Performing a Phase I environmental site assessment has long been a routine, but integral part of the environmental due diligence in any transaction involving the acquisition of an interest in commercial and industrial real property. Perhaps the most important aspect of performing a Phase I is the information that it provides to a potential buyer or anyone acquiring an interest in real property. It aids such party in making an informed decision about the value of a property, the contractual protections that may be desired and even whether to acquire the property at all. However, federal environmental law also provides an added benefit. If a party can demonstrate that it has performed "all appropriate inquiries" (AAI) into the environmental condition of the property including previous ownership and uses of the facility, it may qualify for certain landowner or lender liability protections under CERCLA, among them: bona fide prospective purchaser (BFPP), contiguous property owner or innocent landowner.

On November 1, 2005 EPA published a Final Rule, establishing the requirements for demonstrating that a party has performed AAI. In that Final Rule, EPA confirmed that the ASTM standard known as “Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process” would satisfy AAI for purposes of obtaining the CERCLA protections. That standard was known as ASTM E1527-05.

In 2013, ASTM amended the Phase I standard, now known as ASTM E1527-13. The revised standard included several clarifications and additions, including updated definitions of commonly used terms such as Recognized Environmental Condition (REC), Historical Recognized Environmental Condition (HREC), “de minimis condition,” “migrate/migration,” “release,” and others. It also included a new term, Controlled Recognized Environmental Condition (CREC). While an HREC is now defined as a past release that has been addressed to unrestricted residential use, a CREC is defined as a past release that has been addressed in some manner, but where contamination remains in place. Although this article will not provide an exhaustive list of changes to the ASTM standard, one other important change was the inclusion of vapor migration as a pathway to be investigated by the consultant.

Initially, EPA considered allowing the regulated community to use either of the ASTM standards, “-05” or “-13.” However, on October 6, 2014, EPA formally removed reference to the 2005 standard from the AAI rule. The agency agreed with several comments received from the regulated community asserting that the use of two standards would create confusion and inconsistency in performing and relying upon due diligence. This is a significant development that parties to transactions as well as consultants must take note of. In order to qualify for any of the various protections from liability afforded by performing AAI, a party must use the 2013 ASTM standard, E1527-13 for transactions closing after October 6, 2015. It is critical to note, that the new standard only applies to transactions closing after the effective date of the new rule which is postponed one year to allow for transition to the new standard.

If you have questions regarding this revision to the AAI rule, or any other aspect of transaction-related due diligence, please contact the author.

ENDNOTES

1 The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601, et seq. (CERCLA)
2 See 42 U.S.C. 9601(35)(B). A detailed discussion of what constitutes a BFPP, etc. is beyond the scope of this article but such terms are defined in CERCLA. Also see the federal regulations at 40 CFR 312.20, et seq.
4 The revised AAI rule has an effective date of October 6, 2015.