

The New Environmental Due Diligence

by Carla Consoli and Matt Bingham



INTRODUCTION

As more properties change hands through non-traditional means, environmental lawyers are frequently confronted with situations in which current owners purchased environmentally impaired properties without the benefit of liability exceptions resulting from a 2002 change in federal environmental law. As a result, liabilities otherwise avoided are now landing in unsuspecting owners' laps. The modifications were not widely publicized and thus, real estate practitioners may be unaware that some clients may qualify for the exceptions with a bit of pre-acquisition and post-closing work. Depending on the extent of environmental impairment, the extra effort may prove worthwhile if a claim for remediation is avoided. What follows is a primer on the 2002 changes and how to protect clients using those exceptions to liability.

by (1) acts of God, (2) acts of war, or (3) acts of third parties with whom the landowner has no "contractual relationship". *Id.* at § 107(b). The third party defense became known as the "innocent landowner" defense, but was not available to the majority of potential CERCLA defendants because most landowners are somehow connected to the party that caused the contamination on their land.

Six years after enacting the original act, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act ("SARA"). SARA created a defense to CERCLA liability for landowners who "did not know and had no reason to know" of the presence of hazardous waste on the property at the time the landowner purchased the property. *Id.* at § 101(35)(A). In order for a landowner to establish that it had no reason to know of the contamination, the statute required that the landowner prove that it "undert[ook], at the time of acquisition, all appropriate inquiry into the previous ownership and uses or

ASTM'S PHASE I STANDARD

Background and Development of the Standard

In 1980, Congress passed The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), also called Superfund. CERCLA §§ 101-175. CERCLA creates liability for real property owners and other persons responsible for releases of hazardous waste for remediation costs and for damages caused by the pollution. As originally enacted, the only defenses to CERCLA liability were for contamination caused



the property consistent with good commercial or customary practice in an effort to minimize liability.” *Id.* at § 101(35) (B)(replaced by a new subsection (B) by 2002 amendment). This is called the “innocent purchaser” defense. The way that SARA inserted the defense into CERCLA was by adding a definition of “contractual relationship” and carving out these innocent purchasers from that definition. *Id.* Thus, SARA made the third party defense in the original statute available to innocent purchasers because they could now claim that the contamination was caused by third parties with whom they have no contractual relationship.

In response to the “innocent purchaser” defense created by SARA, the American Society for Testing and Materials (“ASTM”) began developing voluntary consensus standards for use by purchasers of commercial real estate. The first version of this standard was released in 1993 and titled ASTM E1527: Standard Practice for Environmental Site Assessments, Phase I Environmental Site Assessment Process. The most recent version of the standard states that its purpose is to define “good commercial and customary practice ... for conducting an environmental site assessment” with respect to CERCLA contaminants and petroleum products. ASTM E1527-05 § 1.1.

Elements of a Phase I

The most recent version of the Phase I standard is ASTM E1527-05, updated in 2005 to reflect the most recent amendments to CERCLA (discussed *infra*). The goal of the processes described in the standard is “to identify recognized environmental conditions.” ASTM E1527-05 § 1.1.1.

The term recognized environmental conditions means the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, ground water, or surface water of the property.

Id. In general, the standard allows information obtained during a prior site assessment to be used in a new assessment subject to conditions designed to ensure that the information is still accurate. *Id.* at §§ 4.6-4.8 (generally), 8.4 (records review – standard historical sources), 9.3 (site reconnaissance), 10.5.3 (interviews with owners and occupants) & 11.6 (interviews with government officials).

A complete Phase I has four components: records review, site reconnaissance, interviews, and a report. *Id.* at § 7.2. Each of these activities must be performed by or under the supervision of an “environmental professional” (“EP”). *Id.* at § 7.5.1. The



standard defines EP by reference to the Environmental Protection Agency (“EPA”) regulations, *Id.* at § 3.2.39, and mandates a minimum level of involvement. Specifically, “the environmental professional must be involved in planning the site reconnaissance and interviews” and must “review and interpret[] the information upon which the report is based.” *Id.* at § 7.5.1.

