

An Introduction to Phase I and Contamination Liability

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PRACTICE AREAS

Environmental

Every purchaser of property or of an entity owning property should be aware of potential environmental liabilities the purchaser will inherit upon purchase. The most comprehensive environmental law presenting a risk of liability to the purchaser of property is the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). CERCLA provides that any property owner can be liable for contamination solely based upon ownership of the property. The day the purchaser acquires title to the property, the purchaser potentially becomes liable for all existing contamination, even contamination caused decades prior to ownership by a former owner that no longer exists, and cleanup activities can be time and cost intensive. For example, in Omaha the clean up of lead contamination caused by a former lead refinery and a former lead battery recycler impacted an area covering 27 square miles, cost over \$200 million, and took over a decade to remediate. Using the correct tools to identify and assess the risk of environmental contamination is a key step in the diligence prior to purchasing a property or acquiring a company.

The Phase I Environmental Site Assessment ("Phase I") is the tool that identifies and assesses the risk of environmental contamination. The environmental industry uses the ASTM Standard E1527-13 (the "Standard"), which sets out all of the elements that must be included in a complete Phase I and provides a template for environmental professionals to use in preparing a Phase I. The Standard sets forth the details for the four major components that must be included in each Phase I: (i) site reconnaissance, where the environmental professional

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visits the property to make visual observations of the environmental condition; (ii) records review, where the environmental professional reviews historical and regulatory records for current and past uses of the property and surrounding properties which may pose an environmental risk; (iii) interviews, where the environmental professional interviews current and past owners and operators of the property and local government officials knowledgeable about any environmental issues associated with the property; and (iv) preparation of the report itself detailing the environmental condition of the property and the environmental professional's opinions relating to such condition. The purchaser will also be required to answer background questions regarding the property and the transaction to the best of the purchaser's knowledge.

In addition to providing information about the environmental risks on the property, the Phase I is an essential part of the defense to CERCLA liability called the Bona Fide Prospective Purchaser ("BFPP") defense. If the purchaser meets all the requirements as explained below, the purchaser will be considered a BFPP and will not be required to contribute to the cost of cleanup of hazardous substances that existed when purchaser acquired the property. The BFPP defense was added to CERCLA in the Small Business Liability Relief and Brownfields Revitalization Act of 2002. Because purchasers performing Phase Is would be held liable for the contamination they discovered, many were unwilling to take on the liability of purchasing contaminated property, which lead to contaminated properties sitting undeveloped, broken down, and undesirable. The BFPP defense was created to provide protection to new purchasers and encourage the development of these undesirable brownfields.

The first step to obtaining the BFPP defense is to obtain the Phase I and satisfy what is called the "all appropriate inquiries" requirement. Then, once the property has been purchased, the following ongoing requirements must be met to make sure the defense is maintained:

- (A) All disposal of hazardous substances must have occurred before the purchase.
- (B) The purchaser conducted "all appropriate inquiries" (the Phase I) before the purchase.
- (C) The purchaser provides all legally required notices upon discovery of contamination. These notices vary by state.
- (D) The purchaser exercises appropriate care by taking reasonable steps to--
 - (i) stop any continuing release;
 - (ii) prevent any threatened future release; and
 - (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

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(E) The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration (e.g., allowing the Environmental Protection Agency or state regulator to access the property for testing and remediation).

(F) The purchaser complies with any land use restrictions established or relied on in connection with the response action (e.g., a requirement that the property not be used for residential purposes); and does not impede the effectiveness or integrity of any institutional control (e.g., tearing through a cap or lining in the soil).

(G) The purchaser complies with any request for information or administrative subpoena.

(H) The purchaser is not--

(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through--

(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

(ii) the result of a reorganization of a business entity that was potentially liable.

Though few cases have addressed what steps are necessary to meet these continuing obligations, key cases have determined that exercising "appropriate care" requires that the purchaser take "all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of the circumstances." The purchaser can lose the BFPP defense for failing to timely address existing contamination. If a Phase I reveals contamination, the purchaser will need to understand what reasonable steps should be taken to prevent or limit harm caused by the contamination, and failure to do so will place the purchaser at risk of CERCLA liability.

by Meagan J. Deichert