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## The Continuing Obligations Plan: ASTM's New Standard For Controlling Environmental Risk In Business Transactions

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### Introduction

To property owners and business managers seeking to take advantage of liability protections afforded to purchasers of contaminated property under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, navigating the treacherous channels of CERCLA's safe harbor exemptions may seem at times a daunting task. Not only must they concern themselves with satisfying the heavily relied upon but sometimes still murky "all appropriate inquiry" standard prior to taking title to property, ever since the enactment of the 2003 CERCLA amendments (known as the Brownfields Revitalization and Environmental Restoration Act, or "BRERA"), they must also concern themselves with a host of requirements throughout their period of ownership in order to maintain their protected status. As pointed out in my prior article ("The Narrowing Safe Harbor of CERCLA Liability Protection for Prospective Purchasers" in the April 2011 issue of *The Metropolitan Corporate Counsel*), owing to large gaps of legal uncertainty left unaddressed by BRERA and the few cases applying it, it can become problematic for a purchaser to discern exactly how far he or she must go in complying with "due care" and other

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requirements to remain exempt from CERCLA liability – short of actually taking on some of the same burdens as would apply to a responsible party who falls outside the exemption.

In return for granting the first-ever CERCLA liability exemption for known contamination under the so-called bona fide prospective purchaser defense, BRERA created a set of conditions required to maintain the defense, which it also applied to the already existing "innocent purchaser" defense for unknown conditions, as well as a new "contiguous property owner" defense for owners of property that become contaminated by releases migrating from off-site properties. These conditions consist of, among other things, the "continuing obligation" to: (1) take reasonable steps with respect to hazardous substance releases, including stopping continuing releases, preventing threatened future releases, and preventing or limiting human, environmental or natural resource exposure to prior releases; (2) comply with any land use restrictions established or relied upon in connection with a response action at a property; (3) not impede the effectiveness or integrity of any institutional control employed at a property in connection with a response action; and (4) maintain engineering controls if the control is an integral component of a land use restriction or institutional control. As commonsensical as these requirements may seem, Congress unfortunately stopped short in BRERA of defining the limits of a purchaser's obligation. For example, no guidance is provided as to how far a purchaser must go to stop continuing releases



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or, for that matter, exactly what kinds of factual circumstances would constitute a "continuing release."

In an effort to bring some much-desired clarity to these and other questions for purchasers who seek to rely on CERCLA's safe harbors in purchase deals, the American Society for Testing Materials recently developed a standard protocol for how to identify, ensure and track compliance with, and manage the ongoing obligations of a purchaser to maintain the CERCLA prospective purchaser exemptions post-closing. As with the well-known ASTM E1527-05 standard for conducting "all appropriate inquiry" investigations (i.e., Phase I environmental site assessments), the new "Standard Guide for Identifying and Complying with Continuing Obligations," ASTM E2790-11, purports to become the private industry benchmark of the measures that "should" – or at least "could" – be taken to ensure continued enjoyment of CERCLA's liability protections. While it is, of course, important to note that ASTM is itself a purely private organization that has no governmental powers to adopt standards of conduct having the force of law, its protocols, which are prepared by committees comprising industry experts in a particular field, nonetheless can be said to provide at least "some evidence" of a standard of care applicable to the industry as a whole. Consequently, although a purchaser's failure to follow any ASTM protocol is not a basis by itself for imposing liability, such a failure could carry some weight in a legal proceeding in which a court is asked to determine whether a duty of care that is the subject of the ASTM protocol was breached.

### A Standard Of Care?

Unfortunately, as a standard of care, ASTM E2790-11 leaves much to be

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desired, owing mainly to two factors beyond its authors' collective control. The first is a set of ambiguous statutory requirements that comprise the "continuing obligations" listed above. The second factor, contributed to in large measure by the first, is a set of conflicting judicial opinions that have served to heap further uncertainty onto the shoulders of a purchaser. The authors of ASTM E2790-11 laudably have attempted to shed some light on these questions by distilling in some instances principles from applicable case law and/or what may be considered obvious hypothetical cases of the types of circumstances that could give rise to a duty for the purchaser to act in order to maintain its exempted status. Unfortunately, though, due to the paucity of judicial opinions applying BRERA's exempted status maintenance requirements, the guidance provided in the standard consists largely of what most legal practitioners in the environmental bar would consider to be as-yet unsettled issues. The consequence is a standard that arguably becomes overly prescriptive or that gives too much credence to specific outcomes in particular cases that, as time will tell, may have been wrongly decided – all at the risk of creating, as noted above, a standard of care for the industry as a whole.

