



Environmental Due Diligence

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Environmental Due Diligence (EDD) enables parties to a real estate transaction – buyers, sellers, lenders, and municipalities – to quantify environmental risk associated with the property to better inform the parties and to allocate related known and potential liabilities. In the best case, conducting EDD properly can qualify a purchasing party for certain defenses to environmental liability under the federal Superfund law administered by the United States Environmental Protection Agency (EPA), more formally known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

This article provides important background for Wisconsin municipalities regarding EDD, including recent developments and revisions related to the standards for performing EDD, why EDD matters to municipalities, and how the due diligence practices, including what constitutes an “all appropriate inquiry” (AAI), are adapting to address “emerging contaminants,” most notably per- and polyfluoroalkyl substances, or PFAS.

Phase I Environmental Site Assessments

The “gold standard” for how to conduct EDD is the Phase I Environmental Site Assessment (“Phase I”). The blueprint for the Phase I has been “codified” in the American Society of Testing and Materials (ASTM) protocol known as ASTM E1527. ASTM has issued several iterations of the ASTM E1527 standard, with the two more recent versions being issued in 2013 (logically known as E1527-13) and in 2021 (E1527-21).

The ASTM protocol is a scoping exercise to implement standardized best practices to address potential environmental conditions at a property. The ASTM protocol sets forth the resources that are to be reviewed, persons to be interviewed, real estate conditions to be observed, and conclusions to be drawn in order to develop property-specific observations of the current and historic use and ownership of a property that have resulted in the presence of “Recognized Environmental Conditions,” known under EDD and ASTM parlance as “RECs.” A REC, whether unqualified, historic, closed or conditional, represents a circumstance where a hazardous substance or substances are or may have been released, which

would give rise to potential federal and state liability for the purchaser as the owner of the property or the party, under CERCLA, or as “the party in possession ... of the hazardous substance that is discharged,” under the Wisconsin Hazardous Substance Spills Law (Wis. Stat. § 292.11). While not equivalent, certain elements of the Phase I inquiry are found in elements of the applicable Wisconsin Administrative Code for site investigations at environmental cleanups – specifically, the site investigation scoping section Wis. Admin. Code §§ NR 716.07(1)-(12).

Even if a Phase I reveals the presence of a REC, for example, past practices on a property that entailed the use and identified discharge – or spilling – of a solvent, such a REC is not necessarily fatal to the deal. Instead, a correctly identified REC provides the opportunity for the parties to the deal to intelligently and cost- and time-effectively quantify the legal and financial risk associated with the REC to address the condition thoughtfully in the transactional documents, such as a development agreement.

Municipalities in Wisconsin have the unique legal authority to qualify for an exemption from liability under Wis. Stat. § 292.11, known as the “Local Government Unit,” or LGU, exemption, if they meet certain criteria. Nevertheless, EDD is critically important for municipalities in order to quantify and address environmental risk associated with brownfields – properties stigmatized by known or perceived environmental conditions – in a brownfield redevelopment.

Changes to the ASTM E1527 Standard

When ASTM unveiled revisions to the ASTM E1527 Phase I standard in 2021, its purpose was to clarify certain elements of the former ASTM E1527-13 process. The revision included, specifically, (i) tightening up the definition of a REC to limit the “likely” presence of a hazardous substance release at a property to only limited circumstances; (ii) restricting the definition of a “controlled” REC, or CREC, which is a REC that was addressed to the written satisfaction of a regulatory agency – like a leak from an underground storage tank that was historically identified, investigated, cleaned up, and closed by the DNR – so that if, subsequent to such closure, there is a change in use at the property (like from industrial

to residential), a change in regulatory standards relevant to the condition, or “receptors,” like a drinking water source, that might now be impaired or threatened by the CREC, the ASTM “needle” might move the condition from a CREC status to a REC status; (iii) better defining the significance of a “historical REC,” or HREC, to make it clear that such a condition is not a REC; (iv) clarifying the obligations of the “Environmental Professional,” or consultant, performing the Phase I to not only identify “data gaps,” but to explain the significance of such gaps on the Phase I conclusions; and, (v) clarifying that there may be conditions indicative of a hazardous substance release during a Phase I, but if these are of a nature that would generally not result in a requirement for environmental response or enforcement action by a government agency, such conditions may be removed from “REC status” as a “de minimis” condition.

