



BNA's Environmental Due Diligence Guide Report™

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An Insider's Perspective

Years in the Making, ASTM Releases New Standard on Continuing Obligations

A new ASTM International standard provides long-needed guidance for owners of properties impacted by contamination and sets forth basic steps addressing continuing obligations that should be followed to maintain superfund landowner liability protections, the chairman of the task group that developed the standard told BNA July 12.

The Standard Guide for Identifying and Complying With Continuing Obligations (E2790-11) was “years in the making,” said Bob Wenzlau, who chaired ASTM’s continuing obligations task group and is chief executive officer of Terradex Inc. in Palo Alto, Calif.

Provides a Process, Framework

The guide sets forth a four-step process that is triggered when someone buys a property. It includes consideration of Phase I findings, the evaluation of conditions and obligations on the property, taking initial steps to perform continuing obligations, and then performing ongoing evaluation and monitoring of the property. Although the guide recognizes a litany of continuing obligations, it primarily focuses on compliance with land-use restrictions and institu-

tional controls and taking reasonable steps to contain releases as required by the Comprehensive Environmental Response, Compensation, and Liability Act (14 EDDG 88, 11/17/05).

“The standard gives good information and guidance without being totally prescriptive,” Michael Sowinski, vice president of Terradex Inc. told BNA. “The standard sets a four-step process that users can tailor to site specifics within a recommended Continuing Obligations Plan along with a monitoring and inspection approach,” Sowinski explained.

Wenzlau’s motivation for developing the standard was to “ensure that brownfields redevelopment projects and properties remained protective across their entire use.” Six or seven years ago, the focus was on the ribbon-cutting celebration, but there were few “metrics or techniques after to ensure the occupants of those sites would enjoy protection across the full use of the projects.”

Developers and big companies expressed a need for guidance because “they wanted some predictability about where they had an obligation.” There were wide variations on the steps being taken to fulfill these legal obligations, Wenzlau explained. “We came to ASTM to begin the process of finding a middle ground that had some edges and a direction.”

The continuing obligations task group included the same kinds of participants that developed ASTM’s

Phase I standard (E1527), such as landowners, redevelopers, big box retailers, utilities, and oil companies as well as state and federal regulators, Wenzlau said.

The Environmental Protection Agency also participated, Sowinski and Wenzlau explained. “EPA representatives offered comments from time to time and, I believe, they are pleased the standard exists,” Sowinski said. Representatives from both the brownfields and enforcement arms of EPA participated, and like some of the other participants, wisely cautioned against speculating or interpreting CERCLA’s meaning in the guide, Wenzlau explained.

A Difficult Process

The process of developing the standard was not an easy one, and there were several difficult, sometimes contentious issues that had to be addressed. Sticky issues included concerns the guide was giving legal advice, the definition of land-use restrictions, and the appropriate amount of documentation necessary to demonstrate that obligations were met. The group also struggled with creating something that was going to work for an array of sites ranging from gas stations to superfund sites, Sowinski and Wenzlau explained.

“About two years ago, the committee circulated the guide and decided it wasn’t really as much a guide as it was a statement of findings and requirements,” Wenzlau said. At that point, “the team looked

at each other and started redrafting.”

“We almost tore the whole thing apart, cherry-picked out the requirements, and made it into a recipe that was sequencing and time-based rather than a situation approach. It was a brave moment for the group. A lot of people had invested a lot of years in the first version. That is why it took so long. We had to find something that nailed the requirements and gave a recipe,” Wenzlau said.

Pioneers in New Territory

“One of the things that made this so difficult was the pioneering nature of what we were doing. This whole

area of continuing obligations is still an immature area. Philosophically, this made things hard,” Sowinski explained.

However, he said, the universe of cleanup sites is shifting very much to the stewardship phase. “This guide is going to become more relevant as more sites go into that space,” Wenzlau agreed. “Attention on these properties is just now starting to shift to the legacy issues,” he explained.

“I speculate that over time, as the guide is used and the space matures, it could even move from a guide to a practice,” Sowinski said. “You could imagine the four-step procedure be-

coming more prescriptive while still flexible and applicable to any kind of site, much like the Phase I.”

Wenzlau said he and Sowinski look forward to educating the marketplace about the standard. “After this experience, we could be pretty good teachers, and that’s what we’ll be turning toward. We love to talk about this. We think a lot of the environmental practice now and looking ahead will be toward legacy management.”

BY MARY ANN GRENA MANLEY

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