An example of an area in which ASTM E2790-11 ventures too far into the practical realm is by providing one-size-fits-all examples of what would, or may, constitute "reasonable steps to stop continuing releases." According to Section 7.6.4.1, the steps that would be deemed "reasonable" may include such activities as: "over packing, emptying, or properly disposing of leaking drums or above ground storage tanks; tightening or replacing valves and/or flanges to stop dripping; emptying a large leaking container that cannot be over packed; and installing or repairing a containment structure." The standard goes on to state that reasonable steps to stop continuing releases *below the ground surface* may include: "emptying a tank, pipeline, or other container where practically feasible, addressing a breach from an existing containment or barrier system, or using plugs to hold back the flow."

While the foregoing recommended activities are all without question environmentally beneficial for any purchaser of property to undertake, and many purchasers, no doubt, would be well-advised to undertake them in most cases (or at least ensure that the seller does so pursuant to a post-closing contractual or statutory obligation), it is not difficult to imagine scenar-

ios in which undertaking them could be unduly expensive in comparison with the benefits to be achieved and/or would expose the purchaser to even greater liability risks in the event of a misstep. For example, the necessity or wisdom of installing or repairing an above-ground containment structure or addressing a breach from an existing below-ground containment or barrier system may be questionable if doing so would be inordinately expensive in comparison with the degree of environmental benefit that would be achieved, especially if the release in question is *de minimis*, of limited duration and/or would not otherwise adversely affect human health or the environment. Moreover, depending on the type of "containment structure" involved, installing, repairing or addressing a breach from it could, under some circumstances, entail significant costs and risks that arguably render them beyond the types of actions that Congress intended for a purchaser to undertake in order to satisfy the "reasonable steps" requirement. At least in some cases, the resolution to such questions necessarily must be left to a careful case-by-case analysis of the entire range of attendant circumstances, options, risks and costs associated with the continuing release at issue.

In another passage in Section 7.6.4.3 addressing the interim responses that may be necessary to "abstain from" in order to prevent migration of hazardous substances that could result in human exposures to hazardous substances, the standard opines that, depending on property-specific facts, activities that "could cause increased exposure include movement of contaminated soils to previously uncontaminated areas, installation of a drainage system for a building that pumps contaminate ground water to a ditch, or causing the migration of contaminated ground water." Again, while it may be environmentally beneficial to abstain from activities that could cause any of the foregoing impacts, it is not a foregone conclusion that doing so will either increase human exposure to hazardous substances or, even if it does, whether any such exposure would be of a sufficient nature or degree as to warrant avoidance of BRERA's liability protections. Presumably, the standard makes room for these exceptional circumstances by noting that the examples given depend on "property-specific facts." Still, it is the highly fact-specific nature of site contamination itself that gives rise to the need for considering such circumstances on a case-by-case basis and, consequently, makes it

difficult at best to reduce to an industry-wide standard of care in a protocol such as ASTM E2790-11.

### The Benefits Of A Continuing Obligations Plan

Notwithstanding the shortcomings of ASTM E2790-11 discussed above, the standard is nonetheless a highly instructive tool for identifying the types of circumstances that warrant consideration in the development of a purchaser's strategy of ensuring that it is complying with BRERA's continuing obligations and will therefore continue to enjoy the benefit of CERCLA liability relief. If used in this manner, ASTM E2790-11 provides a good outline of the range of site-specific factors that often come into play in managing ongoing risks in an environmentally responsible manner, which is an important policy goal behind BRERA's continuing obligations.

Perhaps the most beneficial aspect of ASTM E2790-11, however, lies in its recommendation of, and the practical guidance it provides for, the development of a written plan setting forth the purchaser's continuing obligations. As with any written plan setting forth a procedure for controlling risks to human health presented by site-specific factors, the downside risk to doing so is that failure to follow the plan will provide a roadmap and ample prosecutorial evidence to potential future opposing litigants – including, in this case, a potential basis for voiding the bona fide prospective purchaser, innocent purchaser, or contiguous property owner defenses to CERCLA liability. Nonetheless, given the benefits of ensuring protection of the BRERA defenses by reducing a seemingly complex set of "continuing obligation" requirements to readily identifiable and cost-effective actions that can be effectively monitored over time, the development of a continuing obligations plan is well worth the downside risks.

To its credit, ASTM E2790-11 contains copious recommendations that a purchaser should consult with qualified environmental counsel in the development of a continuing obligations plan. In addition to identifying, in light of applicable case law authority and BRERA's legislative goals, a reasonable course of conduct appropriate for a purchaser to comply with its BRERA continuing obligations in light of the specific circumstances presented by the site in question, working with counsel can serve to protect a purchaser's deliberations, and in some cases the continuing obligations plan itself, from disclosure in any subsequent legal proceeding.