



Environmental Notes - June 2019

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THE BIGGEST PHASE I ERA MISTAKE YOU CAN MAKE
BY CHANGING J. MARTIN

If your company is planning to buy commercial or industrial real estate, it's probably your standard practice to have a Phase I Environmental Site Assessment ("Phase I") performed. When you do so, it's important to ensure the Phase I report you receive from your environmental consultant fully complies with ASTM Standard D1527-13. Why? Because your company cannot qualify as a Small Business Professional Purchaser ("SBPP") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and, in some instances, state law unless the Phase I report complies with the ASTM Standard. Qualifying as a SBPP provides your company with a defense to CERCLA liability for existing contamination on the property, even if it is common knowledge the property is contaminated.

We review Phase I reports to clients regularly to ensure the reports comply with the ASTM Standard. What's the biggest mistake we see? The failure by the environmental consultant to issue the report to the entity that will take title to the property. Plainly, though, it's not always the consultant's fault, because how the other parties to a development company enter into a contract to purchase real estate, the environmental consulting firm is engaged to perform a Phase I for the developer, and the firm sends

the developer a user questionnaire. The developer completes the user questionnaire, sends it back to the consultant, and the consultant issues the report to the developer. A couple of weeks before closing, the developer forms a special purpose entity to take title, such as an LLC, and assigns the contract to the LLC. The LLC then closes on the property. Result? The LLC cannot qualify as a SBPP. Why? Because the Phase I was issued to the developer, not to the LLC that took title, in most instances, the developer never told the consultant that it planned to form an LLC to take title.

This seems like an easy mistake to avoid, but we see it happen over and over. Smart real estate purchasers will advise their consultants that they intend to form an LLC to take title, and smart consultants will advise their clients to let them know if an entity other than the client will take title. Securing the SBPP defense is cheap insurance against environmental liability, but this common mistake will leave the buyer unprotected.

VIRGINIA CO2 RULE APPROVED, BUT CANNOT BE IMPLEMENTED
BY JOHN M. "JAY" HOLLOWAY III

At its April meeting, the Virginia Air Pollution Control Board (the "Board") approved a final CO2 Cap and Trade Rule, (9 VAC 5-140-200). The "Rule" is the CO2 emissions from the power sector by a rate

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