



To learn more about our Environmental Law Practice Group, please [click here](#).

To learn more about our Real Estate Practice Group, please [click here](#).

#### Contacts

**William R. Weissman**  
[wweissman@Venable.com](mailto:wweissman@Venable.com)  
202.344.4503

**Michael C. Davis**  
[mcdavis@Venable.com](mailto:mcdavis@Venable.com)  
202.344.4545

**Gregory S. Braker**  
[gbraker@Venable.com](mailto:gbraker@Venable.com)  
202.344.4807

**Thomas E.D. (Ted) Millspaugh**  
[temillspaugh@Venable.com](mailto:temillspaugh@Venable.com)  
202.344.4596

## ASTM International Publishes Guide for Property Owners Seeking Superfund Liability Relief

In 2002, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act, which, among other things, amended the Superfund statute (also known as "CERCLA") to carve out of the harsh liability scheme exceptions for certain new property owners that did not cause contamination found on their property. Congress was responding to developers' reluctance to acquire Brownfields properties because CERCLA made owners of contaminated properties fully liable under the "no fault" joint and several liability scheme even though contamination on the property may have been caused by prior owners or third parties. Congress' aim was to remove disincentives for restoring Brownfields sites to productive use by creating a pathway for new property owners to escape CERCLA liability if they satisfied certain conditions.

### Property Owners Eligible for CERCLA Liability Defenses

Under the 2002 amendments, three categories of property owners may be eligible for CERCLA liability relief:

- Innocent Landowners – those that acquired property with no knowledge or reason to know of contamination on the property;
- Contiguous Property Owners – those that acquired property with no knowledge or reason to know of contamination that migrated onto the property from off-site sources; and
- Bona Fide Prospective Purchasers – those that acquired property with or without knowledge of contamination on the property and no disposal of hazardous substances occurred after acquiring the property.

As a practical matter, few property owners will likely qualify for the first two categories because knowledge or reason to know of contamination on a property is an automatic disqualifier, but such knowledge is not a disqualifier for property owners seeking to qualify as Bona Fide Prospective Purchasers.

### Conditions for Eligibility for CERCLA Landowner Liability Defenses

Congress subdivided the conditions that establish the property owner's eligibility for the CERCLA liability defenses into obligations that apply before acquiring the property and those that apply once the property has been acquired.

#### *Pre-Acquisition Obligations*

Most property owners are familiar with the pre-acquisition obligation to undertake "all appropriate inquiries" into the previous ownership and uses of the property. The statute spelled out in general terms the scope of

this "due diligence" and assigned EPA the responsibility of publishing a regulation containing the specific standards and practices for conducting "all appropriate inquiries." EPA published such a rule in 2006 (40 C.F.R Part 312) and also stated that compliance with the widely-accepted ASTM Phase I Standard (ASTM E1527-05, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*) constitutes compliance with the "all appropriate inquiries" rule.

### ***Post-Acquisition Continuing Obligations***

The post-acquisition continuing obligations are more far-reaching but some of them lack the clarity that facilitated compliance with pre-acquisition "all appropriate inquiries." The obligations that are relatively straight-forward include:

- compliance with all release reporting requirements;
- providing cooperation, assistance and access to the property to persons conducting site cleanups; and
- compliance with EPA information requests or CERCLA subpoenas.

The remaining continuing obligations suffer from legislative ambiguity that could easily trip up the property owner seeking to ensure eligibility for the CERCLA liability defenses. These obligations require:

- compliance with "any land use restrictions" established or relied upon in connection with a site cleanup at the property and not having impeded "the effectiveness or integrity of any institutional controls";
- taking "reasonable steps" to "stop any continuing release," "prevent any threatened future release," and "prevent or limit . . . exposure" to a release of hazardous substances on the property; and
- not otherwise be potentially liable or affiliated with a potentially liable party through family or certain contractual relationships.

These three sets of obligations raise a host of questions that are not easily resolved. For example, Does compliance with "any land use restrictions" include restrictions that ordinarily do not run with the land to future owners? EPA has issued nonbinding guidance that suggests that it does, but other stakeholders question whether a land use restriction that, by its terms, applies to party A (current or past owner) but not to party B (future owner) can constitute a restriction on the use of land by party B. Another question is whether a party that took steps thought at the time to be reasonable to prevent or limit exposure to a release but was unsuccessful loses eligibility for the CERCLA liability defense. A third question is whether an indemnification clause in a property sales agreement under which the buyer agrees to indemnify the seller if the latter is ultimately held liable for cleanup costs disqualifies the buyer from relying on the CERCLA liability defense.

Unlike the pre-acquisition rulemaking authority given to EPA to develop standards and practices for "all appropriate inquiries," EPA does not have similar authority to define post-acquisition continuing obligations. These are interpretive questions that must ultimately be resolved by the courts, presumably in the context of a party in Superfund litigation asserting one of the CERCLA liability defenses. The way property owners answer these questions today can have profound consequences in the event of Superfund litigation down the road.

Given this statutory uncertainty and EPA's lack of authority to issue definitive regulations on these issues, ASTM International, the well-known standards setting organization, undertook to develop a guide to assist

property owners in satisfying their post-acquisition continuing obligations and invited EPA staff to participate in the development process. After several years of debate and drafting, a consensus standard was approved and a [copy can be purchased from the ASTM web site](#). In addition to the EPA staff, the ASTM drafting committee included representatives of state and other federal agencies, the property developer community, environmental professionals, industry attorneys, and general citizens. Venable partner, [William Weissman](#), was a member of the drafting committee.

In one respect, satisfying continuing obligations is similar to purchasing fire insurance. The property owner obviously hopes the need for filing a claim under that policy will never occur. Similarly, the property owner hopes never to face Superfund litigation. Nevertheless, the payoff for satisfying continuing obligations will accrue to the property owner in the event the owner faces possible Superfund litigation. Assuming the property owner has kept good records, the owner should be in a position to present evidence of compliance with continuing obligations in presenting a defense to any Superfund claims.

For more information on steps which should be taken to satisfy continuing obligations, please contact [William Weissman](#) (202.344.4503), [Michael Davis](#) (202.344.4545), [Gregory Bracker](#) (202.344.4807), or [Ted Millsbaugh](#) (202.344.4596).

---

**If you have friends or colleagues who would find this alert useful, please invite them to subscribe at [www.Venable.com/subscriptioncenter](http://www.Venable.com/subscriptioncenter).**

CALIFORNIA MARYLAND NEW YORK VIRGINIA WASHINGTON, DC

1.888.VENABLE | [www.Venable.com](http://www.Venable.com)