

NEW ENVIRONMENTAL DUE DILIGENCE STANDARDS WILL IMPACT PROPERTY TRANSACTIONS

ASTM International, a global standards development organization, recently issued standards regarding site assessments of forestland and rural property and chemical subsurface building contamination. These standards will have significant impact on transactions involving changes in property ownership or operations.

OVERVIEW OF NEW ASTM STANDARDS

The first standard addresses Phase I investigations for forestland and rural properties, complementing the 2005 ASTM *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process* (ASTM E 1527-05). The new standard is specifically recognized in federal regulations as satisfying the All Appropriate Inquiry ("AAI") requirements of the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"), as revised by the 2002 brownfields amendments, for large tracts of undeveloped property.

The other new standard provides a means of evaluating potential vapor intrusion and, while not incorporated into the AAI regulations, will most certainly become a common non-scope add-on to Phase I investigations, much the way considerations relating to asbestos, lead paint and radon have.

These two standards are positioned to have a considerable effect on the environmental due diligence process for transactions involving changes in ownership or operation of real property. These new standards will have to be carefully considered for property transactions that are a result of an asset transfer, change in ownership of an entity holding title or change of an entity leasing the property,

STANDARD FOR FORESTLAND AND RURAL PROPERTY

A final rule issued by the United States Environmental Protection Agency (USEPA) on December 23, 2008 allows, but does not require, prospective purchasers of forest or rural tracts of 120 acres or more to use the *Standard Practice for Environmental Site Assessments: Phase I Environmental Process for Forestland or Rural Property* (ASTM standard E 2247-08) to satisfy federal AAI requirements, rather than using the 2005 ASTM standard for Phase I investigations.

This final rule allowing use of the new ASTM Phase I standard for forestland and rural property to satisfy AAI requirements, which became effective March 23, 2009, will allow investigations to be specifically tailored to conducting site assessments of large tracts of undeveloped land. Performance of an investigation that satisfies this ASTM standard for such properties will satisfy the AAI requirements necessary to establish the innocent purchaser defense, as well as the bona fide prospective purchaser and contiguous property owner liability protections.

While ASTM E 2247 was first published in 2002, it was not originally recognized in USEPA's 2005 AAI rule as being compliant with AAI requirements. Revisions made and approved in 2008 addressed site assessment issues involving property uses and environmental concerns typical of forestland and rural property. Recognizing the inaccessibility and remoteness of large forestland and rural properties, ASTM 2247-08 provides for the use of remote sensing methods such as aerial photographs or flyovers during site reconnaissance to identify suspect areas for closer inspection on the ground. This recognizes industry practice, preserves time and promotes cost-effectiveness.

VAPOR INTRUSION STANDARD

Another recently developed ASTM standard addresses the emerging issue of vapor intrusion, which is the movement of volatile chemicals from subsurface contamination into buildings. Transfer of vapors into buildings can occur by diffusion through cracks or seams in subsurface walls or floors, or by convection that may be driven by pressure differentials between indoor and outdoor air.

The USEPA has draft guidance for addressing vapor intrusion at contaminated properties, and many states, including New York, require vapor intrusion to be addressed in connection with required site cleanups. On March 3, 2008, ASTM released *Standard Practice for Assessment of Vapor Intrusion into Structures on Property Involved in Real Estate Transactions* (E 2600-08) as a stand alone or supplement to its ASTM E 1527-05 standard for Phase I site investigations. This standard defers to applicable federal and state guidance but also provides a tiered approach to evaluating the presence or likely presence of contaminants in indoor air that may present an unacceptable health risk.

Tier 1 of ASTM's vapor intrusion standard is a typical "Phase I Type" screening tier to quickly and inexpensively identify potential vapor intrusion conditions. Tier 2 is a more refined screening. Where potential vapor intrusion cannot be screened out, then the parties could proceed to a more comprehensive site-specific investigation (Tier 3) or proceed directly to mitigation (Tier 4).

While the four tiered approach set forth in ASTM standard E 2600-08 for vapor intrusion has not been incorporated in the federal AAI requirements set forth in regulations at 40 CFR Part 312 for establishing the various CERCLA defenses, it will likely become a common non-scope add-on for Phase I investigations. This is anticipated because liabilities faced by parties legally or financially connected to properties with vapor intrusion issues extend beyond remedial obligations to numerous other liabilities relating to toxic tort, diminution in property value and various other common law and statutory claims.

IMPACT ON DUE DILIGENCE COSTS

Simplifying Phase I investigations in connection with due diligence for transactions involving largely undeveloped properties over 120 acres will likely result in time and cost savings.

Although addressing the emerging environmental issue of vapor intrusion as a non-scope add-on to Phase I investigations will likely add to transactional due diligence costs, this analysis is advisable as it may ultimately yield later savings as a result of avoided liabilities, which extend well beyond remedial obligations.

Individuals or entities engaged in transactions that involve changes in ownership or operation of real property should carefully consider environmental issues and seek the advice of experienced environmental legal counsel.

If you have any questions regarding the amendments outlined in this alert, please contact Brenda J. Joyce at 716.843.3855 or bjoyce@jaeckle.com.

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