In addition to the four core components of a Phase I which are the responsibility of the EP, the ASTM standard also contains a number of tasks that “do not require the technical expertise of an environmental professional” and are generally “to be performed by the user.” *Id.* at § 6.1. The standard defines “user” as “the party seeking to use Practice E 1527 to complete an environmental site assessment of the property.” *Id.* at § 3.2.93. In most cases, this would be a potential purchaser of the property. The user tasks in § 6 include:

- ▶ Reviewing recorded land title records and lien records to identify environmental liens or activity and use limitations,
- ▶ Communicating any specialized knowledge or experience that might indicate the existence of environmental conditions at the site to the EP,
- ▶ Communicating actual knowledge of any environmental liens or activity and use limitations relating to the property to the EP,



- ▶ Considering the relationship between the purchase price of the property and the fair market value of the property if the property was not contaminated,
- ▶ Communicating any commonly known or reasonably ascertainable information about the property that is material to recognized environmental conditions at the property to the EP, and
- ▶ Informing the EP if the Phase I is being performed for a purpose other than to qualify for a defense to CERCLA liability.

Id. at § 6.2-7. Appendix X3 of the standard provides an optional questionnaire to assist the EP in gathering relevant information from the user.

1) Records Review

The first component of a Phase I is records review. *Id.* at § 8. The ASTM standard provides substantial guidance about the records that should be reviewed but also gives the EP considerable discretion. Section 8.2 gives an expansive list of potential sources of environmental information about a site and an approximate minimum search distance (from the boundary of the subject property) for each source but does not require that all of the sources or any one of them be checked and allows for an adjustment of the minimum search distance in most cases. Similarly, § 8.3 requires that “all obvious uses of the property ... be identified from the present, back to the property’s first developed use, or back to 1940, whichever is earlier,” but qualifies the requirement with terms like “reasonably ascertainable” and “likely to be useful.” While the standard provides a lot of useful information about conducting a records review, it ultimately gives the EP discretion over how far to pursue the review, and requires the EP to explain his or her reasoning in the report.

2) Site Reconnaissance

Visiting the site and observing environmental conditions, or site reconnaissance, is the second component of a Phase I. *Id.* at § 9. The site visit necessary for a Phase I does not need to include any sampling or intrusive testing. All that the standard requires is for a competent person to “visually and/or physically observe[]” the property. *Id.* at § 9.2. A competent person is someone “possessing sufficient training and experience necessary to conduct the site reconnaissance ... in accordance with this practice, and having the ability to identify issues relevant to recognized environmental conditions in connection with the property.” *Id.* at § 7.5.1. To the extent observable, the person conducting the site visit is required to note past and present uses of the property and adjoining properties and to consider

whether each use is or was likely to involve the presence of hazardous substances or petroleum products. *Id.* at §§ 9.4.1.1-5 & 9.4.2.1-2. The standard also states that the site visitor should document the geologic and topographic conditions of the site and structures, roads, water supply, and sewage disposal system if present. *Id.* at §§ 9.4.1.6-10. Other things the standard specifically mentions as relevant to a Phase I include storage tanks, odors, pools of liquid, drums, stains, corrosion, stressed vegetation, solid waste, and wells. *Id.* at §§ 9.4.2.4-9.4.4.7.

3) Interviews

The third component of a Phase I is conducting interviews with past and present owners and occupants, *Id.* at § 10, and with state and/or local government officials, *Id.* at § 11. As with the site reconnaissance component, the person conducting the interviews must “possess[] sufficient training and experience necessary to conduct the ... interviews in accordance with this practice, and hav[e] the ability to identify issues relevant to recognized environmental conditions in connection with the property.” *Id.* at § 7.5.1. The purpose of the interviews is to obtain information about past and present uses and conditions, *Id.* at §§ 10.1-2 & 11.1, attempt to locate certain “helpful documents,” *Id.* at § 10.8, and inquire about legal or administrative proceedings involving the property that are related to environmental conditions, *Id.* at § 10.9. The person responsible for the interviews should make a “reasonable attempt” to arrange interviews with (1) a key site manager identified by the current owner, *Id.* at § 10.5.1, (2) occupants as specified in § 10.5.2.2, (3) past owners, operators, and occupants who are likely to have relevant information, *Id.* at § 10.5.4, and (4) at least one staff member of one of the agencies listed in §§ 11.5.1.1-4.

