

Beyond All Appropriate Inquiry

"Friends never let their friends *bet
chalk*"

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Fact - There is No Such Term as an Off-site REC!

Recognized Environmental Condition (3.2.74)

- Presence or likely presence of HS or PP **on a *property*** under conditions that indicate a release or threatened release....

Property (3.2.66)

- The real property that is the subject of the ESA. Includes buildings and other fixtures and improvements located **on the property** and affixed to the land.



Fact - There is No REC if No Release

Recognized Environmental Condition (3.2.74)

- Presence or **likely** presence of HS or PP under conditions that indicate a **release** or **threatened release**
- Not intended to include *de minimis* conditions (**low health risk/unlikely enforcement**).
De minimis conditions are not RECs
- Includes conditions even in compliance with laws



CERCLA Release 42 U.S.C. §9601(22)

A “**release**” is defined as any “*spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance, or pollutant or contaminant),”*



Farmers Exemption

Agricultural Land/Golf Course

- 42 U.S.C. § 9607(i): “No person (including the United States or any state or Indian tribe) may recover under the authority of this section for any response cost or damages resulting from **the application** of a pesticide product registered under the Federal Insecticide Fungicide and Rodenticide Act [7 U.S.C. § 136, et seq. (“FIFRA”).”]



***SFWMD v. Montalvo*, No. 88-8038-CIV-DAVIS 1988
WL 242688 (S.D. Fla. 1988), aff'd, 84 F.3d 402**

- **Structures** - Are there storage areas, structures, and/or potential mixing areas with signs of (or reported) releases?
- What are the “**conditions**” that indicate an existing release, a past release, or a material threat of a release?
- **Material Threat** (3.2.52) - must be: “a physically observable or obvious threat which is reasonably likely to lead to a release...”



Fact - Opinions and Recommendations are Not the Same as Part of an ASTM E 1527 Phase I ESA

12.6 Opinion

- The *report* shall include the *environmental professional's* **opinion(s)** of the impact on the *property* of conditions identified in the findings section.



Fact - Recommendations are Not a Part of an ASTM E 1527 Phase I ESA

Additional Services (12.9)

- *Any additional services contracted for between the user and the environmental professional(s), including a broader scope of assessment, more detailed conclusions, liability/risk evaluations, **recommendation** for Phase II testing, remediation techniques, etc., **are beyond the scope of this practice**, and should only be included in the *report* if so specified in the terms of engagement between the *user and the Environmental Professional*.*



Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., No. 2:04-cv-2782-MBS, 2010 WL 4025885 (D.S.C. Oct. 13, 2010) (“Ashley II”).

Purpose (1.1)

- this practice is intended to **permit a user** to satisfy one of the requirements to qualify for the *innocent landowner, contiguous property owner, or bona fide prospective purchaser* limitations on CERCLA liability (hereinafter, the “*landowner liability protections,*” or “LLPs”)



Fact - Opinions Regarding Additional Appropriate Investigation is Unusual

Additional Investigation (12.6.1)

“The environmental professional should provide an opinion regarding **additional appropriate investigation**, if any, to detect the presence of hazardous substances or petroleum products. This opinion **should** only be provided in the unusual circumstance when greater certainty is required regarding the **identified recognized environmental conditions.**”



Fact - The Opinion Does not Change the Outcome

“A Phase I Environmental Site Assessment which includes such an opinion by the environmental professional does not render the **assessment incomplete**. This opinion is not intended to constitute a requirement that the environmental professional include any recommendations for Phase II or other assessment activities.”



Example Opinion

- “The disposition of the identified REC, the applicability of one (or more) of the landowner liability protections to CERCLA, its relevance to the future intended uses of the subject property and, finally, the business risk tolerance of the User, may be clarified through further examination (or assessment) of XXX.”

OR

- If going the business environmental risk route, simply replace REC with a description of environmental concern/feature in Opinions Section of the Phase I Report.



Diffuse Anthropogenic pollution ("DAP")

- **The “*Dilemma*”**

How should “common knowledge” that urban soil (or surface waters) often contains substances (which may be hazardous) above unrestricted use criteria, be handled during the course and completion of an ASTM E 1527-05 Phase I Environmental Site Assessment?



Diffuse Anthropogenic Pollution ("DAP")

Question: What about Substances Present above Risk-based or “Use” Criteria vs. a Standard? *Is it a REC?*

- Is/was there a statutory Release?
- Is it an actionable source from the perspective of CERCLA (*e.g.*, RQ release or “impacts” above an Action-specific ARAR)?
- Is it actionable the result of a State Standard (MCL)?



Question 1

Is/Was there a CERCLA release?

- What is known about the DAP?
 - What is/are the mechanism(s) of release?
 - Is/are there identifiable source(s)?
 - Is/was there a hazardous substance, or pollutant or contaminant involved?
- **Answer:** ??? Remember, if no “release” then no “REC.”



ASTM 3.2.74

de minimis condition

- “The term (*i.e.*, REC) is not intended to include de minimis conditions that generally do not present a threat to human health or the environment and that **generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies**. Conditions determined to be de minimis **ARE NOT** recognized environmental conditions (RECs).



Question 2

Is it an actionable source from the perspective of the EPA?

- Is the “soil impact” the result of an RQ release/Action-specific or automotive exhaust (for example) and **not** historic uses of the property or some long since discontinued industrial activity?
- **Answer:** By definition, if no CERCLA enforcement (even if there is a release), then **No REC.**



Question 3

Is it actionable the result of a State Standard (MCL)?

