UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2017 Renewable Energy Law Conference

January 31-February 1, 2017
Austin, Texas

CERCLA, Corrections and Critters— Three Areas to Address in the Development of Renewable Energy Projects

James A. Thornhill

Author Contact Information:
James A. Thornhill
McGuireWoods LLP
jthornhill@mcguirewoods.com

I. INTRODUCTION

Development of renewable energy projects requires extensive environmental due diligence and non-energy regulatory permitting. Three notable areas of such due diligence and permitting are (1) a Phase I environmental site assessment under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), (2) corrections to locations or height of structures that are subject to Determinations of No Hazard to Air Navigation from the Federal Aviation Administration, and (3) protection of species and their habitats under numerous federal and state laws. This outline briefly discusses these three areas and the issues that need to be considered by developers, lenders and tax equity investors in the development and financing process.

II. CERCLA--PHASE I ENVIRONMENTAL SITE ASSESSMENTS

Whenever property is leased or purchased for commercial or industrial use (including renewable energy projects), the due diligence includes a Phase I environmental site assessment ("Phase I"). Although Phase Is are performed for due diligence purposes, their origin and legal purpose is to support possible defenses to liability under CERCLA. While Phase I's are one of many assessments performed for renewable energy projects with others potentially having more importance to the particular project (e.g. species, historic resources and wetland assessments), Phase I's are on every lender's, tax equity investor's and developer's checklist. Understanding why they are performed is important to satisfying the requirements of the various parties to the transaction.

A. CERCLA was enacted in 1980 and imposed liability for releases of hazardous substances on owners and operators of sites among other parties. 42 U.S.C. §9607. CERCLA includes a defense to liability if the release or threat of release of a hazardous substance results from "an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant…." *Id*. Unfortunately, the exception of being in a contractual relationship prevented the use of the defense by purchasers in the early years after its enactment as "contractual relationship" was defined to include land contracts, deeds, easements, leases, or other instruments transferring title or possession…." 42 U.S.C. §9601(35).

B. The Superfund Amendment and Reauthorization Act of 1986 ("SARA") was passed adding what is commonly known as the "innocent purchaser defense" by defining "contractual relationship" to exclude a purchaser who acquires the facility:

(1) After the release of hazardous substances; and
(2) The purchaser "did not know and had no reason to know" of the presence of hazardous substances. This was to be shown by having completed prior to acquisition "all appropriate inquiries" into the past uses of the property.

From the three words "all appropriate inquiries" the Phase I was developed by the environmental consulting community. SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1616-1617 (current version at 42 U.S.C. § 9601 (35)).

C. Phase Is evolved after the enactment of SARA:

(1) Phase I's began early on including underground storage tanks ("USTs") and petroleum as EPA's UST regulations went into effect in 1988.
(2) In 1993, the American Society for Testing and Materials ("ASTM") developed its first standard for use in performing Phase Is, entitled Standard Practice for Performance of Phase I Environmental Site Assessments, with the number E1527-93.
(3) The ASTM standard gained some, but not widespread, traction in the real estate industry in the early years as most consultants had developed their own forms over the years since SARA.
(4) ASTM amended the standard in 1997 and 2000, creating E1527-97 and E1527-00, which experienced broader usage.

D. CERCLA was further amended in 2002 with the Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfield Act"). The Brownfield Act required EPA to promulgate an All Appropriate Inquires ("AAI") standard and provided that until developed, AAI could be met by 97 or 00 ASTM standard. 42 U.S.C. § 9601 (35). The act also added two new defenses to liability, the bona fide prospective purchaser and contiguous property owner defenses. 42 U.S.C. §§ 9607 (q) and (r).

E. EPA's AAI regulation found at 40 C.F.R. pt. 312 went into effect for purchases of real property on November 1, 2006. The most critical component of the AAI regulation was that it provided for the use of ATSM Standard E1527-05 instead of the regulation itself as the consultants and users were then used to the ASTM standard. The current regulation allows the use of an updated standard identified as ASTM Standard E 1527-13 "Standard Practice for Environmental Site Assessments: Phase I Site Assessment Process." *Id.* § 312.11. The regulations also allow the use of the ASTM Standard E2247-08 "Standard Practice for Environmental Site Assessments: Phase I Site Assessment Process for Forestland or Rural Property Phase I." *Id.*

Title search: CERCLA, Corrections and Critters— Three Areas to Address in the Development of Renewable Energy Projects

First appeared as part of the conference materials for the
2017 Renewable Energy Law session
"Regulatory Due Diligence Issues in Energy Financing"