4) Report

The final component of a Phase I is the written report by an EP. *Id.* at § 12. The ASTM provides a recommended format (table of contents) for the report in Appendix X4. The standard also discusses several items that should be included in the report including:

- ▶ Documentation for the report’s findings, opinions, and conclusions;
- ▶ Identification of the EP and the person performing the site visit and interviews,
- ▶ Information obtained from the “user” pursuant to the “user’s responsibilities” discussed above,
- ▶ The scope of services covered by the report,
- ▶ Findings of the investigation including any known or suspected environmental conditions and any de minimis conditions,

- ▶ The EP's opinion regarding the impact of any condition discovered and an explanation of her "rationale for concluding that a condition is or is not currently a recognized environmental condition,"
- ▶ The EP's opinion regarding additional investigation that should be conducted,
- ▶ A discussion of "significant data gaps that affect the ability of the [EP] to identify recognized environmental conditions,"
- ▶ A conclusion stating whether the Phase I revealed any environmental conditions,
- ▶ Additional services if applicable,
- ▶ Any deviations from the standard,
- ▶ Published sources relied upon in preparing the report,
- ▶ The signature of the EP responsible for the Phase I,
- ▶ An EP statement per 40 CFR § 312.21(d), and Appendices as appropriate.

Id. at §§ 12.2-14.

"ALL APPROPRIATE INQUIRY"— THE EPA STANDARD

Development of the EPA standard

In 2002, Congress passed another amendment to CERCLA, the Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Amendments"). The Brownfields Amendments created two new defenses to CERCLA liability: the Contiguous Property Owner ("CPO") defense, CERCLA § 107(q), and the Bona Fide Prospective Purchaser ("BFPP") defense, *Id.* at §§ 107(r)(1) & 101(40). Like the innocent purchaser defense, one element of both of these new defenses is to make "all appropriate inquiries" into a property's history "in accordance with generally accepted good commercial and customary standards and practices." *Id.* at § 101(40)(B)(i) (BFPP defense); *see also Id.* at § 107(q)(1)(A)(viii)(I) (CPO defense).

Rather than relying on a private organization (the ASTM) to define generally accepted practices, the Brownfields Amendments require EPA to "establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries." *Id.* at § 101(35)(B)(ii). Congress also included a list of ten criteria for EPA to incorporate into its standards and practices.

In promulgating regulations that establish the standards and practices referred to in clause (ii), the Administrator shall

include each of the following:

- I The results of an inquiry by an environmental professional.
- II Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.
- III Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.
- IV Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.
- V Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.
- VI Visual inspections of the facility and of adjoining properties.
- VII Specialized knowledge or experience on the part of the defendant.
- VIII The relationship of the purchase price to the value of the property, if the property was not contaminated.
- IX Commonly known or reasonably ascertainable information about the property.
- X The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

Id. at § 101(35)(B)(iii).

Instead of its regular internal rulemaking process, EPA used negotiated rulemaking to generate a proposed rule for conducting AAI. In negotiated rulemaking, representatives of various interested groups negotiate the substance of a rule as members of a formal advisory committee and then submit the resulting rule to EPA. Each member of the committee agrees to support EPA's proposed rule if there are no substantive differences between it and the consensus version submitted to the agency by the committee.

EPA began identifying potential members of the advisory committee for the rule on AAI in the fall of 2002. The committee



ultimately included representatives of state, local, and tribal governments; real estate developers, environmental interest groups, EPs, EPA itself, and others. The committee began meeting in April, 2003 and reached a consensus on a proposed rule in December, 2003. EPA released its proposed rule for public comment on August 26, 2004. After receiving and reviewing numerous comments, EPA released its final rule for conducting AAI on November 1, 2005. It became effective one year later.

