

Phase I Environmental Site Assessments in Brownfield Transactions, Including Recent Changes Reflected in ASTM Standard E1527-13



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Environmental Assessment – What is it and why is it Important?



- Part of the standard “due diligence” process for identifying potential risks and liabilities
- Provides the prospective purchaser or tenant with information regarding past and current property uses
- Informs negotiation of risk transfer mechanisms in the transaction
- Required by virtually all commercial lenders
- Required for obtaining federal, state and local grants to offset redevelopment costs
- Pre-requisite for qualifying for Minnesota and federal environmental liability assurances

Examples of Sources of Potential Environmental Liability

- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601, *et seq.*
- Minnesota Environmental Response and Liability Act (MERLA), Minn. Stat. § 115B.01, *et seq.*
- Minnesota Petroleum Tank Release Cleanup Act, Minn. Stat. § 115C.01, *et seq.*
- Common law (*e.g.*, nuisance, trespass)

Brownfield Amendments to CERCLA (2002)



- Created the “Bona Fide Prospective Purchaser” (BFPP) Defense for post-2001 acquisitions, where:
 - BFPP is not a “responsible person” or affiliated with a responsible person
 - BFPP performed “**all appropriate inquiries**” before taking title
 - BFPP takes “reasonable steps” after taking title with respect to the “identified release” (*e.g.*, complies with land use restrictions and institutional controls, provides access, etc.)

MERLA Liability Assurances

- No Association Determination (NAD)/Retroactive NAD
- Off-Site Source Determination
- No Action/No Further Action Letter
- Commissioner's Certificate of Completion



Minnesota Tank Act Liability Assurances

- General Liability Letter
- Leak Site Tank Removal Letter
- Leak Site Closure Letter (tank and non-tank)



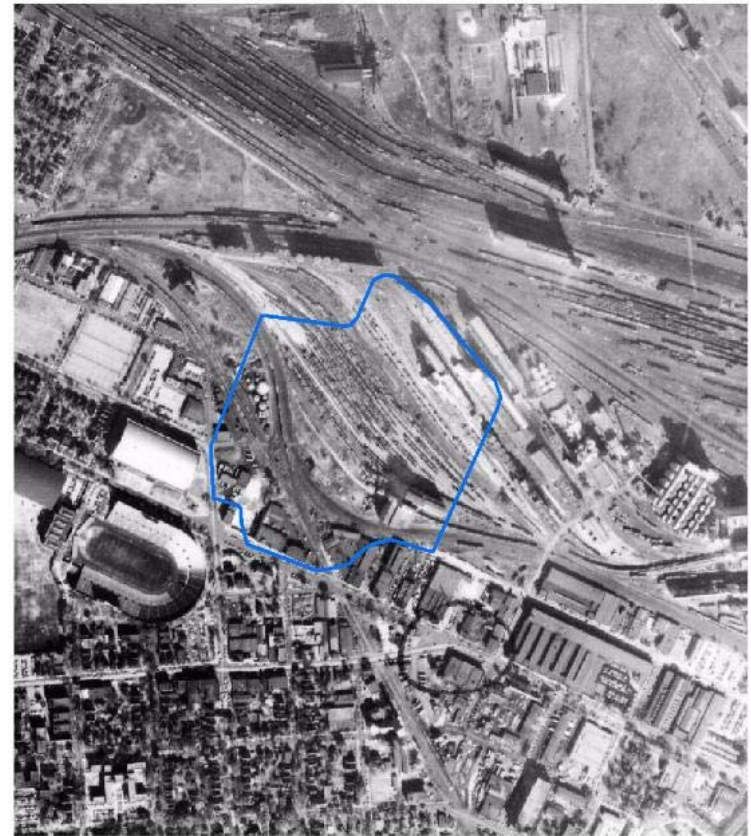
Phase I Environmental Site Assessments



- Systematic approach to identifying existing or potential “recognized environmental conditions” (RECs), “historical RECs” and “controlled RECs” that may affect real property
- Industry standard has been published by the American Society for Testing and Materials (ASTM) since 1993
- Current ASTM Phase I ESA standard is E1527-13
- Recognized by EPA as sufficient to satisfy the “all appropriate inquiries” requirement for BFPP defense
- Required by MPCA for issuance of NADs and other liability assurances

Phase I ESA Components, Timing and Cost

- Property records review
- Review of historical property use information
- Site inspection
- Interviews
- Regulatory records review
- User questionnaire response
- Typically takes between 2 and 4 weeks to complete
- Cost ranges from \$2,000 to \$5,000 and up



H istorical I nformation G atherers, Inc.	Proposed Football Stadium Huron Blvd. & 4th St. SE Minneapolis, Minnesota	1953	
		HIG Project Number: MAC-1613	
		Client Project Number:	
		Approximate Scale: 1:6000 (1"=500')	

Phase I ESA Requirements

- Must comply with current (2013) ASTM standard
- Must be a “User” to Rely on Report
- Must be performed by an “Environmental Professional”
- Valid for 1 year from date of Report, BUT...
- Has a “shelf-life” of 180 days from earlier site inspection, interviews and records review

