



Designation: **E2790–11** **E2790 – 20**

Standard Guide for Identifying and Complying With Continuing Obligations¹

This standard is issued under the fixed designation E2790; the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A number in parentheses indicates the year of last reapproval. A superscript epsilon (ε) indicates an editorial change since the last revision or reapproval.

INTRODUCTION

A need and desire exists to purchase and redevelop environmentally impacted property. Under federal and state laws, however, purchasers or other owners of environmentally impacted property can sometimes be among those liable to address the environmental impacts even though they did not cause the impact. Recognizing this as an unintended hindrance to property redevelopment, more recent federal and state laws provide liability protections for certain innocent owners. These liability protections, however, are ordinarily conditioned on the performance of certain future activities, known as “continuing obligations” designed to safely manage or control environmental impacts. Among others, continuing obligations may include requirements to take reasonable steps to manage environmental impacts or to prevent unsafe exposure, or requirements to comply with or maintain the effectiveness of activity and use limitations. The actual continuing obligations that may be needed vary and depend on site specifics, and could also depend on whether the liability concern involves federal liability, state liability, or both. In any case, the need for continuing obligations could arise in the short term and, in some cases, could last for a long time. This guide seeks to provide its users with information and guidance for establishing a process and, in turn, identifying and performing the continuing obligations needed in site specific circumstances. By helping users identify and perform continuing obligations, this guide can be an important implementing tool for users who wish to qualify for various federal or state liability protections afforded to innocent owners of environmentally impacted property. Similarly, where sound risk management rather than a desire for liability protection is the goal, the procedures recommended in this guide can also prove useful.

1. Scope

1.1 *Purpose*—The purpose of this guide is to provide information and guidance² related to the process of identifying and fulfilling *continuing obligations*³ at *commercial real estate*, and *forestland and rural property*, with respect to property that is contaminated by *hazardous substances* within the scope of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. § 9601 *et seq.*) as well as *petroleum products*, or other contaminants that require cleanup under federal or state law (collectively hereafter *chemicals of concern*). ~~As such, this guide’s primary purpose is to provide information and guidance about procedures that, if completed, would help~~ Because of the importance of federal law, this guide largely focuses on ~~users to satisfy continuing obligations~~ applicable to the *innocent landowner, landowner (ILO)*, the *contiguous property owner (CPO)*, and the *bona fide prospective purchaser (BFPP)* protections from CERCLA liability (hereinafter, collectively referred to as the “*CERCLA Landowner Liability Protections*,” or “*CERCLA LLPs*”) (see ~~Legal Appendix X1-1~~ Appendix X1 to ~~X1-3~~ Appendix X3 for an outline of CERCLA’s liability and defense provisions). However, the *continuing obligations* arising from *CERCLA LLPs* are often very similar to the types of *continuing obligations* that state laws set as conditions for state liability protections. And, therefore, the purpose of this guide seeks to help users who wish to perform *continuing obligations* because of concerns over CERCLA liability and also extends to help users who wish to perform *continuing obligations*

¹ This guide is under the jurisdiction of ASTM Committee E50 on Environmental Assessment, Risk Management and Corrective Action and is the direct responsibility of Subcommittee E50.02 on Real Estate Assessment and Management.

Current edition approved May 15, 2011; Jan. 1, 2020. Published June 2011; August 2020. Originally approved in 2011. Last previous edition approved in 2011 as E2790–11. DOI: 10.1520/E2790-11-10.1520/E2790-20.

² This guide’s CERCLA discussions are for information purposes only and are not intended and should not be construed as legal opinions or conclusions of law. This guide should not be relied upon to answer legal questions.

³ Definitions provided in Section 3. All defined terms appear in italics.

because of concerns over state law liability. Similarly, where sound risk management rather than a desire for liability protection is the goal, the procedures recommended in this guide can also prove useful

1.1.1 *Intended Scope of Standard Guide*—As a standard guide, this document provides a compendium of information and options but does not recommend a specific course of action. As a guide, the purpose of this standard is to simply increase the awareness of possible techniques or procedures related to *continuing obligations* and to offer guidance based on a consensus of viewpoints, but not to establish a standard practice to follow in all cases.

1.1.2 *Continuing Obligations—Obligations Under CERCLA*—Subsequent to *property* acquisition, the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (the “*Brownfields Amendments*”), which amended CERCLA, requires persons (a broad term meant to cover individuals, companies, government agencies, and other entities) seeking to maintain *CERCLA LLPs* to establish, by a preponderance of the evidence, fulfillment of certain *continuing obligations*. The *continuing obligations* set forth in the *Brownfields Amendments* include: (1) complying with any *land use restrictions* established or relied upon in connection with a *response action* at a *property*; (2) not impeding the effectiveness or integrity of any *institutional controls* employed at a *property* in connection with a *response action*; (3) taking *reasonable steps* with respect to releases of *hazardous substances*, including stopping *continuing releases*, preventing threatened future *releases*, and preventing or limiting human, environmental or *natural resource exposure* to prior *releases of hazardous substances*; (4) providing full cooperation, assistance and access to persons who are authorized to conduct *response actions* or *natural resource* restoration at a *property*; (5) complying with information requests and administrative subpoenas; and (6) providing legally required notices with respect to releases of any *hazardous substances* at a *property*; and (7) the *CERCLA LLPs* for *BFPPs* and *ILOs* also require that all disposal of *hazardous substances* at the *property* occurred prior to *property* acquisition.⁴ The *BUILD Act* further amended CERCLA. Under the *BUILD Act*, certain tenants qualify for CERCLA’s *bona fide prospective purchaser* protections if the *property* owner qualifies as a *bona fide prospective purchaser*, and certain tenants can qualify as *bona fide prospective purchasers* only if, among other conditions, the tenants fulfill *continuing obligations*.

