ASTM Environmental Site Assessment Standards: Overview

Prepared by:
Christopher P. McCormack, Esq.
Pullman & Comley LLC

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I. ASTM ENVIRONMENTAL SITE ASSESSMENT STANDARDS: OVERVIEW

In selecting and using ASTM standards for environmental due diligence, it is useful to begin by considering how those standards are developed.

A. The ASTM Consensus Process for Standards Development

ASTM International, formerly the American Society for Testing and Materials, is a consensus-based standard-setting organization composed of volunteer members drawn from the private sector, academia and government. ASTM technical committees are organized by discipline or subject; subcommittees focus on narrower subsets of a committee's portfolio. Committee members are classified by their orientation to the subject matter. For environmental standards, the most important categories are the "Users" who request assessment work and employ the results to make business decisions, and the "Producers" who conduct the actual assessments and generate the reports delivered to Users. In managing technical committees, ASTM strives to assure fair representation of Users and Producers by requiring balance among official voting members. For this reason, official committee voting status is allocated so as to maintain an appropriate ratio of Users and Producers. Thus, while environmental consultants classified as "Producers" make up a large proportion of Committee E50, official voting status is granted only to approximately the number needed to balance the voting "User" membership.

ASTM technical standards are developed and revised by "task groups" comprised of volunteers from a committee. A task group will typically meet in person at semi-annual "committee week" meetings, and more frequently by email and web meeting, to discuss and debate the provisions of standards. All existing standards are reviewed on a regular basis for currency and correction. New and revised standards are developed as "work items" under tracking numbers assigned by ASTM.

Once a task group has developed a new or revised standard, the next step is to submit the item to a broader set of stakeholders by means of a series of ballots. Initial ballots are often at the subcommittee level; a given standard may go through multiple subcommittee and committee ballots. Members scrutinize ballot items closely and can cast negative ballots on specific provisions of a draft. The task group on the standard or work item must address each negative, often by consulting personally with the negative voter. At this step, the balloter may elect to withdraw the negative, or may agree to resolve it with non-substantive "editorial" changes that can be adopted without further balloting. The task group may deem a negative "persuasive" and accommodate it by making substantive revisions that require reballoting. Voters may also offer comments or suggestions the task group has discretion to accept or reject. The iterative, ongoing process of addressing negatives and comments may lead to extensive revisions.

If efforts to accommodate a negative are not successful, the task group can deem it "nonpersuasive." Then the proposed justification for the "nonpersuasive" finding must itself be put to the full committee for a vote. The item can proceed only if that finding is endorsed by the full committee.

The standard development process is not over at that point, however. Any nonpersuasive finding goes to the ASTM Committee on Standards, which reviews it to assure the task group has fully addressed the subject matter of the negative vote. A negative balloter may also appeal to COS to make a case for rejection.

The balloting process together with the requirement of committee balance discourage deviation from what a broad cross-section of stakeholders supports. At the same time, the procedural protections for resolution of negative ballots mean that a committed negative voter has meaningful ability to influence the final product. A standard that makes it to publication thus can fairly claim to represent a genuine consensus as to procedures, expectations and terminology.

B. Using ASTM Standards for Site Assessment and Other Due Diligence Tasks

Environmental due diligence involves evaluating environmental considerations for purposes of a given transaction. The scope of "due diligence" in any situation varies depending on the subject matter of the transaction and the risk tolerance of the participants.

Speaking generally, environmental due diligence involves certain overarching questions that can be simply stated.

- **Is there something to be concerned about?** Regulatory enforcement risk was historically a driver of environmental assessment, but may not loom as large in an era when new Superfund site listings are rare and straitened public finances limit enforcement resources. Even if the potential for a cleanup order is low, however, similar property condition considerations may give rise to lawsuits or indemnity claims from purchasers, abutting property owners, or employees subject to workplace exposure to site conditions. A threshold level of due diligence is necessary simply to identify possible problems.

- **How big is the problem?** Environmental unknowns are often less intractable when reduced to a finite range of compliance or remediation costs. Some degree of quantitative site understanding can be helpful at two levels – first for the transaction parties themselves as they negotiate price, escrow arrangements, or indemnities, and second for financial and insurance underwriters whose support may be critical in keeping a deal together.

- **Will environmental issues affect property use?** An important due diligence task is to identify matters that call for ongoing attention. In the recent past, vapor intrusion has emerged as a specific subject of concern even on properties that

are not themselves the source of contamination or likely targets of remedial enforcement. Similarly, successful past remediation work may have resulted in imposition of property use restrictions a new owner will need to observe – not only to protect persons on the property but even, in some circumstances, to preserve liability protections. Regulatory "closure" may also be achieved by remediating to risk-based criteria that effectively limit property use, for example by permitting contaminated soil to remain in place under a building or pavement, or by restricting occupancy to industrial or commercial uses. The property purchaser or owner who analyzes these considerations systematically can often realize much or all of a property's value through productive use that coexists with protective measures.

Several ASTM standard practices and guides[1] can help answer these questions.

