

NEW REQUIREMENTS FOR PHASE I DUE DILIGENCE EFFECTIVE NOVEMBER 1, 2006

Changes in the standard for performing pre-purchase environmental due diligence that have been subject to a 1 year phase in period become final and effective on November 1, 2006. Starting November 1, 2006, in order to satisfy the requirements for performing "all appropriate inquiries" under CERCLA (the federal "Superfund" law) in order to qualify for the "innocent landowner defense" or the "bona fide prospective purchaser exemption" to CERCLA liability, parties performing pre-purchase due diligence must meet the requirements of the All Appropriate Inquires Final Rule, or follow the standards set forth in the new ASTM standard for performing Phase I Environmental Assessments [ASTM E1527-05] published in late 2005.

In addition to the liability protection afforded by compliance with the new requirements, there are significant substantive improvements in the new ASTM Phase I standards that make it even more important that lenders and buyers rely only on Phase I Environmental Assessments that have been performed under the 2005 standard as they evaluate the risk posed by purchasing or lending on property.

The most significant changes/improvements in the 2005 ASTM standard include:

- A requirement that the consultant identify "data gaps" that might exist in prior testing work that has been done on a property. The requirement for identification of data gaps is very significant, particularly in the context of potential redevelopment of properties that have been subject to prior commercial uses. The consultant must evaluate the prior work and identify areas where testing or analysis may be deficient.
- Implementation of standards for the "environmental professional" that can prepare and certify the Phase I Report. While it is possible that a consultant can have the credentials to do a Phase I without licensure as a PE (professional engineer) or PG (professional geologist), the new rule and standard recognize licensed PEs or PGs as professionals qualified to perform Phase I assessment. In light of the requirement for identification of "data gaps" which implies significant experience in interpreting and analyzing data, and because of the other implicit benefits that may flow from having the work performed and certified under seal by a licensed PE/PG in the state in which

the property is located, we suggest that our clients request that the work be signed and sealed by a licensed PE/PG, barring unusual circumstances. Under the new standard, you have a basis in rule and the standard for requesting that level of education for the certifying "environmental professional."

- Increased investigation of past land uses through additional requirements for interviewing prior owners/occupants. These requirements are designed to insure that all appropriate and available sources of historical information have been adequately evaluated so that environmental concerns can be identified.
- Limited "shelf life" for Phase I's. Some information in the Phase I will only have a "shelf life" of 180 days and thus the practice of reusing or recertifying older reports will be limited.

There are other technical changes based on the new standard. Please feel free to call if you have specific questions.

Based on discussions with a number of consulting firms, you can expect that a Phase I under the 2005 standard will cost approximately \$500 - \$750 more than a Phase I performed under the 2000 standard – at least until implementation of the new requirements become more routine. In addition, there are other areas relating to the engagement of the consultant that you should be aware of. We routinely see situations where clients execute the consultant's standard form contract for Phase I Assessment services without careful review. This is unwise. Virtually all consultants now included provisions in the "fine print" that substantially limit their liability in the event of a material error in the work. Obviously, given the nature of environmental liabilities, it is probable that any material omission by the consultant could result in a substantial loss. There are other areas, such as indemnification, insurance, confidentiality, payment terms, as well as other terms not typically covered in the consultant agreement that should be added for the benefit of the client. We have negotiated revised consulting terms and conditions with most major consulting firms over the years and can provide quick revisions to the "standard terms" that are generally acceptable to qualified professionals and will protect the client's interests. In addition, the firm can assist you with the evaluation of any environmental risks identified in the Phase I, and mechanisms to address those risks.

If you have any questions, please contact Laurel Lockett at (813) 229-4139 or at llockett@carltonfields.com or Roger Schwenke at (813) 229-4152 or at rschwenke@carltonfields.com.

This publication is not intended as, and does not represent legal advice and should not be relied upon to take the place of such advice. Since factual situations will vary, please feel free to contact a member of the firm for specific interpretation and advice, if you have a question regarding the impact of the information contained herein. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.