Elements of All Appropriate Inquiry

EPA concluded that the primary objective of the AAI standard should be to “identif[y] conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.” 40 CFR § 312.20(e). It also recognized that the standard must satisfy the criteria given by Congress in the Brownfield Amendments. To address these ideologically distinct goals, EPA approached the AAI standard from both a broad, ends-driven perspective, *Id.* at § 312.20(e)(1)(i)-(vii) (objectives of AAI), and from a more practical, task-driven perspective, *Id.* at §§ 312.21-312.31 (discussing each of the ten statutory criterion). These two different approaches are discussed below. The standard also describes limits on the use of information obtained in previous inquiries. *Id.* at § 312.20(a)-(d).

One of the most important elements of the EPA standard is its definition of an EP. In general terms, an EP is “a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the objectives and performance factors” of the standard. *Id.* at § 312.10(*Environmental Professional*)(1). More specifically, the definition establishes minimum qualifications for EPs. An EP must:

- ✓ Be licensed or registered as a Professional Engineer or Professional Geologist AND have three years of relevant full-time experience, OR
- ✓ Be licensed or certified to perform environmental inquiries AND have three years of relevant full-time experience, OR
- ✓ Have a Baccalaureate degree or higher in engineering or science AND five years of relevant full-time experience, OR
- ✓ Have the equivalent of ten years of relevant full-time experience.

Id. at § 312.10(*Environmental Professional*)(2). Establishing minimum qualifications for EPs was a significant difference

from the then-current ASTM standard and was one of the most contested sections of the new Regulation.

1) Objectives and Performance Factors

In attempting to develop standards and practices that would satisfy the statutory criteria for AAI, EPA realized that “the purposes and objectives for the individual criterion and the types of information that must be collected to meet the objectives and criterion often overlapped.” Preamble to 40 CFR § 312, II(L). Because of this overlap, EPA determined that the best way to describe the standards and practices for AAI was in the context of a set of objectives and performance factors that would apply to the standards “comprehensively.” *Id.* “By establishing a concise set of objectives and setting some boundaries on the information collection activities through the establishment of performance factors, we believe that the final rule fulfills the statutory objectives, provides for a comprehensive assessment of the environmental conditions at the property, and avoids the conduct of duplicative investigations and data collection efforts.” *Id.*

In addition to the primary objective quoted above, the Regulation provides some specific guidance on the goals of AAI by listing seven categories of information that the party conducting AAI should seek. These include:

- 1) “Current and past property uses and occupancies;
- 2) Current and past uses of hazardous substances;
- 3) Waste management and disposal activities ... ;
- 4) Current and past corrective actions ... ;
- 5) Engineering controls;
- 6) Institutional controls; and
- 7) Properties adjoining or located nearby the subject property that have environmental conditions” that could have affected the subject property.

40 CFR § 312.20(e)(1)(i)-(vii). All of the standards and practices described in the Regulation should be performed with the purpose of gathering information that is relevant to these objectives.

The performance factors essentially limit the amount of time and effort that must be expended in pursuing the objectives listed above. To make AAI into a property, a person is only required to “seek to [g]ather the information ... that is publicly available, obtainable from its source within reasonable time and costs constraints, and which can practicably be reviewed.” *Id.* at § 312.20(f). The second performance factor for a person con-

ducting the inquiry is to “[r]eview and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice ... taking into account information gathered in the course of complying with the other standards and practices.” *Id.* As with the objectives, the performance factors apply to all activities undertaken while conducting AAI.

In conjunction with the objectives and performance factors discussed above, the AAI standard requires EPs to consider whether there are any data gaps in the information they are able to collect. The Regulation defines “Data Gaps” as “a lack of or inability to obtain information required by the standards and practices listed in [this Regulation] despite good faith efforts by the environmental professional or [the prospective landowner], as appropriate, to gather such information pursuant to [the objectives of AAI].” *Id.* at § 312.10(Data gap). If an EP or prospective landowner conducting an AAI investigation believes that there are data gaps that affect their ability to identify potential releases or threatened releases of contaminants, the EP or other person must identify the data gap, identify the sources used to address the data gap, and comment on the significance of the data gap. *Id.* at § 312.20(f). This element of AAI was not required by earlier ASTM standards and received considerable public comment.