1.1.3 *Continuing Obligations at Non-CERCLA Properties*—In many cases, liability protections under state law require the performance of the same or similar types of *continuing obligations*. For example, many states have enacted laws that define *bona fide prospective purchaser* to read similarly to the CERCLA definition, including *BFPP* requirements to exercise appropriate care, to comply with *land use restrictions* or to not impede the effectiveness or integrity of *institutional controls*. Analogous to CERCLA, some of these state laws may provide state law liability protections for persons who meet the *BFPP* definition.⁵ In addition, as described in Guide E2091, several state *voluntary cleanup programs* provide liability releases within “No Further Action” (NFA) or “Certificates of Completion” documents only if the conditions provided in those documents are complied with.⁶ These conditions vary but often include requirements to exercise appropriate care with respect to environmental impacts or to comply with *activity and use limitations*.⁷ *AULs* are employed at many properties remediated under state or non-CERCLA federal programs where CERCLA liability may not be of concern but, nonetheless, the *AUL* and *reasonable step* procedures recommended by this guide may provide useful procedures for assuring *AUL* compliance. For example, Michigan state law sets “due care” requirements for purchasers of contaminated properties, mandating that they perform various post-purchase duties including, among others, complying with and not impeding the effectiveness and integrity of *AULs*, and preventing exacerbation and mitigating unacceptable exposure of hazardous substances.⁸ Wisconsin also sets legal rules and administrative guidance covering certain *continuing obligations* for *AULs*.⁹ Additional states similarly impose *continuing obligations* related to *AULs*.

1.1.4 *Certain Continuing Obligations Not Detailed in this Guide*—The procedures recommended in this guide focus on *continuing obligations* pertaining to *land use restrictions*, *institutional controls*, and taking *reasonable steps*. As noted immediately above, CERCLA lists and similar state laws or administrative programs require other *continuing obligations* such as those related to legally required notices, allowing access, and cooperating with government regulators. These “other” *continuing obligations* are not further discussed in this guide. The lack of detailed treatment of these other *continuing obligations*, however, does not intend to suggest that they are less important or less relevant to maintaining *LLPs*; *CERCLA LLPs* or similar state liability protections. The user seeking additional information will find background on these other *continuing obligations* in Legal Appendix XI Appendix the X1.8 Legal Appendix to this guide.

1.1.3 *Guide Does Not Provide Legal Advice*—As noted above, this guide primarily intends to provide information and guidance to users who wish to perform *continuing obligations* for the purpose of maintaining *CERCLA LLPs*. To serve this purpose, this

⁴ In setting forth these requirements, the *Brownfields Amendments* use the terms “vessel” and “facility” to describe the subject *property*. See, for example, CERCLA § 101(40), 42 U.S.C. § 9601(40). Since the aim of this guide is to assist the user in identifying and satisfying *continuing obligations* at *commercial real estate*, we use the term “*property*”, which is the relevant subset of “*facility*” throughout this guide.

⁵ See Legal Appendix X1.5.

⁶ Guide E2091, § 4.4 (describing *AULs* described in or attached to state “No Further Action” and “Certificate of Completion” certificates as critically important for state liability releases). When No Further Action letters or Certificates of Completion approve risk-based corrective actions, the underlying risk-based conditions or future assumptions may trigger *continuing obligations*.

⁷ See, e.g., R.I. Gen. Laws § 23-19.14-7(2)(i)-(iii) (exemption to liability for contaminated property purchasers when following requirements listed in remedial decision letter, letter of compliance, or enforceable settlement agreement).

⁸ See MCL § 324.20101 *et seq.*

⁹ *Continuing Obligations for Environmental Protection, Responsibilities of Wisconsin Property Owners*, PUB_RR_819 (Jun. 2009) (avail. at <http://dnr.wi.gov/org/aw/rr/archives/pubs/RR819.pdf>); <https://dnr.wi.gov/files/PDF/pubs/tr/RR819.pdf>).

guide focuses on technical, scientific, and procedural issues involved with identifying and performing appropriate *continuing obligations* under site-specific circumstances. In order to explain the context for the various *continuing obligations* recommended in this guide, however, the guide necessarily makes reference to the statutory provisions of CERCLA. These CERCLA discussions are meant for informational purposes only and are not intended and should not be construed as legal opinions or conclusions of law; nor should any statement in this guide be relied upon as legal advice concerning CERCLA or any legal matter. The CERCLA *LLPs* involve complicated legal matters with potentially severe consequences. This guide is not intended to and does not replace legal advice, and should not be relied on for any legal question. No implication is intended that a person must use this guide in order to establish or maintain *LLPs*. Conversely, no implication is intended to assure a person using this guide of success against CERCLA liability when using this guide. The *user* is encouraged to seek legal advice when seeking to establish and maintain CERCLA liability defenses. In a number of sections throughout the guide, the guide notes instances where legal issues are particularly relevant and often reinforces the guide's overall recommendation to seek the advice of legal counsel concerning CERCLA *LLPs*. Where particular sections do not suggest the need for legal advice, no implication is intended that legal advice is not recommended or warranted.