Consideration of PFAS in ASTM E1527-21 Revision

As noted above, ASTM also sought to clarify attention to PFAS and other certain substances through the E1527-21 revisions. By way of background, the interrelationship of the ASTM Phase I process and the CERCLA liability exemptions is important to understand in regard to PFAS. Again, a party purchasing a property may qualify as exempt from CERCLA liability as, for example, a CERCLA defined “innocent landowner” exemption, if that party did not know and had no reason to know of the presence of a hazardous substance discharge on the property the purchaser subsequently owns if, at the time that party took title to the property, the party conducted “all appropriate inquiry” (AAI), into the current and former use and ownership of the property. In 2006, the EPA formally indicated that a party could prove it had performed “all appropriate inquiry” if it conducted a Phase I environmental site assessment that met the ASTM standard.

When PFAS arose as a substantial concern nationally and in Wisconsin in the late 2010s, the disconnect in the ASTM-EPA AAI interrelationship became apparent. Because AAI is a CERCLA term, the protection only extends to hazardous substances subject to the CERCLA law. ASTM practices go a bit further than CERCLA, in that an ASTM Phase I also includes petroleum products, otherwise excluded from the scope of CERCLA. The ASTM Phase I also includes consideration of other applicable state environmental laws and enforceable standards. Thus, until ASTM sought to address this gap, an “off the shelf” ASTM E1527-13 Phase I would not address PFAS (or, interestingly, asbestos). While there have been “workarounds” to address these “out of scope” conditions and substances, ASTM and the resulted community sought greater and more efficient clarity.

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Instead of simply adding PFAS to the Phase I scope when it released the revised standard in November 2021, ASTM sought to maintain the AAI nexus, so in its E1527-21 revisions, it noted that PFAS could be incorporated by consultants as a “non-scope” condition. Then, in March 2022, EPA issued a fast-track process to finalize approval and specified *either* the E1527-13 or the E1527-21 standard would suffice to meet AAI. Substantial negative feedback and comment followed, after which EPA withdrew its approval for the E1527-21 standard. The most resounding criticism of the initial proposed adoption was that allowing two standards conflicted with the premise of what an acceptable, universal AAI standard is.

PFOA and PFOS as CERCLA Hazardous Substances

In the meantime, EPA subsequently proposed formal designation of two PFAS compounds, PFOA and PFOS, as CERCLA hazardous substances by federal rule in fall 2022 to go into effect in fall 2023. In a somewhat related action therefore, on December 15, 2022, EPA initiated formal approval of the E1527-21 Phase I standard as sufficient to meet AAI. This will include PFAS as an ASTM “non-scope consideration” add-on, until the CERCLA hazardous substance designation for PFOA and PFOS rule making is complete, at which time the scope of the AAI-related inquiry will sweep in all hazardous substances, which will, for better or worse, include the two more widely prevalent PFAS. The effective date of EPA adopting the E1527-21 standard for AAI is February 13, 2023.

Conclusion

As the adage provides, “knowledge is power.” In the framework of brownfield redevelopment, a municipality’s management of environmental risk – legal and financial liability – depends on critically intelligent evaluation of the

conditions present on properties. Although the development and evolution of the EDD process known as the ASTM Phase I Environmental Site Assessment has been and may continue to be a little bumpy, for now, municipalities have a clearer understanding that engaging an environmental consultant to perform a Phase I environmental site assessment that meets the ASTM E1527-21 standard will meet two goals: identifying known and potential environmental risks and qualifying for exemptions from CERCLA liability, including for PFAS.

Liability 442

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