2) Tasks included in AAI

The EPA standard for making AAI includes a subsection on each of the criterion in the Brownfield Amendments. Most of the tasks are indistinguishable from the same tasks in the ASTM standard. Variations between the two standards, to the extent they exist, are discussed in the next section.

The standard divides the responsibility for addressing each of the statutory criterion between the EP and the person who might need to establish one of the statutory defenses to CERCLA liability (usually a prospective purchaser). The EP is responsible for conducting interviews, reviewing historical sources of information, reviewing government records, making a visual inspection, and considering the degree of obviousness of the contamination or potential contamination. *Id.* at § 312.21. The person who will want to invoke the defense is required to search for recorded environmental cleanup liens, consider their own specialized knowledge or experience, and evaluate the relationship of the purchase price to the value of the property if it was not contaminated. *Id.* at § 312.22. Both parties are responsible for considering any commonly known or reasonably ascertainable information regarding the subject property. *Id.* at §§ 312.21 & 312.22.

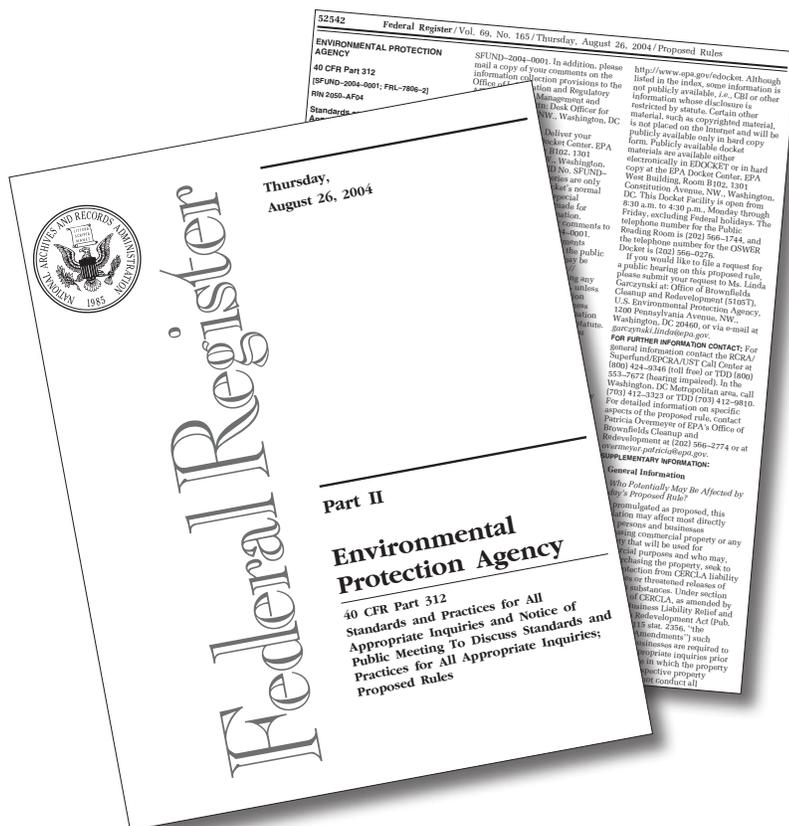
Comparison to ASTM’s Phase I standard

Although there are some minor differences between the ASTM Phase I standard and AAI as described in 40 CFR § 312, the federal regulation states that following the procedures of the ASTM standard fulfills the requirements of AAI. *Id.* at § 312.11.

In today’s final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 ... and recognizing the E1527-05 standard as consistent with today’s final rule. ... Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to comply with today’s final rule.