1.1.5 *Inclusion of Petroleum Products*—*Petroleum products* are included within the scope of this guide because they are often of concern at *commercial real estate*. Although *petroleum products* enjoy a limited exclusion from CERCLA liability, current custom and usage generally includes an evaluation of whether *petroleum products* may be present on *commercial real estate* during pre-acquisition *environmental site assessments*. Further, state laws and programs requiring *continuing obligations* often cover *petroleum products*. Thus, this guide likewise includes *petroleum products* within its scope. The actions discussed in this guide could be useful or prudent if applied at *commercial real estate* affected by a release of *petroleum products*.

1.1.5 *Applicability to Non-CERCLA Properties*—While this guide is primarily intended to address CERCLA *LLPs*, it need not be limited exclusively for that purpose. The procedures described in this guide may prove prudent at properties where *Activity and Use Limitations (AULs)* or environmental contamination exists, even though CERCLA *LLPs* may not be of concern. *AULs* are employed at many properties remediated under state or non-CERCLA federal programs where CERCLA liability may not be of concern but, nonetheless, the *AUL* and *reasonable step* procedures recommended by this guide may provide useful procedures for assuring *AUL* compliance. For example, Michigan state law sets “due care” requirements for purchasers of contaminated properties, mandating that they perform various post-purchase duties including, among others, complying with and not impeding the effectiveness and integrity of *AULs*, and preventing exacerbation and mitigating unacceptable exposure of hazardous substances.⁵ Also, for example, Wisconsin sets legal rules and administrative guidance covering certain continuing obligations for *AULs*.⁶

1.1.6 *Discussion of the Related Terms: Activity and Use Limitations, Institutional Controls, Engineering Controls, and Land Use Restrictions*—The term *Activity and Use Limitation (AUL)* (*AUL*) is taken from and meant to match the meaning of that term provided in Guide E2091, to include both legal controls (that is, *institutional controls*) and physical controls (that is, *engineering controls*) within its scope. Agencies, organizations, and jurisdictions, however, may define or utilize these terms differently. For example, the term “land use controls” is used by the Department of Defense and the term *land use restrictions* is used but not defined in the *Brownfields Amendments*. CERCLA, as amended by the *Brownfields Amendments*, expressly prescribes *continuing obligations* only for *institutional controls (ICs)* (*ICs*) and *land use restrictions (LURs)*, (*LURs*), each of which represents a subset of the term *AUL*. In addition to *land use restrictions* and *institutional controls*, additional types of *AULs*, particularly *engineering controls*, may exist at a *property*. While broadly a type of *AUL*, *engineering controls* could also be required by or be associated with *ICs* or *LURs*. Where this guide directly addresses the continuing obligations for *AULs* set forth in CERCLA, it uses the statutory terms *land use restrictions* and *institutional controls* to maintain consistency with CERCLA. Where this guide refers generally to *AULs*, this guide employs the term *AUL*. Although certain continuing obligations expressly refer to *land use restrictions* and *institutional controls*, the broader set of continuing obligations (such as taking reasonable steps to address releases of chemicals of concern) require a consideration of all *AULs*, including *engineering controls*.

1.1.7 *Properties Covered*—In addition to *property* with *AULs*, the procedures suggested by this guide are primarily intended to cover *property* where *chemicals of concern* are known to have been (1) released on the *property* prior to acquisition by the current *property owner*, (2) are present at the *property* after acquisition by the current *property owner*, due to the migration from neighboring *property*, or (3) are discovered after *property* transfer where the *Phase I* (or other methods of performing *AAI*), though properly performed, provided no reason to know of the presence of *chemicals of concern*. This guide focuses on these release situations because such situations tend to give rise to circumstances in which one or more of the CERCLA *LLPs* could apply. See Legal Appendix state liability protections or similar risk management concerns drive the need for *continuing obligations* of CERCLA at a *LLPs* *property*.

1.1.8 *Recognized Environmental Conditions*—For the purposes of this guide, the term *recognized environmental condition* is defined in the same manner as the term is defined in Practices E1527 and E2247, which provide guidance for the *Phase I environmental site assessment* process (hereafter *Phase I*). *REC* means the presence or likely presence of any *chemical of concern* on a *property* under conditions that indicate an existing release, a past release, or a material threat of a release of any *chemicals of concern* into structures on the *property* or into the ground, groundwater, or surface water on the *property*. *RECs* do not include de minimis conditions that do not generally present a threat to human health or the environment and which would not generally be the subject of an enforcement action if brought to the attention of the appropriate governmental agencies.