- Notwithstanding an actual defined “act” (that caused the release) and data that demonstrates a violation of a State **Standard** (*i.e.*, health threat), there is no obvious regulatory enforcement vehicle.

Answer: The soil (for example) may contain DAP, but would not likely be subject to a specific enforcement action, and thus could qualify as a *de minimis* condition. Therefore, **No REC.**



Question 4

What about Substances Present above Risk-based or “Use” Criteria?

- Other than Location or Action-specific ARARs
- Regulatory mandated or “Voluntary” Criteria

Answer: If no response the result of enforcement actions (*i.e.*, a violation of a Standard), there may be an exceedance of risk-based criteria, but not the result of an “enforceable” release and therefore **No REC**.



How should “common knowledge” that urban soil often contains substances present above unrestricted use criteria be handled during the course and completion of an ASTM E 1527-05 Phase I Environmental Site Assessment?

Question 5

What about information which represents an "obvious" threat when considering future “use(s)?”



Statutory provisions that the Court will consider when ruling on the defense

- Specialized knowledge or experience
- If purchase price is below market value
- **Commonly known or reasonably ascertainable information**
- **Obviousness of contamination**
- Ability to detect by inspection



ASTM E1527-05 Purpose (1.1)

- Define good commercial and customary practice (*i.e.*, all appropriate inquiry “AAI”)
- Intended to permit the User to satisfy one of the requirements to qualify for the landowner liability protections to CERCLA
- May identify other **business environmental risk** issues associated with non-CERCLA liability (1527-00/05)



Good Commercial or Customary Practice?

- RECs include releases of non-CERCLA **petroleum products** in the scope of E1527, why not DAP?
- Should the LLP “Continuing Obligations” impact how DAP is handled in the context of a Phase I ESA?
- What about liability from DAP that is incurred in the form of claims outside of CERCLA (*i.e.*, **business environmental risk** issues? A REC?
- Is this where an opinion regarding additional appropriate investigation is warranted?



Continuing Obligations

LLPs remain available so long as the landowner:

- Takes **reasonable steps** to stop/prevent any ongoing release;
- Provides full cooperation in connection with response actions;
- Compliant with any land use restrictions or request for information;
- Does not impede the integrity of any institutional control employed for response actions; and
- **Provides legally required notices** with respect to the discovery of HS



Reasonable Steps

- Stop continuing releases
- Prevent threatened future releases; and
- Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substances releases

CERCLA 101(40)D – Bona fide prospective purchaser

CERCLA 107(q)(1)(A) - contiguous property owner

CERCLA 101(35)(B)(II) - innocent landowner



Bona fide Prospective Purchaser

- Knowledge of contamination and the **opportunity to plan prior to purchase.**
- Bona fide prospective purchasers may have an obligation to provide notice of discovery
- Providing notice of the contamination to appropriate governmental authorities would be a reasonable step in order to prevent a “threatened future release” and “**prevent or limit...exposure.**”



Business Environmental Risk

- ASTM 3.2.11 “A risk which can have a material environmental or environmentally-driven impact on the business associated with the current or planned use of a parcel of commercial real estate, not necessarily limited to those environmental issues required to be investigated in this practice. Consideration of business environmental risk issues may involve addressing one or more non-scope considerations...”



Conclusions

- If DAP is likely to exceed the applicable risk-based criteria for a new use like residential or new development involving land disturbance activities, then the DAP would probably qualify as a REC because:
 - Of new contamination
 - It is now enforceable
 - It represents a threat to public health, or
 - **All of the above.**
- Since the user's intentions (which can reasonably be anticipated by the EP) could be construed as outside of "due care" and therefore in non-conformance with continuing obligations (*i.e.*, not consistent with reasonable steps) and subsequently actionable under CERCLA, an opinion for additional appropriate investigation would be warranted



Conclusions

- If the user tells the EP why they are commissioning the Phase I (*e.g.* for purchase and continued use "as-is" vs. redevelopment for a residential use), the EP should take the intended land use into consideration in the opinions section of the Phase I report regardless of the REC/No REC decision.



And You Thought it's only a Phase I?

- Stick to the Agreed Upon Scope
- Stick to the Standard
- Feel Comfortable that you can “connect the dots” in regards to all REC determinations.
- Don't Forget the Power of Business Environmental Risk
- No Recommendations unless Asked and Then Provide under Separate Cover
- Get a Second Opinion when in Doubt



E1903 Phase II

- Legal Hooks (AAI)
 - Additional Appropriate Investigation
 - BFPP Continuing Obligations (i.e., reasonable steps to prevent or limit exposure to previous releases of H.S.)
 - Data Gaps/REC's (i.e., confirm or refute)
- Regulatory Hooks
 - Qualify for Brownfield Funding
 - Financial Disclosure Responsibilities with respect to Environmental Liabilities required for compliance with the Sarbanes Oxley Act of 2002



E1903 Phase II

- Other Hooks
 - Tools for Business Environmental Risk
 - Benchmark for Common Law Matters (*i.e.*, Foreseeable Risks)



E 1903 Scientific Method

- What is the question? (*i.e.*, Objective)
- Research (Phase I or Similar Effort)
- Hypothesis (What do you expect from the data?)
- Experimental Strategy (Scope of Work)
- Sample/Test (Implement Site Assessment Plan)
- Analyze Results (QA/QC, Did you answer the question?)
- Conclusion (The Answer is X. Now What?)
- Report (*i.e.*, = Phase II)

