

12/29/2008

EPA Approves Use of New Phase I Standard for Forestland and Rural Property

Beginning November 1, 2006, those seeking to establish the innocent purchaser, bona fide prospective purchaser or contiguous property owner defenses under the Comprehensive Environmental Response, Compensation and Liability Act were required to comply with the Environmental Protection Agency's ("EPA's") then new "All Appropriate Inquiries" standard ("AAI"). At the time AAI was finalized as a regulation, ASTM International ("ASTM") published "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" E 1527-05 (the "2005 ASTM Standard"). The final AAI rule specifically referenced the use of the 2005 ASTM Standard as satisfying the AAI requirements. Most consultants have used the 2005 ASTM Standard when performing Phase I environmental site assessments since late 2006. A summary of AAI can be found at *Requirements for Phase I Environmental Site Assessments Effective November 1, 2006* (http://www.mcguirewoods.com/news-resources/publications/real_estate/phasel.pdf).

Since Phase I environmental site assessments originated in 1986, the review of large rural and forestland properties has been difficult and time consuming due to the site reconnaissance requirements alone. On December 23, 2008, EPA approved the use of a new standard for such assessments in meeting AAI. EPA issued a direct final rule published in the Federal Register on December 23, 2008 providing that use of ASTM Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forest Land and Rural Property E2247-08 (the "ASTM Forestland Standard") will satisfy AAI. Although a purchaser may continue to utilize the 2005 ASTM Standard when conducting AAI, the ASTM Forestland Standard should help in certain instances when larger timberland or comparable transactions are planned. While the two standards are identical in many instances, this article briefly focuses on the applicability of the ASTM Forestland Standard and the alternative site reconnaissance component that may be used when assessing larger tracts.

Applicability

The ASTM Forestland Standard may be used for assessing 120 acres or greater of forestland or rural property or with a developed use of only managed forestland, agricultural land, or both. The property itself does not have to be contiguous, but the non-contiguous areas should have the same general land use when using the standard. The property may also include isolated areas of non-rural or non-forestland property.

The critical definitions for use in determining the applicability of the standard are as follows:

Forestland Property "is property "that is either 'historically undeveloped' or 'managed forestland.'"

Historically Undeveloped Forestland is “property that is historically undeveloped or unmanaged forestland if it contains no relevant man-made changes and is of such size or of such a nature that visible and physical observance of the property as contemplated in Section 9 of this practice is not capable of being accomplished within reasonable time and cost constraints, will yield little information relevant to the property, or will generate extraordinary amounts of irrelevant information. Large tracts of ‘historically undeveloped forestland’ may contain isolated areas of ‘commercial real estate’ which are not relevant to the ‘historically undeveloped forestland.’”

Managed Forestland is forestland “that has received the practical application of biological, physical, quantitative, managerial, economic, social, and policy principles to the regeneration, management, utilization, and conservation of forests to meet specific goals and objectives while maintaining the productivity of the forest. The management of ‘forestland’ may include the management for aesthetics, fish, recreation, urban values, water, wilderness, wildlife, wood products, and/or other forest resource values, goals, or objectives.”

Rural Property includes “non-‘commercial real estate,’ undeveloped real property, real property used for agricultural purposes, or “commercial real estate” used only for the transportation of people or products (including, but not limited to, natural resource development, for example, mining, oil and gas, and so forth.”

Commercial Real Estate is “any real property except a dwelling or property with no more than four dwelling units exclusively for residential use (except that a dwelling or property with no more than four dwelling units exclusively for residential use is included in this term when it has a commercial function, as in the building of such dwellings for profit). This term includes, but is not limited to, undeveloped real property and real property used for industrial, retail, office, agricultural, forestry, other commercial, medical, or educational purposes; property used for residential purposes that has more than four residential dwelling units; and property with no more than four dwelling units for residential use when it has a commercial function, as in the building of such dwellings for profit.”

Site Reconnaissance

As the definition of “historically undeveloped forestland” implies, the key component of the standard is how it allows for less than walking the property to satisfy the site reconnaissance portion of the standard. More specifically, the ASTM Forestland Standard provides that in the “unusual circumstance that a property cannot be visually and/or physically observed,” the environmental professional may use other methods such as the review of available imagery or observations from nearby locations. Flyovers are also an option. The standard does make clear that when using these alternative methods, any suspect areas such as cleared or disturbed soil, mounds, trenches, structures or other indications of possible release of hazardous substances or petroleum products must be inspected by walking to “ground truth” the observations.

While this change may reduce the time and expense for Phase I’s of larger tracts, the consultant is also required to consider all roads and paths and their potential use for the

past release of hazardous substances and petroleum products. All interiors of structures are also to be assessed and observed for evidence of releases.

Conclusion

The new ASTM Forestland Standard finally provides some practical relief to those trying to assess large rural and forested tracts of land for a Phase I environmental site assessment. Although helpful, any purchaser hoping to rely on the standard should carefully consider its use by consulting with counsel and an experienced consultant. If in doubt, the purchaser should look to the 2005 ASTM Standard when completing a Phase I.

James A. Thornhill
804.775.1163
jthornhill@mcguirewoods.com