1.1.8 *Presumption of All Appropriate Inquiries and Desire to Qualify for LLPs*—This guide is primarily intended for *users* who seek to qualify for any *CERCLA LLPs* or similar state-law *LLPs*. Therefore, this guide presumes that its *users* have performed or will perform a currently valid *Phase I* or otherwise satisfy “*all appropriate inquiries*” prior to acquisition of the *property*. This presumption affects the organization and structure of this guide because it assumes certain *Phase I* activities would have been successfully performed and, in turn, relied on and built upon during the stepwise process suggested in this guide. *Users* who may not need or desire protections under CERCLA or state *LLP*, but nonetheless seek guidance on performing *continuing obligations* can nonetheless benefit from this guide and, in particular, the procedures described in Step 3 and Step 4 of this guide’s stepwise process.

1.1.9 *Timing*—Subject to the other scope considerations described in this section, the procedures in this guide are intended to be applicable when a *user* knows or has reason to know, after the ~~user’s~~ purchase of the *property*, that *chemicals of concern* either ~~(1)~~ have been released at the *property* or ~~(2)~~ may be released in the future. Therefore, for *users* who purchase *property* where *RECs* Recognized Environmental Conditions (RECs) have been identified, this guide is meant to apply upon *property* purchase. *Users* who have gained knowledge or reason to know of *property releases* of *chemicals of concern* prior to the publication of this guide (for example, where a *user* purchased contaminated *property* years before this guide was published) may still use this guide. Such *users* may need to reconsider and update the findings and conclusions in any existing *Phase I* (or alternative *all appropriate inquiries* efforts) in order to fully utilize this guide. See 5.2.2 (addressing presumption of currently valid *Phase II* ~~AAH~~).

1.1.10 *Determination of No Continuing Obligations Related to Activity and Use Limitations and Reasonable Steps*—Section 5 of this guide recommends a procedure for considering whether *continuing obligations* covered by this guide are required or applicable to the *property*. Refer to ~~1.1.3~~ 1.1.3 for a summary of *continuing obligations* that are not addressed in detail by this guide. As addressed in more detail in Section 5, a determination that no *continuing obligations* are required can be made where neither *RECs*, *institutional controls*, nor *land use restrictions* exist, and ~~users~~ otherwise have no knowledge to indicate the presence of *chemicals of concern* at the *property*. Even where a *Phase I* (or *all appropriate inquiries*) found *RECs*, further evaluation (see Section 6) can justify a conclusion that no *chemicals of concern* were released and, in turn, this conclusion can justify a determination of no *continuing obligations*. See 5.4, however, discussing the case where future circumstances could arise that would cause *users* to reevaluate determinations that no *continuing obligations* are required.

1.1.11 *CERCLA Requirements Other Than Continuing Obligations*—CERCLA and similar state laws provide various liability defenses. This guide does not provide guidance on requirements other than *continuing obligations* that may be necessary to retain eligibility for *CERCLA LLPs* or other CERCLA or state law defenses. See Legal Appendix X1.2 and X1.3 for discussion of ~~CERCLA~~ *CERCLA LLPs* and other CERCLA defenses.

1.1.12 *Other Federal, State, and Local Environmental Laws*—*Users* are cautioned that federal, state, and local laws may impose environmental assessment, *remedial action*, or other obligations related to *hazardous substances* or *petroleum products* that are beyond the scope of this guide.

1.1.13 *Guide Does Not Provide Legal Advice*—As noted above, this guide primarily intends to provide information and guidance to *users* who wish to perform *continuing obligations* for the purpose of maintaining *CERCLA LLPs* or similar liability protections under state law. To serve this purpose, this guide focuses on technical, scientific, and procedural issues involved with identifying and performing appropriate *continuing obligations* under site-specific circumstances. In order to explain the context for the various *continuing obligations* recommended in this guide, however, the guide sometimes makes reference to the law, such as statutory provisions of CERCLA. These discussions are meant for informational purposes only and are not intended and should not be construed as legal opinions or conclusions of law; nor should any statement in this guide be relied upon as legal advice concerning CERCLA or any legal matter. The *CERCLA LLPs* involve complicated legal matters with potentially severe consequences. This guide is not intended to and does not replace legal advice, and should not be relied on for any legal question. No implication is intended that a person must use this guide in order to establish or maintain *LLPs*. Conversely, no implication is intended to assure a person using this guide of success against CERCLA liability when using this guide. The *user* is encouraged to seek legal advice when seeking to establish and maintain CERCLA liability defenses. In a number of sections throughout the guide, the guide notes instances where legal issues are particularly relevant and often reinforces the guide’s overall recommendation to seek the advice of legal counsel concerning *LLPs*. Where particular sections do not suggest the need for legal advice, no implication is intended that legal advice is not recommended or warranted.

1.1.14 *Documentation*—CERCLA requires that a *user* seeking to retain eligibility for an ~~LLP~~ *CERCLA LLPs* must demonstrate compliance with *continuing obligations* by a preponderance of evidence. ~~There~~ While the legal standards may vary, state *LLPs* may also require *LLP* seekers to provide evidence as to *continuing obligations*. Under CERCLA there is no apparent requirement for written documentation to demonstrate compliance with *continuing obligations*, but written documentation could be useful and, perhaps even essential, in cases where a *user* desires to demonstrate the performance of *continuing obligations*. The guide provides guidance in Section 9 on the preparation of *continuing obligation plans* and suggests procedures for documenting *continuing obligation* efforts. *Users* are encouraged to consult with legal counsel on steps to be taken to document compliance with *continuing obligations*.

