The reports may appear to be comprehensive because of thick appendices containing database searches but are often sketchy on substance and highly unreliable. They are also often poorly written and inform the reader only about what the consultant found, not what the consultant failed to consider. Thus, it is difficult to determine if a site investigation was sufficiently comprehensive. Indeed, a recent government study suggested that more than 70 percent of these "commodity-style" Phase I reports failed to discover site contamination.

modity-style" ESA reports. A number of banks and developers began using these environmental insurance policies in lieu of doing any due diligence at all. Not surprisingly, as "commodity-style" ESAs became more common, environmental consultants began seeing an increase in due diligence litigation filed by clients for environmental conditions not uncovered by the ESAs. Indeed, insurance carriers have reported that 20 percent - 30 percent of the claims made under Errors and Omissions policies now involve claims for negligent due diligence.

(c) The ASTM 1527 2000 Practice

It was this backdrop that ASTM embarked on its effort to revise the E1527 standard.¹⁵ After a three year effort, the final revised standard was approved in April. Following is a discussion of the principal changes contained in the 2000 revisions.

1. Scope

The focus of ASTM 1527 continues to define the standard for satisfying the all appropriate inquiry requirement of the CERCLA innocent purchaser's defense. However, the practice committee recognized that the innocent landowner defense is not the primary reason why ESAs are performed. The committee believed that the recent increase in due diligence litigation demonstrated that many users believe ESAs should address all environmental risks that can impact a property. Accordingly, the revised practice now contains a new term "Business Environmental Risk" (defined below) and expressly states in paragraph 4.4 that evaluation of "Business Environmental Risks" will require services beyond the scope of ASTM 1527.

2. Non-Scope Considerations

Prior versions of ASTM 1527 identified issues that could impact commercial real estate but that were not required to satisfy the all appropriate inquiry requirement of the CERCLA innocent purchaser defense. ASTM left it up to the user whether to include these items in the scope of work. These considerations included asbestos-containing materials, radon, lead in drinking water, lead-based paint, and wetlands. Paragraph 12.1.4 of the 2000 revision expands the list of non-scope considerations to include endangered species, regulatory compliance, ecological resources, industrial hygiene and indoor air quality, health and safety, power lines and electromagnetic

fields, and cultural and historical resources. The list is not intended to be all-inclusive.

3. Significant New Definitions

(a) Activity and Use Limitations

This definition applies to legal and physical restrictions such as engineering and institutional controls that reduce or limit potential exposure to soil or ground water contamination, prevent activities that could interfere with the effectiveness of a response action, or ensure maintenance of a condition of no significant risk to human health and the environment.

The practice does not require the environmental professional to check for recorded activity and use limitations. Instead, the user has the obligation to check for or retain a title company or title professional to find "reasonably ascertainable" activity and use limitations recorded against the property. Activity and use limitations that are unrecorded or recorded in any place other than the local land title records will not be considered to be "reasonably ascertainable."

(b) Environmental Professional

Since the adoption of the first ASTM standards in 1993, there has been considerable controversy over who is qualified to perform the ESAs. Some members of the committee have recommended that only licensed professional engineers or professional geologists be allowed to perform the ESAs. Still others have not wanted to limit that term to licensed individuals.

The committee was unable to reach consensus for the 2000 revisions. The practice continues to define an environmental professional as a "person possessing sufficient training and experience" and who has "the ability to develop opinions and conclusions regarding recognized environmental conditions." However, to provide guidance to users when selecting environmental professionals, Appendix X3 was added to the practice. The appendix is divided into two parts.

The first section discusses information that a user should collect prior to engaging an environmental consultant. Much of this information relates to the user responsibilities set forth in Section 5 but includes additional items. For example, the user should assemble information about the type of transaction (sale, purchase, exchange, etc.), identify the parties who will rely on the ESA as well as the names and phone numbers of site contacts, indicate if the value

¹⁵ ASTM 1527 had been revised in 1994 and 1996.

of the property has been reduced because of environmental conditions or any other special knowledge about site conditions that would be relevant to the consultant, the purpose of the ESA, existence of environmental liens or use restrictions, the scope of services to be provided, and any special terms or conditions that must be agreed upon by the consultant.

The second section contains questions regarding the training and experience of the individual and firm that the user is considering. For the individual, the user should inquire about their formal education, ESA training, length of time performing ESAs, experience performing the particular services required by the project, sample reports, references, and familiarity with the practice. For the firm, the practice recommends that the user inquire about the organization's quality assurance/quality control program, internal risk management program, the standard terms and conditions, and insurance coverage.

