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Above and Beyond the ASTM Report

Advise property owners to heed continuing environmental obligations

COMMERCIAL MORTGAGE BROKERS MAY be familiar with general environmental compliance requirements — such as ASTM International’s Phase I environmental site assessment (ESA) — that are required for any commercial property transaction. The compliance process does not end there, however.

Savvy brokers should be aware of other obligations that must be met by their clients after the property transaction is completed. Even though some obligations are voluntary, compliance can mean steering clear of liability and maintaining the property in a saleable and fundable condition.

Superfund amendments

The 2002 Brownfields Amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, were enacted to encourage the redevelopment of abandoned or underutilized brownfield sites.

To do so, the Small Business Liability Protection and Brownfields Revitalization Act established two new liability defenses to the existing innocent-landowner defense: the Bona Fide Prospective Purchaser defense, which protects the purchaser of a property known to be contaminated; and the Contiguous Property Owner defense, which protects the owner of a property that abuts a contaminated property.

The Brownfields Act includes six post-purchase obligations that must be followed to allow the new property owner to continue to qualify for either of these two liability defenses. Three of the six obligations are intuitive and easily understood:

1. **Cooperate with persons conducting response actions** regarding hazardous waste;

2. **Comply with information requests** and administrative subpoenas; and
3. **Provide legally required notices** regarding the presence of hazardous waste on the property.

The other three continuing obligations required under the Brownfields Act are:

1. **Comply with land-use restrictions;**
2. **Do not impede the effectiveness** or integrity of institutional controls established in connection with a response action; and
3. **Take reasonable steps** regarding releases of hazardous substances.

The implementation of these three obligations is less obvious and requires knowledge of the new ASTM E2790-11 standard, also known as the Standard Guide for Identifying and Complying with Continuing Obligations.

This E2790-11 standard is designed to establish methodologies by which the purchaser can implement these three continuing obligations, thereby maintaining the applicable liability protections.

The standard is entirely voluntary. As such, this standard may not be of interest to your clients if they use Phase I ESA reports only in quantifying business risk. If your clients are concerned with CERCLA liability, then it is strongly recommended to consider implementing this standard.

As with the standard for Phase I ESAs, the continuing-obligations standard does not require an exhaustive review or comprehensive steps to be taken.

Restrictions and controls

Many contaminated properties are remediated without removal of the contamination — relying instead on other means to prevent human and ecological exposure to the chemicals. These controls are dubbed

“activity and use limitations” in the ASTM Phase I ESA standard. The E2790-11 standard refers to them as “land-use restrictions” — the term that also is used in the Brownfields Act.

Land-use restrictions can be institutional controls that are legal limitations on the usage of the property, such as deed notices, restrictive covenants and so on. They also can be engineering controls that are physical barriers that limit human contact with the contaminated media, such as impermeable caps and fencing.

Although the Brownfields Act specifically excludes engineering controls from the continuing-obligations requirement, they were included in the ASTM standard because, in practicality, engineering controls are unlikely to be effective without the active cooperation of the property owner.

To comply with land-use restrictions, the property owner must honor the conditions established in deed notices and restrictive covenants, and must avoid actions that can compromise the effectiveness of existing engineering controls.

Reasonable steps

The obligation to take reasonable steps regarding releases of hazardous substances is the most difficult of the obligations to

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define. The standard breaks this obligation into three parts:

1. **Stop continuing releases** of hazardous substances;
2. **Prevent threatened future releases** of hazardous substances; and
3. **Prevent human, environmental or natural resource exposure** to prior releases of hazardous substances.

All three parts of this obligation warrant explanation.

First, a continuing release — in the ASTM standard — refers to pre-existing contamination that continues to be released to the environment. For instance, if there is a leaking underground storage tank on the property, the purchaser has the obligation to remove the tank and mitigate the leak — even if the property had been purchased “as is.” If the sales agreement indicated that the seller maintained liability for the tank, the purchaser still has the obligation to see to it that the seller fulfills the obligation in a timely fashion.

Once released from their container, contaminants will migrate away from the container and will continue to do so as long as the leaking container is present. This active migration of contaminants from their point of origin clearly constitutes a continuing release.

Continuing releases of hazardous substances also may occur during construction activities. Consider, for example, a property with historical contaminated fill. The property owner decides to undertake a construction project that would require excavating contaminated fill for the building foundation and moving it to another portion of the property. In many regulatory jurisdictions, this activity is allowable if the other portion of the property is contaminated in a similar manner. But, in a narrow sense, this activity constitutes active migration of hazardous substances, which violates the continuing-obligations standard.

Second, preventing future threatened releases of hazardous substances means addressing any recognized environmental conditions that were defined by the Phase I ESA. If there is an underground storage tank on the property that poses a material

threat to the environment because of its suspected condition, then the property owner must address this threat or risk losing liability protection, even if there is, as yet, no evidence that the tank has leaked.

Third, preventing human, environmental or natural resource exposure to prior releases of hazardous substances can affect purchasers who qualify for the Contiguous Property Owner defense. For example, let’s say a contaminant plume originating on a property contiguous to the purchased property is migrating onto the subject property. If the contaminants threaten a drinking-water well on the subject property, or can create a vapor intrusion threat on the subject property, then the property owner has an obligation to mitigate this threat to maintain the Contiguous Property Owner defense.

Even if the owner of the contiguous property is taking steps to mitigate potential exposure to humans on the subject property, the property owner still has an obligation to ensure that the proper steps are taken. This obligation also applies if a contaminant plume originating off-site threatens on-site natural resources, such as streams, wetlands, or threatened or endangered species.

Continuing plan

To ensure that the provisions of the standard are implemented appropriately and in a timely fashion, the standard recommends — but does not require — the development of a continuing-obligations plan. The plan specifies a four-step process to address continuing obligations.

The first step involves a paper review to determine if recognized environmental conditions, significant data gaps, or institutional or engineering controls exist, and whether they trigger continuing obligations.

If controls exist, the property owner goes on to the second step of the acquisition of data beyond what was accessed as part of the Phase I ESA. It also requires the property owner to consider future-use scenarios. If there are indications of continuing or threatened releases, potential exposure to contaminants, or institutional or engineering controls, then the property owner

moves on to the third step: Performing initial continuing obligations.

In the third step, the property owner takes actions that are previously mentioned under “reasonable steps” to stop continuing releases, comply with existing institutional controls and avoid interfering with existing engineering controls. The owner also establishes procedures to comply with land-use restrictions and ongoing-response actions. These procedures may involve employee and contract worker awareness training or the posting of warning signs.

When these procedures are completed, the property owner moves on to the fourth step: Perform ongoing continuing obligations, which will be performed as long as needed to ensure that the property owner maintains liability protections.

Because environmental site conditions vary widely — from simple to highly complex — the standard is intentionally non-prescriptive, and it provides a significant amount of flexibility in the development and implementation of the continuing-obligations plan.

Environmental professional

Unlike the Phase I ESA standard, an environmental professional does not need to be involved in implementing the continuing-obligations standard. The property owner must justify that the reasonable steps have been performed by a qualified person, however. Therefore, the expertise of an environmental professional may be desired for the more-complicated cases. Advise your clients to work with a professional who is knowledgeable of the continuing-obligations standard and experienced in the investigation and remediation of contaminated properties.

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Commercial mortgage brokers should be aware of the complex issues that surround environmental standards. By advising clients to maintain properties in compliance with these standards, brokers will help clients keep their liability protections and avoid unnecessary costs in the future. ●