1.2 *Objectives*—This guide establishes the following objectives: (1) provide information and guidance related to procedures to identify and comply with *continuing obligations* on *commercial real estate* or on forest or rural land; and (2) formulate and clarify suggested industry methods and procedures for identifying and satisfying *continuing obligations* that are practical, efficient and reasonable.

1.3 *Organization of this Guide*—This guide has nine sections and eight appendices. Fig. 1 provides a representation of this guide as a flowchart, and represents decision points for the *user* as the guidance is applied:

Section 1 is the Scope.

Section 2 lists Referenced Documents.

Section 3, Terminology, contains definitions of terms used in this guide, definitions of terms unique to this guide and acronyms.

Section 4 discusses the Significance and Use of this guide.

Section 5 discusses Step 1, a screening process relying on the *Phase I* to help determine whether *continuing obligations* apply to the *property*.

Section 6 discusses Step 2, a process for evaluating the environmental conditions and *AULs* that may affect the *property* in advance of planning for *continuing obligations*.

Section 7 discusses Step 3, providing guidance for a process to select *continuing obligations* to be performed under site-specific circumstances.

Section 8 discusses Step 4, providing guidance for a process to select and schedule monitoring requirements for *continuing obligations*.

Section 9 offers guidance on documentation for (1) statements of no *continuing obligations* on a *property*, (2) a *continuing obligations plan*, and (3) reporting the periodic monitoring of *continuing obligation*.

The Appendices provide additional information:

Appendix X1 (the Legal Appendix) describes liability and defenses to liability under CERCLA, as amended by the *Brownfields Amendments*, while also providing important discussion on *continuing obligations*.

Appendix X2 provides a recommended table of contents and report format for a statement of no *continuing obligations*.

Appendix X3 provides a representative form for a statement of no *continuing obligations*.

Appendix X4 provides a recommended table of contents and report format for a *continuing obligations plan*.

Appendix X5 provides a recommended table of contents and report format for a *continuing obligations monitoring and evaluation report*.

Appendix X6 provides a representative form for *continuing obligations* field investigation, for a simple site.

Appendix X7 provides a representative form for *continuing obligations* field investigation, for a more complex site.

Appendix X8 develops five scenarios to assist in the application of this guide.

1.4 This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use.

1.4 This guide offers guidance on performing one or more specific tasks and should be supplemented by education, experience and professional judgment. Not all aspects of this guide may be applicable in all circumstances. This guide does not necessarily represent the standard of care by which the adequacy of a given professional service must be judged, nor should this document be applied without consideration of a property's unique aspects. The word "standard" in the title means only that the document has been approved through the ASTM consensus process.

1.5 This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety, health, and environmental practices and determine the applicability of regulatory limitations prior to use.

1.6 This international standard was developed in accordance with internationally recognized principles on standardization established in the Decision on Principles for the Development of International Standards, Guides and Recommendations issued by the World Trade Organization Technical Barriers to Trade (TBT) Committee.

