

DUE DILIGENCE PERSPECTIVES

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What's On Tap

- * Phase I Overview and Update
- * Vapor Intrusion Considerations
- * Agency Record Reviews
- * Perspectives On Reports
- * Hits and Misses



Phase I Overview

- * Why perform a Phase I?
 - * Secure liability protections
 - * Satisfy lenders
 - * Inform / aid negotiations



All Appropriate Inquiry

- * CERCLA “innocent purchaser” defense if purchaser had undertaken “**all appropriate inquiries** into the previous ownership and uses of the property ...”
- * All appropriate inquiry - not defined
- * ASTM E 1527-93 fills the gap
- * 2002 Brownfields Act made “all appropriate inquiry” a pre-requisite for contiguous property owner and bona fide prospective purchaser defenses

All Appropriate Inquiry Rule

- * Brownfields Act required EPA to develop an all appropriate inquiry rule.
- * ASTM E1527-97 / E1527-00 deemed AAI.
- * Final AAI Rule effective Nov. 1, 2006.
- * AAI Rule included all main ASTM 1527-00 activities, enhanced some inquiries / extended scope, defined role of EP.
- * Satisfy AAI by the AAI Rule or ASTM E1527-05.

ASTM E1527-13 Highlights

- * November 2013: ASTM E1527-13.
 - * Simplified the definition of REC
 - * Vapor intrusion considerations
 - * Amended definition of Historical REC
 - * Added Controlled RECs
 - * File review considerations
- * EPA response - ASTM E1527-13 met AAI.
- * After October 2015 - ASTM E1527-05 not AAI



Vapor Intrusion Considerations



Agency Record Reviews



Report Considerations

- * Attorney-client privilege
- * Recommendations
- * Writing style
- * Trust EDR?
- * Quality of aerials/Sanborns



Phase I Hits and Misses



Non-ASTM Considerations

1. Cost of Asbestos and Other Hazardous Building Materials
2. Stormwater/Operating Permits
3. Mold
4. Lead Based Paint
5. Water Supply
6. Radon

What is a REC?

- * What is important – the facts or the label?
- * Subjective or professional judgment?
- * Variability across consultants
- * Confusion about offsite sources
- * Everything is a REC?



Cannot See the Forest for the Trees

- * Phase I reports that dutifully provide individual historical source information (e.g., Sanborn maps) but fail to provide any narrative describing the overall history of the site



Check the Box Reports

- * Reports that are merely check the box without understanding the site
- * All ASTM elements present, but little thought given to explaining the property



Did Not Bother To Read Their Own Attachments

- * Reports that contain important information in attachments that were missed or ignored
 - * Example – the case of the moving street



Case of the Moving Street



QUESTIONS?



*"If you ask me anything
I don't know, I'm not
going to answer."*

Yogi Berra