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Regulatory Update
regarding new ASTM
Phase I ESA Standard

Issue No. 17 | Fall 2021 Is It a REC? – Superfund Sites

Specific Phase I environmental site assessment requirements have been closely tied to the Comprehensive Environmental Response, Compensation, and Liability Act, CERCLA or “Superfund,” since inception of the All Appropriate Inquiry (AAI) rule in 2006. Often at the top of the chart when conducting AAI on a particular property is proximity to Superfund Sites. These are properties that the U.S. Environmental Protection Agency (EPA) has placed on its National Priorities List (NPL), a register of the most serious uncontrolled or abandoned hazardous waste sites identified for possible long-term remedial action under the Superfund program. The NPL, which EPA is required to update at least once a year, is based primarily on the score that a site receives from EPA’s Hazard Ranking System. A site must be on the NPL to receive money from the Superfund Trust Fund for remedial action.

As of 2021 the U.S. has 1,322 Superfund sites with more than 50 additional sites proposed for addition to the NPL.

Background

Congress passed CERCLA in 1980 to address the growing concerns posed by hazardous waste sites. The law authorized EPA to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment, and force potentially responsible parties (PRPs) to clean up releases or threatened releases from these sites and to seek reimbursement from the PRPs for money used from the Superfund. In 1986, the Superfund Amendments and Reauthorization Act (SARA) reauthorized CERCLA to continue cleanup of the growing list of Superfund sites around the country and gave EPA additional enforcement authority.

What has become well known in the real estate industry in particular is that buyers, lessors, and lenders can be held strictly liable for contamination at hazardous waste sites that they either currently own or operate, or owned or operated in the past, even if a prior owner caused the contamination. Because of this strict liability, developers and lenders became increasingly risk averse to having any dealings with formerly used properties for fear of becoming the dreaded PRP. In 2006, Congress further amended CERCLA to clarify and standardize liability defense and require AAI to provide the much desired liability limitations to *bona fide prospective purchasers and Innocent landowners* (see www.epa.gov/enforcement/bona-fide-prospective-purchasers for details).

Specific AAI standards apply to the subject property and even for contiguous property owners (CPO), where EPA offers an assurance letter to limit liability for CPOs. States offer similar “comfort letters” to CPOs and prospective purchasers. As we have become accustomed, a part of the Phase I ESA is to research sites within a certain approximate minimum search radius as measured from the nearest boundary of the subject property. An NPL site, as well as certain corrective action sites regulated under RCRA and their State or Tribal equivalent, are given the widest berth of 1.0 mile when considering risk to your property.

So, is being within one mile of a Superfund site automatically considered a recognized environmental condition (REC)? In many cases yes, but further clarification should be provided in the Phase I ESA report.

Factors to Consider in Your Phase I

The ASTM Standard 1528 for Phase I ESAs (revised in 2021, see Regulatory Update on p.3) allows for adjustments to the minimum search distance at the discretion of the Environmental Professional. Factors to consider in adjusting the approximate minimum search distance include whether the property may be in a dense urban setting (as opposed to rural or suburban); the property type (residential or commercial/industrial) and its relationship to existing or past uses of surrounding properties; and – an important one for EPs to put on their thinking caps - **the distance that the hazardous substances or petroleum products are likely to migrate based on local geologic or hydrogeological conditions.** The Standard also throws in “other reasonable factors” that are not defined but of course would need EP clarification.

But what about being NEAR a contaminated property? Is NPL site data “reasonably ascertainable” and “practically reviewable”? Yes since NPL sites, even newly listed are generally well investigated, and information is provided for public access by EPA and local technical review committees. For NPL sites that have been around a while or cleaned up, look for the 5-year review.

Five-year reviews are conducted following implementation of a remedial action on a NPL site as a means to determine effectiveness of the remedy and if it continues to be protective of human health and the environment. In particular five-year reviews are required by CERCLA when contamination remains on a site at levels that are above unrestricted use limitations. Reviews are repeated every succeeding five years as long as site use remains restricted, and EPA will retain final responsibility for determining if the remedy was effective. These comprehensive public documents also offer background information on the particular NPL site and its environment and therefore provide a good reasonably ascertainable and practically reviewable source of information for your Phase I. EPA also recently launched the Superfund Redevelopment Mapper, a GIS tool with spatial data on and near Superfund sites, available at <https://www.epa.gov/superfund-redevelopment>.

Other factors to evaluate: does the Superfund site qualify as a controlled (CREC), and do Institutional Controls or Activity and Use Limitations apply. The potential for vapor intrusion should be considered, especially at older NPL sites where this pathway was not originally investigated, should be considered as it also may result in reopening investigations.

