

Environmental Due Diligence In The Wake Of COVID-19

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The COVID-19 pandemic has the potential for impacting prospective purchasers of real estate from performing due diligence. The Bona Fide Prospective Purchaser (BFPP), the Innocent Landowner (ILO), and the Contiguous Property Owner (CPO) who want to avail themselves of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) defenses under the All Appropriate Inquiry Rule (AAI) may find it difficult to carry out the essential requirements under the rule. The baseline level of environmental due diligence under the AAI Rule is the performance of a Phase I Environmental Site Assessment (ESA) in accordance with the ASTM E 1527-13 standard.

An essential component of the ASTM standard is a site visit of the subject property. Non-essential business shutdowns and shelter-in-home orders may prevent consultants from performing such visual inspections in certain states. Although the ASTM standard allows for the specification of “data gaps” and “limiting conditions/deviations,” the site visit is such a core requirement of the standard that, in the ordinary course, failure to perform one within 180 days of the closing date of a transaction renders a Phase I ESA inadequate for purposes of qualifying for CERCLA defenses.

Arguably, the failure to perform a site inspection will render the Phase I ESA deficient, and therefore, not eligible to qualify for one of the CERCLA defenses under the AAI Rule. It is uncertain at the time of this writing whether the EPA will issue guidance on the issue. Therefore, to the extent possible, companies should schedule Phase I ESAs to occur after the expiration of non-essential business shutdowns or shelter-in-home orders. Alternatively, if a Phase I ESA cannot be delayed, then companies may wish to consider creative means of performing the site inspection, e.g., perhaps using drones to examine interior and exterior site features or using FaceTime or Skype to direct any facility personnel onsite to perform the site surveillance. Even so, these creative measures are sure to be attacked in the courts. Careful consideration should be exercised before utilizing drones or on-site personnel to conduct site inspections.

McGlinchey’s Environmental team is here to help with all your environmental due diligence needs. Please contact us with any questions on the above topics or your environment and energy questions in general. We look forward to helping.

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