Preamble to 40 CFR § 312, IV(F). Thus, in regards to establishing the BFP defense to CERCLA liability, the differences between the two standards are irrelevant – either one will satisfy the AAI element of the defense.

Where there are differences between the two standards, the ASTM standard is usually more demanding than the EPA standard. The biggest difference is that the ASTM Phase I includes petroleum products within its scope. ASTM E1527-05 § 1.1.2. Petroleum and natural gas products are explicitly excluded from the definitions of “hazardous substance” and “pollutant or contaminant” in CERCLA. CERCLA §§ 101(14) & 101(33). For



purposes of establishing the BFPP defense to CERCLA liability, the EPA rule requires “investigations as required in this part ... to identify conditions indicative of releases or threatened releases ... of hazardous substances, as defined in CERCLA section 101(14).” 40 CFR § 312.1(c)(1). Thus, the scope of a Phase I per the ASTM standard is more comprehensive than the scope of AAI under the EPA Rule.

The ASTM and EPA standards also differ in the time period that must be covered by the search of historical records such as recorded land title documents, aerial photographs, and fire insurance maps. The EPA rule requires that “[h]istorical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes.” *Id.* at § 312.24(b). The ASTM standard takes a different approach: “All *obvious* uses of the *property* shall be identified from the present, back to the *property’s* first developed use, or back to 1940, whichever is earlier.” ASTM E1527-05 § 8.3.2 (italics in original). Apparently, if a property was first developed after 1940, AAI only requires searching historical records back to the time of the development while the Phase I standard would require the EP to search the records back to 1940.

Other areas where the ASTM standard imposes more stringent requirements than the EPA rule include the user’s responsibility to share information with the EP,¹ the extent of investigation into government/environmental records,² and explaining the reason for a below-market purchase price.³ The ASTM standard also gives considerable information about conducting site reconnaissance of a property while the EPA rule is essentially silent about how to make a visual inspection.⁴ There are also a few instances where the EPA rule is more demanding than the ASTM standard.⁵

BFPP DEFENSE TO CERCLA LIABILITY

The definition of “Bona fide prospective purchaser” (added by the Brownfield Amendments) lists the elements of the BFPP defense. CERCLA § 101(40). Although the statute does not divide the elements in any way, EPA classifies them as either Threshold Requirements (elements that must be present at the time of closing) or Continuing Obligations (elements that must be satisfied continuously after closing). Preamble to 40 CFR § 312, II(D). Each element of the BFPP defense must be demonstrated by a preponderance of the evidence. CERCLA § 101(40). The Brownfield Amendments also provide for a “windfall lien” for situations where the federal government

spends money cleaning up a site, the value of the site increases as a result of the clean-up, and the owner can establish the BFPP defense. *Id.* at § 107(r)(2)-(4).

Threshold Requirements (Pre-Closing Elements)

There are three threshold requirements to the BFPP defense. Specifically, a landowner seeking to invoke the BFPP defense must:

- 1) Show that “[a]ll disposal of hazardous substances at the facility occurred before the person acquired the facility,” *Id.* at § 101(40)(A);
- 2) Have “made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices” before acquiring the property,⁶ *Id.* at § 101(40)(B); and
- 3) Not be “potentially liable, or affiliated with another person that is potentially liable, for response costs at a facility,” *Id.* at § 101(40)(H).

With the exception the second element, making AAI, the threshold requirements of the BFPP defense are fairly straightforward and have not created substantial discussion or controversy.

Continuing Obligations (Post-Closing Elements)

There are six continuing obligations to the BFPP defense that landowners must comply with for the entire time that they own property that is the subject of a CERCLA action. To successfully invoke the BFPP defense, a landowner must:

- 4) “[P]rovide[] all legally required notices with respect to the discovery or release of any hazardous substances at the facility,” *Id.* at § 101(40)(C);
- 5) “[E]xercise[] appropriate care with respect to hazardous substances found at the facility by taking reasonable steps” regarding those substances, *Id.* at § 101(40)(D);
- 6) Cooperate fully with “persons that are authorized to conduct response actions or natural resource restoration” at the subject property, *Id.* at § 101(40)(E);
- 7) Comply with all land use restrictions on their property that are related to a response action, *Id.* at § 101(40)(F)(i);
- 8) “[N]ot impede the effectiveness or integrity of any institutional control” utilized at the property in connection with a response action, *Id.* at § 101(40)(F)(ii); and

- 9) Comply with requests for information and administrative subpoenas pursuant to CERCLA, *Id.* at § 101(40)(G).