2. Referenced Documents

2.1 ASTM Standards:¹⁰

E1527 Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process

E1689 Guide for Developing Conceptual Site Models for Contaminated Sites

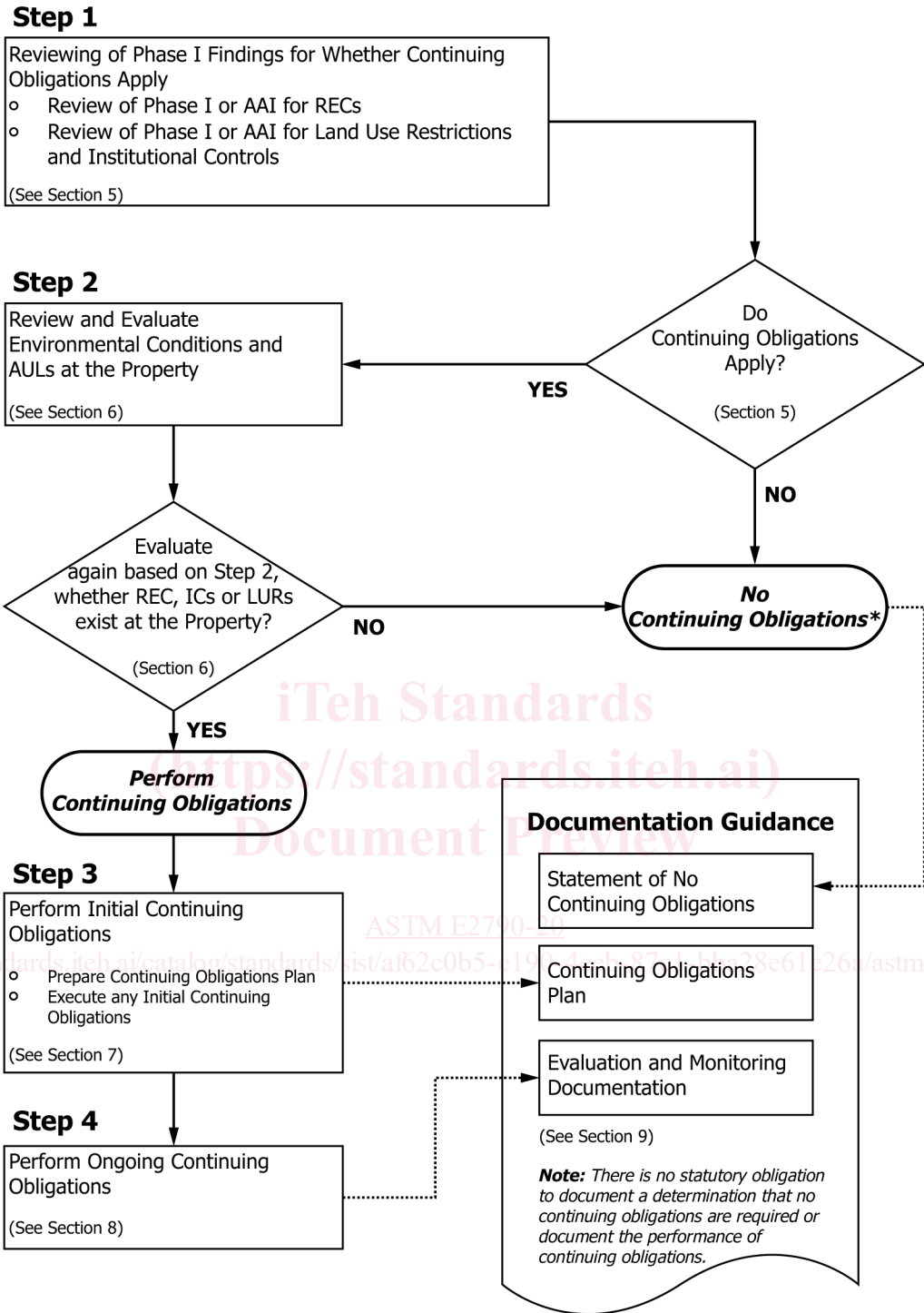
E1903 Practice for Environmental Site Assessments: Phase II Environmental Site Assessment Process

E2081 Guide for Risk-Based Corrective Action

E2091 Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls

E2205 Guide for Risk-Based Corrective Action for Protection of Ecological Resources

¹⁰ For referenced ASTM standards, visit the ASTM website, www.astm.org, or contact ASTM Customer Service at service@astm.org. For *Annual Book of ASTM Standards* volume information, refer to the standard's Document Summary page on the ASTM website.



NOTE 1—Continuing obligations may be triggered based in the future as discussed in 5.4.1. Other obligations may exist as discussed in 5.4.2.

FIG. 1 Flowchart of Guide to Continuing Obligations

E2247 Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property

~~E2435 Guide for Application of Engineering Controls to Facilitate Use or Redevelopment of Chemical-Affected Properties~~

2.2 Federal Statutes and Regulations:

Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) (42 USC 9601 *et seq*) as amended Small Business Liability Relief and Brownfield Revitalization Act (the “Brownfield Amendment of 2002”)

Brownfields Utilization, Investment, and Local Development Act of 2018 (“BUILD Act”)

“All Appropriate Inquiries” Final Rule, 40 CFR Part 312

2.3 USEPA Documents:

~~Draft Interim Final Guide, Institutional Controls: A Guide to Planning, Implementing, Maintaining and Enforcing Institutional Controls at Contaminated Sites, November 2010~~December 2012

~~Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants, January 2009~~

~~Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners (Contiguous Property Guidance), January 2004~~

~~Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property, or Innocent Landowner Limitations on CERCLA Liability (Common Elements Interim Guidance), March 2003~~

~~Institutional Controls: A Site Manager’s Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups, September 2000~~

~~Final Policy Towards Owners of Property Containing Contaminated Aquifers—Memorandum (Contaminated Aquifer Policy), May 1992~~

~~Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provisions, Dec 2012~~

Advanced Monitoring Technologies and Approaches to Support Long-Term Stewardship, July 2018.

Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners (“Common Elements”). July 2019

2.4 Other Relevant Documents:

~~Association of State and Territorial Solid Waste Management Officials (ASTSWMO), State Approaches to Monitoring and Oversight of Land Use Controls, October 2009~~

~~Interstate Technology Regulatory Council, An Overview of Land Use Control Management Systems, December 2008~~

~~Uniform Environmental Covenants Act (available at <http://www.environmentalcovenants.org>)~~

~~Uniform Fire Code, National Fire Protection Association~~

~~International Fire Code, International Code Council~~

~~Standard Definition of Petroleum Statistics, American Petroleum Institute, Fourth Edition, 1998~~

Interstate Technology Regulatory Council, Long Term Contaminant Management Using Institutional Controls (2017) (available at <http://institutionalcontrols.itrcweb.org/>).

3. Terminology

3.1 This section provides definitions and a list of acronyms for many of the words used in this guide. The terms are an integral part of this guide and are critical to an understanding of the methodologies described herein.

3.2 Definitions:

3.2.1 *activity and use limitations (AULs)*—legal or physical restrictions or limitations on the use of, or access to, a site or facility to eliminate or minimize potential ~~exposures to hazardous substances~~chemicals of concern or ~~petroleum products~~ or to prevent activities that could interfere with the effectiveness of a *response action*, to ensure maintenance of a condition of “acceptable risk” or “no significant risk” to human health and the environment. These legal or physical restrictions are intended to prevent adverse impacts to individuals or ~~populations~~populations, or environmental receptors that may be exposed to ~~hazardous substances~~chemicals of concern~~petroleum products~~.

