



Landowner Liabilities & “Reliance Letters”

August 2007

Overview

One of the most common inquiries regarding landowner liability protections that Caltha receives are related to “reliance letters”. This is also one of the most commonly misunderstood areas related to Landowner Liability Protection (LLP). This Regulatory Update provides some basic information on reliance letters and on Landowner Liability Protections.

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What is a Reliance Letter?

If you were to do a word search for “reliance letter” within the ASTM Standard Practice for Environmental Site Assessments (ASTM E 1527-05) or any of the related federal rules and legislation (such as the Small Business Liability Relief and Brownfields Revitalization Act), you will quickly discover one fact...

From both a technical and legal perspective, there is **NO SUCH THING** as a reliance letter relating to landowner liability protections.

Over time, a common misconception has developed, especially upon lenders, investors and prospective buyers, that a reliance letter means that they can “rely” on the results of an environmental site assessment (ESA) conducted previously and on behalf of another party. The reliance letter is viewed as a type of insurance or guarantee that that property is not contaminated.

Recent changes to the landowner liability protection rules have clarified that reliance letters do not take the place of conducting “all appropriate inquiry” to determine if evidence of contamination and other “recognized environmental conditions” exist.

However, this does not keep some companies who prepare ESAs from continuing to sell “reliance letters” to third parties.

Landowner Liability Protections are available only if a Phase I Environmental Site Assessment was conducted **prior** to purchasing property

Activity & Use Restrictions (AULs)

AULs are explicit restrictions on the uses and/or activities that are allowed on a property. The existence of an AUL should be considered an indication that the property is contaminated and not suitable for unrestricted use.

“Industrial Use Only” restriction may indicate that contamination was partially cleaned up to meet industrial standards. Restrictions could also limit physical changes to the buildings, parking lots, etc.

To be eligible for LLPs, Owners must know and have complied with all AULs

If Not a Reliance Letter, Then What?

If the reliance letter does not meet requirements for “all appropriate inquiry”, what opinions do lenders, investors and prospective buyers have?

To meet current legal requirements, these parties need to be established as “USERS” of the ESA. ESAs are prepared based on specific USERS and those USERS are identified in the ESA report. These identified USERS are the only parties that can claim that they have conducted “all appropriate inquiry”.

USERS of the ESA report also have specific responsibilities that are spelled out in the ASTM Standard E 1527-05. Therefore, to be listed as a USER, parties must:

1. **Assure that the ESA was completed using ASTM E1527-05 Standard Practice within the previous 180-days**
2. **Complete User Questionnaire**
3. **Conduct review of judicial and title records for applicable Activity & Use Restrictions (AULs)**
4. **Demonstrate compliance with any AULs**

If the ESA is more than 180-days old, or will be more than 180-days old at the time of closing, an update to the ESA will be required. In this case, the new USER may want to discuss with the company preparing the ESA whether it is more cost effective to update an outdated ESA report prepared for someone else, or to prepare a new ESA report.

In many cases, a new ESA may be more cost effective.

Regulatory Briefings are published periodically by Caltha to highlight new or proposed environmental, health & safety regulations

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Useful Links

Caltha ESA website:

http://www.calthacompany.com/?page_id=30

Caltha Environmental Due Diligence Blog:

<http://environmentaldue.calthacompany.com/>

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