C. "All Appropriate Inquiry" and Other Benefits for Buyers, Sellers, Lenders and Insurers

The E1527 Phase I standard has long been associated with the "all appropriate inquiry" that must be undertaken to qualify for certain landowner liability protections under CERCLA.[2] In 2005, implementing a rulemaking mandate of the 2002 CERCLA "brownfield amendments,"[3] EPA and ASTM simultaneously issued, respectively, a rule defining AAI criteria and a revised version of E1527 that EPA endorsed as an alternative means of satisfying the AAI requirement.[4]

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[1] In ASTM parlance, a "practice" is "a set of instructions for performing one or more specific operations that does not produce a test result," and a "guide" is "a compendium of information or series of options that does not recommend a specific course of action." Very generally, a guide "increases the awareness of information and approaches in a given subject area" and is advisory, whereas a "practice" is prescriptive or mandatory. See "Form and Style for ASTM Standards." ASTM International, http://www.astm.org/COMMIT/Blue_Book.pdf (April 2018; visited December 26, 2018).

[2] Up to 2002, 42 USC § 9601(35)(B) provided: "To establish that the defendant had no reason to know … the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." After the 2002 Brownfields Amendments, and to the present, the same provision reads: "To establish that the defendant had no reason to know … the defendant must demonstrate to a court that— (I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and(II) the defendant took reasonable steps to— (aa) stop any continuing release; (bb) prevent any threatened future release; and (cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance."

[3] Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-119, § 223, 115 Stat. 2356, 2372 (2002), codified at 42 USC § 9601(35).

[4] Compare 40 C.F.R. Part 312 with E1527-05. The formal recognition of E1527-05 as an AAI alternative was incorporated into 40 C.F.R. §312.11(a). EPA subsequently afforded the same recognition to E1527-13, see 78 Fed. Reg. 79,319 (Dec. 30, 2013), and thereafter deleted reference to the 2005 revision, see 79 Fed. Reg. 60,087 (Oct. 6, 2014). The latter change became effective in October 2015, effectively allowing for phase-out of any assessments conducted under the 2005 standard by virtue of the one-year "shelf life" limitation on use of prior reports.

Assessment in accordance with the E1527 standard thus supports statutory liability protections.[5]

With time, however, concern with CERCLA liability has become less and less a motivating factor for environmental due diligence. New National Priority List designations are rare; the most dangerous sites have been addressed; remediation options have expanded to embrace risk-based solutions that mitigate risk at comparatively reasonable cost. Contaminated properties that remain fall in the brownfield range of the spectrum – "dirty" but vanishingly unlikely to trigger the kind of liability once darkly associated with viable PRP status at multi-party Superfund sites.

So the conventional thinking is that few conduct a Phase I assessment anymore out of concern with CERCLA liability. But more than ever, a Phase I site assessment is a routine and expected part of any transaction. And the reason is clear: an inquiry designed to identify "recognized environmental conditions" just makes sense for a buyer – and the E1527 Phase I standard provides a common frame of reference for buyer and seller to develop the facts and negotiate over their implications. Indeed, no matter the attenuated relevance of CERCLA liability, an attorney who fails to advise a transactional client to undertake pre-purchase site assessment flirts with malpractice.

In part this is a matter of dollars and cents. But non-CERCLA liability considerations are relevant as well. Even if a property owner is not liable to a regulatory authority for a groundwater solvent plume originating off-site, it may have a duty in tort that runs to site building occupants exposed to contaminated vapor or construction workers exposed to contaminated groundwater in excavations.

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[5] As a historical note, the Phase II standard (discussed in Part III below) was formerly linked to pre-2002 notions of "all appropriate inquiry. When originally issued in 1997, it referred to "good commercial and customary practices," a rubric derived from the CERCLA "innocent purchaser" defense, and stated that it was "'intended to constitute 'all appropriate inquiry into the previous ownership and uses of a property' to determine whether hazardous substances or petroleum products have been disposed or released there in order to satisfy one element of the innocent purchaser defense to CERCLA liability." See E1903-97 (2002), section 1.1.1. The 2002 Brownfields Amendments to CERCLA elaborated on the definition of "all appropriate inquiry" and required EPA to write regulations establishing "good commercial and customary standards and practices." See 42 U.S.C. §9601(35(B). Those standards stopped short of sampling: EPA said the AAI rule "does not require sampling and analysis as part of the all appropriate inquiries investigation," 70 Fed. Reg. 66,070 (Nov. 1, 2005), at 66,101; the parallel ASTM standard said Phase I assessment "does not include any testing or sampling of materials (for example, soil, water, air, building materials)." E1527-05, Section 7.4.

Because these changes decoupled sampling and analysis from AAI, the E1903 Phase II standard no longer refers to AAI. It should be noted, however, that in the Federal Register notice of the new AAI rule in 2005, EPA cautioned that the lack of a sampling requirement in the rule "does not prevent a court from concluding that, under the circumstances of a particular case, sampling and analysis should have been conducted to meet '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' criterion and obtain protection from CERCLA liability." 70 Fed. Reg. at 66,101.

In practice, liability concerns are often not the predominant consideration in environmental due diligence. For properties and entities with "environmental issues," the parties that have not already shied away from a transaction need information and analysis to hammer the fractious unknowns of contaminated property into a practical deal. Due diligence activities help transaction parties quantify costs associated with environmental issues. For this purpose, the orderly procedures defined by ASTM standards can be invaluable both in understanding the issues, and in laying out the nomenclature, process and guidance that enable the parties to talk about the same things on the same terms.