NOTE 1—CERCLA expressly lists *continuing obligations* for *institutional controls* and *land use restrictions*, each of which represents a subset of the term *AULs*. Additional types of *AULs*, such as *engineering controls*, may exist at a *property*.

3.2.2 ~~all appropriate inquiries or AAI~~(AAI)—that inquiry conducted prior to the date of acquisition of the subject *property* constituting “all appropriate inquiries into the previous ownership and uses of the *property* consistent with good commercial or customary practice” as defined in CERCLA, 42 U.S.C. §9601(35)(B), and in EPA’s regulations, 40 C.F.R. Part 312, that will qualify a party to a *commercial real estate* transaction for one of the threshold requirements that an *owner of commercial real estate* must satisfy in order to be eligible for any of the *landowner liability protections* to CERCLA liability (42 U.S.C. §9601(35)(A) & (B), §9607(b)(3), §9607(q); and §9607(r)), assuming compliance with other elements of the defense.

3.2.3 *appropriate care*—CERCLA defines *BFPPs* as persons who, among other things, exercise *appropriate care* with respect to *hazardous substances* by taking *reasonable steps* to stop any continuing *release*, prevent any threatened future *release*, and prevent or limit human, environmental, or *natural resource exposure* to any previously *released hazardous substances*. 42 U.S.C. §9601(40)(D); §9601(B)(iv). *Appropriate care* is one of several *continuing obligations*.

3.2.4 *bona fide prospective purchaser (BFPP)*—a person who meets the criteria set forth in CERCLA §101(40) (42 U.S.C. §9601(40)) qualifies as a *bona fide prospective purchaser*. Generally, a *BFPP* can be a person who purchases or acquires a leasehold interest in *property* knowing that it is was already contaminated. Among other requirements, *BFPPs* must make *all appropriate inquiries* and perform *continuing obligations*. ~~obligations, however certain exceptions to the requirements to perform all appropriate inquiries and continuing obligations apply to leasehold interest BFPPs based on whether the owner of the property qualifies as a BFPP.~~ Persons meeting the definition of *BFPP* may, in accordance with the provisions set forth in CERCLA §107(r) (42 U.S.C. §9607(r)), qualify for CERCLA’s *BFPP landowner liability protection*, which provides a potential defense for such persons from the meaning of “owner” or “operator” as defined by CERCLA. ~~A person must make all appropriate inquiries into the previous ownership and uses of the property prior to acquiring the property and all disposal of hazardous substances at the property must have occurred prior to acquisition.~~ The *property* must have been acquired after January 11, 2002. See Legal Appendix X1.3.2 listing and citing the statutory provisions for the *other BFPP* necessary requirements that are beyond the scope of this guide: criteria.

3.2.5 *Brownfields Amendments*—amendments to CERCLA contained in the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 (2002), 42 U.S.C. §§9601 *et seq.*

3.2.6 *Build Act*—amendments to CERCLA contained in the Brownfields Utilization, Investment, and Local Development Act, enacted as part of the Consolidated Appropriations Act 2018, Pub. L. No. 115-141 (2018).

3.2.7 *CERCLA LLPs—Landowner liability protections* under CERCLA, which include the *bona fide prospective purchaser*, *contiguous property owner*, and *innocent landowner LLPs*. See 42 U.S.C. §§9601(35)(A)-(B), 9601(40), 9607(b), 9607(q), 9607(r).

3.2.8 *chemicals of concern*—means *hazardous substances* or *petroleum products* ~~products~~ or any specific compounds and their breakdown products that are identified under federal environmental laws, *state cleanup programs*, *voluntary cleanup programs* or other state or federal corrective action laws or regulations as requiring *response action*.

3.2.9 *commercial real estate*—any real *property* except a *dwelling* or *property* with no more than four *dwelling* units exclusively for residential use (note, however, that a *dwelling* or *property* with no more than four *dwelling* units exclusively for residential use is included in this term when it has a commercial function, as in the building of such dwellings for profit). This term includes but is not limited to undeveloped real *property* and real *property* used in industrial, retail, office, agricultural, other commercial, medical or educational purposes; *property* used for residential purposes that has more than four residential dwelling units; and *property* with no more than four dwelling units for residential use when it has a commercial function, as in the building of such dwellings for profit.

3.2.10 *contiguous property owner (CPO)*—a person who meets the criteria set forth in CERCLA § 107(q)(1)(A) (42 U.S.C. § 9607(q)(1)(A)) qualifies as a *contiguous property owner*. *Contiguous property owners* are persons who own *commercial real estate* that is contiguous to and that is or may be contaminated by *hazardous substances* from other *property* that is not owned by that person. To qualify as *CPOs*, among other requirements, persons must have conducted *all appropriate inquiries* and perform *continuing obligations*. Persons meeting the definition of *contiguous property owner* may, in accordance with the provisions set forth in CERCLA §107(q) (42 U.S.C. §9607(q)), qualify for the CERCLA *contiguous property owner LLP*, which provides a potential defense for such persons from the meaning of “owner” or “operator” as defined by CERCLA and, therefore, could relieve such persons from CERCLA liability that would be triggered based on their status as an “owner” or “operator”. Knowledge of contamination resulting from all appropriate inquiries would preclude this liability protection. See Legal Appendix X1.3.3 for the other necessary requirements that are beyond the scope of this guide.