(c) Business Environmental Risk

This new term refers to a risk that may have a material environmental or environmentally driven financial impact on the business associated with the current or planned site use. An investigation to evaluate material environmental risks usually will be much broader than one designed to qualify for the CERCLA innocent purchaser's defense and likely will involve one or more of the "non-scope" Considerations set forth in Section 12.

(d) Material Threat

This phrase means a physically observable or obvious threat which is reasonably likely to lead to a release that in the opinion of the environmental professional threatens and might result in an adverse impact to human health and the environment. The practice gave an example of an aboveground storage containing hazardous substance that shows evidence of damage. The damage would be considered a material threat if the damage was serious enough to contribute to tank integrity failure that could cause a release of its contents to the environment.

(e) Historical Recognized Environmental Condition (HREC)

The goal of the ASTM standards was to establish protocols for discovering RECs. Environmental professionals were obligated to identify RECs that were visually and physically observable during the site

visit or that were identified in interviews or record reviews.

The definition of REC applied to the presence or likely presence of hazardous substances indicating that a release or threatened release has or may have occurred in the past into structures on the property, or into the soil, ground water, or surface water of the property. The term included the presence of hazardous substances or petroleum under conditions that are in compliance with environmental laws. However, it does not include de minimis conditions that did not present a material risk of harm to public health or the environment and that generally would not result in any enforcement action if brought to the attention of governmental agencies.

One problem with this definition was that it may not necessary comport with requirements of various state cleanup and reporting laws. In addition, it is difficult to predict if a particular level of contamination may set off an enforcement action. De minimis concentrations of hazardous substances might trigger enforcement actions if there are environmentally sensitive areas, local drinking water wells, or the site is located in a residential community. It would have been preferable if the standards simply referred to state cleanup levels.

In addition, there has been considerable confusion about whether a REC identified in a prior ESA such as a leaking underground storage tank, past release that has been remediated using a risk-based cleanup approach, or contamination that has been addressed using engineering or institutional controls to prevent exposure to on-site residual contamination should still be considered a REC. As a result, Section 3 of ASTM 1527 now contains a new term "Historical Recognized Environmental Condition" (HREC). This term refers to environmental conditions that would have been considered RECs but may not be considered RECs because the conditions have been remediated to the satisfaction of the applicable government agency. Such satisfaction might be evidence by a No Further Action or its equivalent. The practice provides that the environmental professional performing the ESA will make the decision about whether a former environmental condition is an HREC or REC after taking into account the current impact that the environmental condition has on the property. The new practice contains new documentation procedures for reporting the existence of environmental conditions that are discussed in the documentation section of this article.

[§231.1175(c)(3)(e)]

Decisions on HRECs, though, may require input from lawyers. For example, if an adjoining site has impacted the property but the contamination is being remediated by the adjoining property owner, does this qualify as an HREC? Does it depend on the likelihood that the adjoining property owner would indemnify the user or whether the user would have a cause of action for stigma damages? Also, if the property itself has been remediated and been issued a No Further Action letter with reopeners, does the presence of the reopeners prevent the ERC from being considered an HREC? Another illustration might be a property containing an engineering control in the form of a cap that is subject to institutional controls preventing disturbance of the soil. If the property owner fails to maintain the cap, could the owner become liable for addressing the contamination? If so, should the cap be considered an HREC? What if the property owner plans to expand a building into the area of the cap? Would this transform the HREC back into an ERC? It is difficult to see how an environmental professional could make decisions about HRECs in these situations without assistance from an environmental attorney.

(4) Historical Research

Perhaps the largest source of due diligence claims litigation has been claims of inadequate historical research into the past uses and conditions of the property. Section 7 of ASTM-1527 establishes categories of government records and historical sources that are to be reviewed as part of the minimum scope of work for a Phase I ESA.

The purpose of the historical review is to develop a picture of the past uses of the property and surrounding area to determine the likelihood that past uses may have led to RECs on the property. Environmental professionals are not required to conduct exhaustive reviews of records but only review those records or historical sources that were "reasonably ascertainable" or information that is "practically reviewable". The practice defines "reasonably ascertainable information" as data that may be obtained "within reasonable time and cost constraints," while information that was practically reviewable referred to information that did not require extraordinary analysis. ASTM 1527 suggests that records that are sorted or filed according to limited geographic areas would be considered "practically reviewable" while large data bases that are not organized by zip code or other geographic designation or that are organized by chronological order would not be considered

"practically reviewable". For information to be obtainable within a "reasonable time and cost constraint" means that the information would be provided by a source within 20 calendar days of receiving a written, telephone, or in-person request at no more than a nominal cost for retrieving and copying the materials. Information that can only be reviewed by a visit to the source will be considered to be "reasonably ascertainable" if the site visit is permitted within 20 days of the request.