These other factors may be of particular note when the subject property lies within the NPL site, such as a large groundwater contaminant plume or multi-site release area. If your subject property is underlain by contaminated groundwater, for example, conducting Phase I due diligence will not automatically lead to a requirement to remediate the groundwater on the subject property. Under its Contaminated Aquifer Policy, EPA generally will not look to a landowner whose property is not the actual source of the release to conduct further investigations or install groundwater remediation systems. EPA's long term policy has been that, in the absence of exceptional circumstances, a property owner in this circumstance should not have "to take any affirmative steps to investigate or prevent the activities that gave rise to the original release" in order to satisfy the innocent landowner defense.

Case Studies

Subject Property Within NPL Site - The Phase I ESA researched impacts to a proposed warehouse redevelopment within the boundaries of the former Defense Depot Ogden (DDO) NPL site. Until the 1970s, operations at DDO included on-site disposal of liquid and solid materials, incineration of oily liquid materials and combustible solvents in on-site burning pits, and burning and burial of solid wastes that impacted soil and groundwater. Following cleanup, additional operation and maintenance activities under the direction of US EPA and US Army Corps of Engineers (USACE) and Utah Department of Environmental Quality (UDEQ) are ongoing. EPA divided the contaminated areas at DDO into four separate areas, or operable units (OUs), to better address site cleanup. From the available data it could be confirmed that the subject property is not located directly within or adjacent to any of the OUs or active cleanup areas, and US EPA and state regulators agreed that there are no known or suspected health risks or cleanup requirements identified for the subject property.

The available documentation showed that exposure pathways addressed by the DDO cleanup were primarily health risks from people ingesting or touching contaminated soil or groundwater. The DDO therefore has land use restrictions in place that include no residential use and no access to or disturbance of groundwater in and near the OU areas, which was determined to be consistent with planned use of the subject property.

NPL site Within Half Mile of Subject Property – A former creosote wood treating plant that operated prior to the 1950s and later used as an asphalt plant was identified as an NPL site near the subject property, an industrial manufacturing facility. During the active wood treating process, excess creosote and wastes were discharged to an unlined pit resulting in extensive groundwater, soil, and sediment contamination, which exists as a pool of dense non-aqueous phase liquids (DNAPL) extending as much as 120 feet below the ground surface. The available public record demonstrated that EPA and state regulators approved a Technical Impracticability (TI) Waiver, which suspended the groundwater cleanup goals within two defined TI zones. One of the conditions of the TI waiver includes long term sampling and monitoring of sediments and groundwater, and continued recovery of DNAPL.

At the time of the Phase I for the subject property, the NPL site had completed its third 5-year review and concluded that current remedies remain protective of human health and the environment. Based on location and current regulatory status, the Phase I was able to conclude that this NPL site is not suspected to present significant environmental concerns to the subject property and therefore did not qualify as a REC.

REGULATORY UPDATE: New Standard for Phase I Environmental Site Assessments

In November 2021 ASTM International published an update of its *E1527-13 Standard Practice for Phase I Environmental Site Assessments*. Dubbed E1527-21, the revised standard offers some changes to the 2013 Standard. A brief summary of key revisions:

- Provides a **new definition of REC**, adding a notation on what is “likely”, as in likely presence of hazardous substances and petroleum products, or likely release to the environment.
- First introduced in 2013, the concepts of **historic REC (HREC) and controlled REC (CREC) are better defined**, and an Appendix with flow chart is provided to aid the Environmental Professional in classifying HRECs and CRECs.
- **Property Use Limitations (PULs)**, which are Risk-based controls on a contaminated property that were formerly designated as activity and use limitations, engineering controls, or institutional controls, are now grouped as PULs.
- **Eight Standard historical sources are emphasized**, i.e., research the Big Four (aerial photos, city directories, topographic maps, fire insurance maps) or explain why you did not. The remaining standard historical sources are identified as building department records, tax files, zoning information, and interviews. Also don’t ignore adjoining properties.
- Several **suggestions intended to strengthen the Phase I report are presented**, such as more consistent use of the term “subject property”; a new definition for “Significant Data Gap”; requirement to include maps & photographs in the report.
- **Emerging contaminants?** These classes of compounds that include PFAS/PFOS (see *Is It a REC?* Issues 9 and 10) are affected by some state regulations, but ASTM feels that until an emerging contaminant is officially defined as a hazardous substance under CERCLA, addressing these compounds will remain as Non-Scope considerations in the Phase I.

While EPA reviews the new ASTM E1527-21 for compliance with AAI, which can take up to a year, a Phase I user has options: 1) continue using ASTM E1527-13, which will remain in effect during EPA’s review; 2) begin using and citing E1527-21; 3) Cite E1527-13 while EPA conducts its review, and ensure that the Phase I report also incorporates the E1527-21 revisions. If your Environmental Professional has been producing quality deliverables, your current Phase I scope and report should not differ substantially from what will be required under the new standard.

The full Standard is available for purchase from ASTM International [here](#).

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