

Environmental Alert: ASTM Releases New Guidance on Continuing Obligations for Landowner Liability Protections under CERCLA

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In order to spur the redevelopment of Brownfields, Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to provide liability protection to bona fide prospective purchasers (BFPPs). To qualify for this protection, landowners must first complete "all appropriate inquiries," which typically require a Phase I Environmental Site Assessment (ESA). The American Society for Testing and Materials (ASTM) standard for Phase I ESAs is recognized by the EPA as satisfying this requirement and is very familiar to developers, property owners, and consultants. To maintain the BFPP liability protection, however, landowners must also comply with certain continuing obligations associated with "recognized environmental conditions" (RECs) identified in the Phase I ESA.

Recent case law developing in the BFPP context cast significant doubts regarding what is required to meet the continuing obligation requirements. Failure to comply with continuing obligations requirements can limit or even eliminate these liability protections. To help clarify this situation, ASTM recently issued The Standard Guide for Identifying and Complying with Continuing Obligations (E2790-11) ("Guide"). The Guide, which is intended to be used on a voluntary basis, focuses on three continuing obligations under CERCLA (i.e., land use restrictions, institutional controls, and taking reasonable steps with respect to releases of chemicals of concern). While the Guide is primarily focused on CERCLA liability, it has potential application to other environmental assurance protections, as well.

The Guide establishes a four-step process for demonstrating compliance with any continuing obligations at commercial real estate, forestland, or rural properties:

- Step 1: Review of Phase I ESA to identify any continuing obligations associated with RECs, land use restrictions (LUCs), and institutional controls (ICs);
- Step 2: Review and evaluate RECs, and activity and use restrictions;
- Step 3: Perform any "initial" continuing obligations and prepare a continuing obligations plan setting forth "ongoing" continuing obligations; and
- Step 4: Implement and document completion of ongoing continuing obligations.



The Guide recognizes that continuing obligations will depend upon the RECs, LUCs, and ICs applicable to each site. To that end, the procedures need to be tailored to meet site-specific conditions. The Guide also cautions that evaluation and compliance with continuing obligations and CERCLA liability defenses in general may require the experience and judgment of an environmental professional, including competent legal advice.

The steps recommended in the Guide may ultimately provide an objective benchmark for demonstrating compliance with continuing obligations.

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