The 2000 revision places greater emphasis on investigation of historical contamination. It adds three types of government records that need to be reviewed. The environmental professional must review the CERCLIS NFRAP¹⁶ list for both the property and adjoining properties. In addition, state lists of brownfield sites and local land records where activity and use limitations may be recorded also have to be reviewed.

The 2000 revision also requires users to evaluate the existence or effectiveness of institutional and engineering controls. However, it does not make any other changes to the requirements pertaining to historical source review. In 1993, the practice only required the environmental professional to review at least one reasonably ascertainable standard historical source¹⁷ dating back to 1940 or the property's first obvious use.¹⁸ The practice indicated that if title search records were used, at least one additional historical source would have to be consulted. In 1994, this requirement was changed to require the environmental professional to review as many standard historical sources as were necessary and were "reason-

¹⁶ The CERCLA Information System (CERCLIS) is a database that EPA has developed to inventory and manage sites where releases of hazardous substances are known to have occurred. Inclusion of a site in CERCLIS does not represent a finding of liability or a determination that a response action is necessary. The CERCLIS should not be confused with the National Priorities List (NPL), which is the list of the sites that EPA believes pose the greatest risk of danger. The NPL is contained in Appendix B to the National Contingency Plan (NCP). 40 CFR Part 300, Appendix B. A "NFRAP" designation means No Further Response Action Planned.

¹⁷ The standard historical sources identified by ASTM included aerial photographs, fire insurance maps, property tax files, recorded land title records, USGS 7.5 minute topographic maps, local street directories, building department records, zoning/land use records and other historical sources such as newspaper archives, local historical society files, records in files, and/or personal knowledge of the property owner/occupants that would be deemed credible by a reasonable person.

¹⁸ The practice defines prior use to include agricultural use and the placement of fill materials.

[§231.1175(c)(4)]

ably ascertainable" and likely to be useful in determining prior use.

Standard historical sources that were reviewed in a prior ESA do not have to be reviewed again but uses of the property since the prior ESA should be identified. This requirement is particularly important for shopping centers since approximately 70 percent of shopping centers may have had a dry cleaner as tenants at some point in time. Many dry cleaning establishments only operate for a couple of years. Therefore, it is possible that a dry cleaner could have operated at a site after an ESA was performed but vacated the premises prior to the current ESA.

(5) *Enhanced User Responsibilities*

Under the existing ASTM 1527, the user had a number of responsibilities during the ESA. These included providing the environmental professional with information on environmental liens, disclosing any specialized knowledge of RECs or past ESAs. If the user had actual knowledge that the purchase price of the property was significantly less than comparable properties, the practice said the user should try to provide a written explanation for the lower price.

The 2000 revision expands the responsibilities of the user. Now, the user is responsible for providing information about activity and use limitations, and also must identify the reason for the ESA (e.g., qualify for the innocent purchaser's defense, understand all of the environmental risks associated with the property, etc.). If the user wants a more complete understanding of the environmental risks associated with the property, then the environmental professional will need to determine, based on experience, if the scope of services needs to be expanded. If the user declines to indicate the purpose of the Phase I, the environmental professional must add limiting language to that effect.

(6) *Phase I ESA Report Format*

One of the most important changes to the ASTM 1527 is the enhanced documentation requirements. The analysis, opinions, and conclusions in the ESA now must be supported by documentation. If the environmental professional has chosen to exclude documentation from the report, the environmental professional shall indicate the reasons for doing so (e.g., a confidentiality report). The goal of the 2000 revisions is for the Phase I report to stand on its own so that third parties can recreate the process that was used and arrive at the same conclusions. This

could minimize the need to perform new ESAs for properties where there is an existing ESA that is less than six months old. Following are some of the key documentation requirements:

(a) *Scope of Services*

The report should describe all services performed in sufficient detail to allow a third party to reconstruct work performed. This ESA should individually list any deviations or deletions from the practice and list the additional non-scope considerations.

(b) *Findings*

The report must have a "Findings" section that identifies known and suspected environmental conditions associated with the property, including REC, HREC, and de minimis conditions.

(c) *Opinion*

The 2000 revisions create an separate "environmental professional's opinion" section. Here, the environmental professional must discuss the logic and reasoning used in evaluating the effects of the known or suspect environmental conditions on the property. The opinion section must include the specific rationale for concluding that a known or suspect environmental condition such as an HREC is not currently a REC. Known or suspected environmental conditions that are identified as an ERC also must be listed in the conclusions section.