A few commentators have objected to some of these continuing obligations on the basis of their vagueness or the burden they place on landowners.⁷ However, these objections might not carry much weight since I could not find any court opinions discussing any of these elements of the BFPP and the EPA is not developing a regulation for any them.

The Windfall Lien

Along with creating the BFPP defense, the Brownfield Amendments provide for a lien in favor of the United States

Government in certain situations. *Id.* at § 107(r). The government has a “windfall lien” on property when (1) it incurs response costs associated with cleaning up contaminants at a site and the costs are not recovered from other sources, (2) the fair market value of the property increases as a result of the clean-up, and (3) the owner qualifies as a BFPP and is therefore not liable for the clean-up costs under CERCLA. *Id.* at § 107(r) (2)-(3). The maximum amount of the lien is the increase in the fair market value of the property due to the clean-up. *Id.* at § 107(r)(4)(A). ☞

endnotes

1. Compare ASTM E1527-05 § 6.2 (“Any environmental liens or activity and use limitations so identified shall be reported to the environmental professional conducting a Phase I Environmental Site Assessment.”), with 40 CFR § 312.25 (“All information collected regarding the existence of such environmental cleanup liens associated with the subject property ... may be provided to the [EP] or retained by the applicable party.”); ASTM E1527-05 §§ 6.3 & 6.4 (requiring user to communicate any applicable information including actual knowledge of environmental liens or activity and use limitations to EP before the EP conducts the site reconnaissance,), with 40 CFR § 312.28 (no mention of the EP); and ASTM E1527-05 § 6.6 (requiring the user to communicate commonly known or reasonably ascertainable information to the EP before the EP conducts the site reconnaissance), with 40 CFR § 312.30 (no duty for “user” to communicate information to EP).
2. Compare ASTM E1527-05 § 8.2 (giving a more expansive list of sources that “shall be reviewed” subject to some conditions), with 40 CFR § 312.26 (several shorter lists of sources that a search of government records “should include,” for adjoining properties each list is specific to the property’s environmental history).
3. Compare ASTM E1527-05 § 6.5 (“user” must try to identify a reason for a difference between purchase price and fair market value if the property were not contaminated and “make a written record of such explanation”), with 40 CFR § 312.28 (requires the user to “consider” whether the purchase price is below fair market value and whether any differential is due to contamination).
4. Compare ASTM E1527-05 § 9, with 40 CFR § 312.27.
5. Compare ASTM E1527-05 § 6.6 (responsibility for commonly known or reasonably ascertainable information only applies to user), with 40 CFR § 312.30 (both user and EP must “take into account commonly known or reasonably ascertainable information with the local community about the subject property and consider such information” in performing their respective tasks); and ASTM E1527-05 § 8.2 (requiring a search of “[F]ederal institutional control/engineering control registries” for the property only), with 40 CFR § 312.26(c)(2)(ii) (requiring a search of engineering controls for adjoining properties within one-half mile if property has been “previously ... identified or regulated ... due to environmental concerns”).
6. Note that this is the only element of the BFPP defense that is satisfied by following the standards and practices described in 40 CFR § 312 (AAI) and ASTM E1527-05 (Phase I).
7. See, e.g., Gregory D. Trimarche, Esq., *CERCLA’s New Prospective Purchaser Defense*, Hazardous Waste Litigation Reporter, Vol. 23, Issue 9 (Dec. 12, 2002), available at www.gtlaw.com/pub/articles/2002/trimarcheg02a.pdf (arguing that the third element above is too vague and that the second element could impose the same cleanup obligations on landowners as liability under CERCLA imposes).

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