Matters Outside the Scope of a Phase I ESA

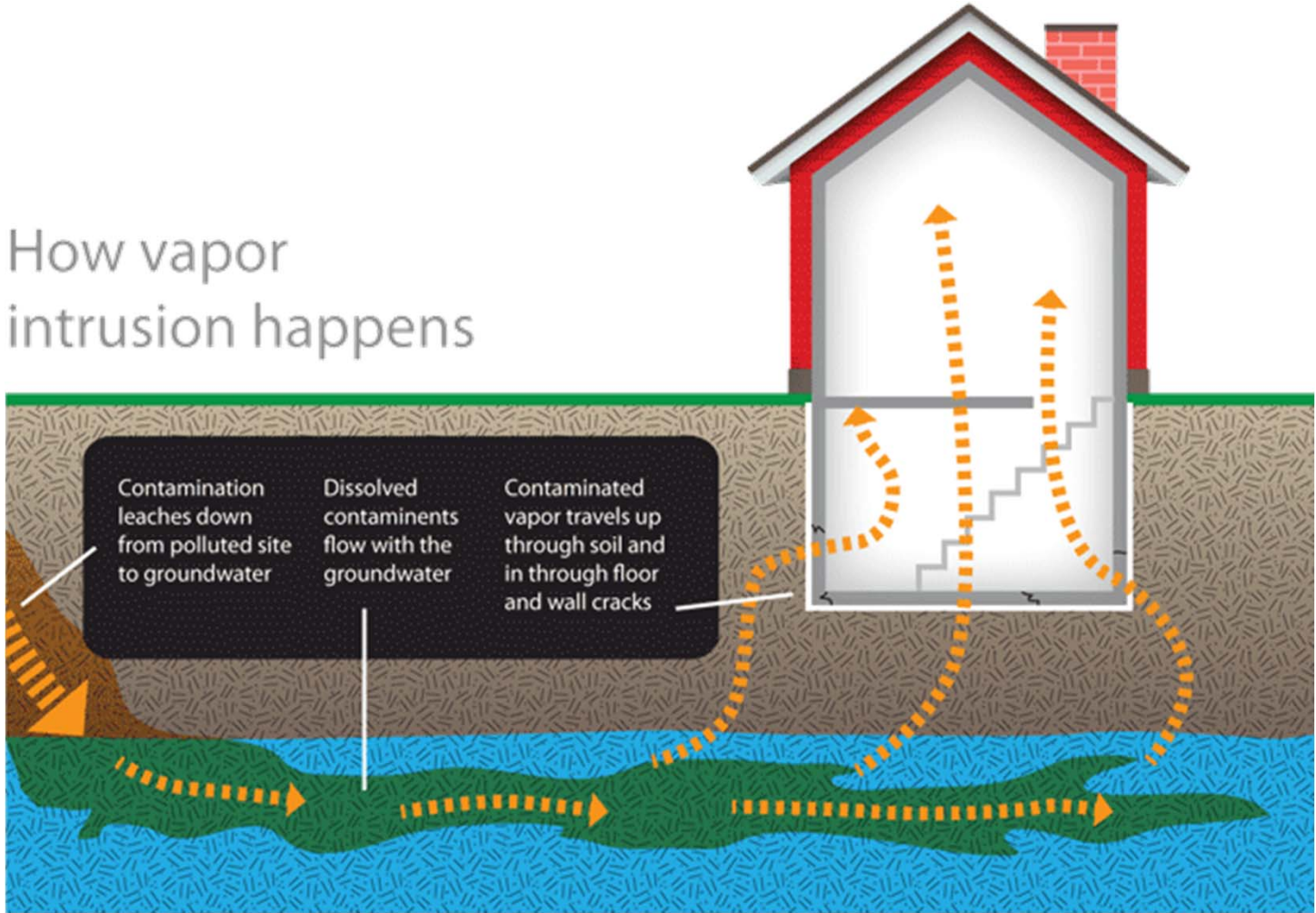
- **NO** intrusive testing of soil, groundwater or other media (*e.g.*, Phase II ESA)
- Asbestos-containing materials (ACMs)
- Lead-based paint
- Radon
- Mold
- Wetlands
- Regulatory compliance (*e.g.*, permits)
- Indoor air quality (*e.g.*, OSHA standards)

Key Changes in 2013 ASTM Standard

- Revised definitions of REC and HREC; added “controlled REC”
- Regulatory agency file reviews
- Added consideration of “Vapor Intrusion” migration pathway

Vapor Intrusion

How vapor intrusion happens



Potential Impacts of 2013 Changes to Phase I ESA Standard

- Provides more thorough information
- Time and cost to complete will increase
- Recommendation for a Phase II ESA will be more likely



Practice Pointers

- Phase I ESAs should be performed for all commercial acquisitions and most industrial/commercial leases
- Select a highly qualified environmental consultant
- Obtain and carefully compare Phase I ESA proposals
- Pay attention to the Phase I ESA contract
- Perform a Phase II ESA where the consultant identifies RECs that could affect value, liability or future use of the property
- Start early so that any issues can be addressed and liability assurances/protections obtained prior to closing

Brownfield Resources

- MPCA Brownfields Program—
<http://www.pca.state.mn.us/index.php/waste/waste-and-cleanup/cleanup/brownfields/index.html>
- MPCA—What's In My Neighborhood? <http://cf.pca.state.mn.us/wimn/search.cfm>
- Minnesota Brownfields—<http://mnbrownfields.org/>
- U.S. EPA Brownfield Grants-- http://www.epa.gov/brownfields/grant_info/
- MN DEED Redevelopment Grants--<http://mn.gov/deed/government/financial-assistance/cleanup/redevelopmentgrantprogram.jsp>
- Met Council Environmental Grants—
<http://www.metrocouncil.org/Communities/Grants-Funding-Finance.aspx>
- Hennepin County Environmental Response Fund (ERF)—
<http://www.hennepin.us/business/property/environmental-response-fund>
- Ramsey County ERF—
https://www.co.ramsey.mn.us/ced/environ_response_fund.htm
- City of Minneapolis Brownfields Program—
http://www.minneapolismn.gov/cped/ba/cped_brownfields

Questions



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