In the opinion section, the environmental professional can provide real value to the user. For example, in determining whether a cap or a deed restriction is an HREC, the consultant may identify maintenance costs for a cap or the effect that the use restrictions might have on future property value or whether an off-site environmental condition could create a stigma for the property. The user could use this information to re-price or restructure the transaction or obtain more favorable insurance rates.

(d) *Conclusions*

The report must contain a conclusion that summarizes all RECs identified at the property and the effects of the ERCs on the property. The report also must include a statement that the ESA was performed at the property in accordance with the practice and describe any exceptions to the practice. The statement also must indicate that the assessment did not find any ERCs except for those listed.

(e) *References*

[§231.1175(c)(6)(e)]

The ESA should include a references section identifying the published references that were relied upon to prepare the report. Each referenced source must be adequately annotated to facilitate retrieval by a third party.

(f) Qualifications

A qualification statement of the environmental Professional(s) responsible for conducting the ESA and preparing the report must be included in the Phase I report.

(g) Appendices

Many environmental consultants have included appendices to their reports that commonly include site photographs, a site map, and the results of the database search. The 2000 revision mandates that the report include an appendix containing supporting documents. The purpose of this requirement is to allow a third party to reconstruct the assessment at a later date. The appendix should document each source that was used even if that source resulted in no findings. Sources shall be sufficiently documented including the name, date the information request was filed, and the date that the original source last updated the requested information. The supporting documentation should include a site map, site photographs, historical research documentation, copies of database and regulatory record reviews, interview documentation, and special contractual conditions between the user and the environmental professional.

(h) Miscellaneous

Use of Prior Assessments

Section 4.6 of ASTM 1527 provides that an ESA that is less than six months old and which was performed in accordance with the practice is presumed to be valid. Such an ESA may be used in its entirety if in the reasonable judgment of the user the conditions likely to affect RECs are not likely to have materially changed since the prior ESA was performed. In making this judgment, the user should take into account the type of property and the conditions in the area surrounding the property. If the conditions may have materially changed, the prior ESA should not be used unless it is supplemented with a current investigation. At a minimum, the current investigation should include a new site reconnaissance, interviews, and an updated records review.

(7) Contract and Written Scope of Work

A significant portion of the due diligence litigation involves scope of work issues that were either not written or were not adequately documented. Section 4.8 of ASTM 1527 provides that the contractual and legal obligations between the user and the environmental professional are beyond the scope of the practice. However, environmental professionals should incorporate many of the concepts contained in the 2000 revisions into their standard terms and conditions. For example, the contract should specify the purpose of the assignment, identify the ASTM scope and non-scope conditions that will be performed and will not be covered, indicate any time constraints imposed by the client since this will have a particular impact on the records and historical sources that will be deemed to be "reasonably ascertainable" and also address any materiality thresholds for the transaction especially if the client requests that the ESA cover business environmental risks. If the client requests a change in the scope of work, the contract should be amended to reflect this change, or a written change order should be executed that would be attached to and made a part of the contract. The contract should contain a limitation of liability that excludes economic damages.

Reliance

Section 4.75 of the practice provides that the contractual and legal obligations between prior and subsequent users of the ESA or between the environmental professional and those who would like to use the ESA are beyond the scope of the practice.

The question of who is entitled to rely on ESAs has proved to be a hotly contested issue in due diligence litigation. ASTM 1527 contains a rather broad definition of "user" that includes a prospective purchaser, potential tenant, owner of property, a lender, or property manager. In the absence of any limitation in the scope of work, many courts may use the "reasonably foreseeability" test to determine to what parties that consultant may owe a duty. Thus, it is advisable that environmental professionals specify the parties who may be able to rely on the ESA and create a time limitation on how long those parties can rely on it.

Consultants also should be aware that in some states, they might have obligations to notify third parties such as adjoining landowners of contamination that might be migrating onto their land from the property inspected by the environmental consultants. Indeed, last year, a consultant in New York who had been retained by a bank to observe a tank excavation being conducted by a borrower of the bank

[§231.1175(c)(7)]

was fined for failing to notify the state environmental agency of evidence that the tank was leaking.

Finally, it should be noted that ASTM also has issued Practice E 2018 *Property Condition Assessments*. This practice addresses physical conditions of property, assesses deferred maintenance, develops a

financial reserve schedule, and helps determine financial impact to asset value in a real estate transaction. While it does not address environmental issues it might be a useful tool when evaluating some of the financial impacts caused by use restrictions or engineering controls.

[\$231.1175(c)(7)]