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Overview and Discussion of Updated Phase 1 Environmental Site Assessment Standard: Mitchell Williams Arkansas Environmental Insights Webinar Slides

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Mitchell Williams Law Firm presented an Arkansas Environmental Insights Webinar titled:

ASTM E1527-21 and AAI

Overview and Discussion of Updated Phase 1 Environmental Site Assessment Standard ("Webinar")

The *Webinar* was held on Thursday, April 21st.

Leslie Davis of Harbor Environmental and myself undertook the presentation of the *Webinar* with my colleague Jordan Wimpy moderating.

The *Webinar* addressed what is arguably a key transactional issue for which there has been a recent development:

- American Standard for Testing and Materials ("ASTM") published an update to its Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment ASTM E1527-21.
- The United States Environmental Protection Agency ("EPA") subsequently promulgated a direct final rule to amend AAI to incorporate and use the E1527-21 standard which is currently scheduled to go into effect in May.
- Note that a review of the comments in response to the direct final rule (i.e., the accompanying proposed rule) indicates that a number of commenters have criticized EPA for retaining ASTM E1527-13 and as a result it is unclear whether the federal agency may decide to withdraw the direct final rule and issue a proposed rule which withdraws 13 and then proposes 21 as the sole relevant ASTM standard.

The *Webinar* addressed:

- Role of environmental site assessments
- Purpose of ASTM standard E1527-21 interaction with CERCLA/Superfund
- Key changes to ASTM standard E1527
- Adoption by EPA
- Importance of recognizing/addressing in appropriate circumstances non-ASTM issues

An initial point was the fact that environmental issues in a commercial transaction continue to play a role in:

- Materiality of environmental issues will obviously vary from deal to deal
- Perception of issue as material is as important as reality
- Trap to be avoided is reducing efforts (i.e., assessments) to address environmental issues based on lower value of facility or property (ex. dry cleaners)
- Party must make that choice being fully advised of risks
- Despite Superfund (and storage tank) secured creditor exemptions addressing liability, lenders often play a role in requiring borrower to undertake assessment because of interest in:
- Maintaining value of collateral
- Ability of borrower to repay loan

The initial discussion also addressed the ability to work through environmental issues today because of:

- Familiarity;
- Improved ability to quantify environmental issues;
- Experience;
- Revised or clarified liability principles;
- Improved assessment techniques;
- Easier access to government records;
- Efforts by the federal and state agencies to reduce, to the extent possible, the environmental regulatory/liability impediments to financing and/or acquiring/leasing existing facilities (“brownfield” programs);
- Governmental trust funds (i.e., storage tank/dry cleaners); and
- Standardized assessment (i.e., AAI/ASTM)

The *Webinar* included the reminder to consider any appropriate scenario non-ASTM items. The example given was a retail motor fuel outlet and if resources for an assessment of a retail motor fuel outlet is limited, then is it more important to undertake non-scope items such as leak detection, registration fees, audit, etc., to ensure tank trust fund eligibility?

Discussion then addressed:

- The concept of All Appropriate Inquiries
- Phase 2/Sampling and Analysis
- Additional Site Characterization

The drivers for AAI/ASTM include:

- Threshold criteria for brownfields grant applicants
- Liability determinations
- Targeted brownfields assessments
- Understand potential environmental risks/liabilities
- Gain information that will help property owner comply with continuing obligations after purchase

The *Webinar* noted that ASTM E1527-21 will be equal to AAI.

Key differences between ASTM E1527-13 and E1527-21 were noted, including:

- Shelf life
- Good commercial and customary practice
- Significant data gaps

The treatment of emerging contaminants (i.e., those not yet federally regulated as hazardous substances that are expected to be regulated in the future) in the scope of work for users is noted. Suggests that

users request their environmental professionals to include these substances, even though not required, if relevant to the facility/property. These may be addressed as non-scope or business risks.

Key terms discussed included:

- Environmental conditions
- De Minimis conditions
- Definition of recognizing environmental conditions
- Definition of likely
- Definition of historical recognized environmental condition
- Definition of controlled recognized environmental condition
- Definition of property use limitation
- Creation of the Appendix X4 Decision Flow Chart

Key takeaways included:

Change is good...in this case!

- Additional “improvements” definitions language will allow EPs to provide more consistent documentation and assignment of RECs.
- Levels the playing field for EPs who do high quality Phase I work because some “optional” requirements are now standard. (site plans, color site photographs, complete historical review on subject property and adjacent)
- Talk early and often with your EP or attorney about plans and scope appropriate to how you intend to develop the property.
- Be willing to discuss the real RISK posed by a REC/CREC.

A copy of the slides can be downloaded [here](#).