3.2.11 *continuing obligations*—~~subsequent refer to post property acquisition, acquisition steps meant to appropriately manage any chemicals of concern at the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (the “for the purposes of legal liability protection, risk management, or other purposes, including those steps enumerated by the Brownfields Amendments”), which amended CERCLA, requires which require persons (a broad term meant to cover individuals, companies, government agencies, and other entities) seeking to maintain CERCLA LLPs to establish, by a preponderance of the evidence, fulfillment of certain continuing obligations: steps or procedures. The including: continuing(1) obligations set forth in the Brownfields Amendments include: (1) complying with any land use restrictions established or relied upon in connection with a response action at a property; (2) not impeding the effectiveness or integrity of any institutional control employed at a property in connection with a response action; (3) taking reasonable steps with respect to releases of hazardous substances, including stopping continuing releases, preventing threatened future releases, and preventing or limiting human, environmental or natural resource exposure to prior releases of hazardous substances; (4) providing full cooperation, assistance and access to persons who are authorized to conduct response actions or natural resource restoration at a property; (5) complying with information requests and administrative subpoenas; and (6) providing legally required notices with respect to releases of any hazardous~~

substances at a property. Many State laws or state cleanup programs list similar continuing obligations as conditions for state liability protections. This guide addresses the first three of these continuing obligations.

3.2.12 *continuing obligation plan*—a plan prepared by the user to identify *continuing obligations* and procedures to be taken post-acquisition of the property to satisfy any *continuing obligations*.

3.2.13 *continuing obligations evaluation report*—a document prepared periodically by the user to document the satisfaction of any *continuing obligations*.

3.2.14 *continuing release or continuing releases*—for the purposes of this guide, means any ongoing release from a man-made container or repository.

3.2.15 *controlled recognized environmental condition*—means controlled recognized environmental condition as defined by Practice E1527. In summary, controlled recognized environmental condition means a type of REC (1) affecting the subject property,(2) resulting from a past release of hazardous substances or petroleum products,(3) that has been addressed to the satisfaction of the applicable regulatory authority or authorities, (4) with hazardous substances or petroleum products allowed to remain in place, and (5) is subject to implementation of property use restrictions or activity and use limitations.

3.2.16 *dwelling*—structure or portion thereof used for residential habitation.

3.2.17 *engineering controls (ECs)*—physical modifications to a site or facility used to ~~render an~~reduce or exposure pathway~~eliminate the or potential potential~~for exposure pathway to ~~incomplete~~chemicals of concern (for example, slurry walls, capping, hydraulic controls for ground water, or point of use water treatment). An *engineering control* is a type of AUL.

3.2.18 *environmental professional*—a person meeting the education, training, and experience requirements as set forth in 40 C.F.R. §312.10(b) and as described in Appendix X2 of Practice E1527. The person may be an independent contractor or an employee of the user.

3.2.19 *environmental site assessment (ESA)*—the process by which a person or entity seeks to determine if a particular parcel of real property (including improvements) is subject to *recognized environmental conditions*. An *environmental site assessment* may include more inquiry than that constituting a *Phase I* or more inquiry necessary to perform *all appropriate inquiries* or, if the user is not concerned about qualifying for *CERCLA LLPs* or similar state *LLPs*, less inquiry than required for a *Phase I* or for performing *all appropriate inquiries*. An *environmental site assessment* is both different from and typically less rigorous than an environmental audit.

3.2.20 *exposure*—contact of an organism (human or ecological receptor) with a *chemical(s) of concern* at the exchange boundaries (for example, skin, lungs, and liver) when the *chemical(s) of concern* is available for absorption or adsorption. For purposes of this guide, *exposure to chemicals of concern* only includes *exposures* to levels that exceed those levels determined to be acceptable by applicable government agency or scientific standards.

NOTE 2—Acceptable exposure levels are dependent upon the target species and may vary based upon other stressors in the habitat.

3.2.21 *exposure pathway*—the course a *chemical of concern* takes from the source area(s) to a receptor or relevant ecological receptor and habitat. An *exposure pathway* describes the mechanism by which an individual or population is exposed to a *chemical of concern* originating from a site. Each *exposure pathway* includes a source or release from a source of a chemical of concern, a point of *exposure*, an *exposure* route, and the potential receptors or relevant ecological receptors and habitats. If the *exposure* point is not at the source, a transport or *exposure* medium or both (for example, air or water) are also included.

3.2.22 *hazardous substance*—~~any substance defined as a defined hazardous substance in pursuant to~~ CERCLA, 42 U.S.C. §9601(14), as interpreted by USEPA regulations and the courts: “(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, (42 U.S.C. §6921) (but not including any waste the regulation of which under RCRA (42 U.S.C. §§6901 *et seq.*) has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act (42 U.S.C. §7412), and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator (of EPA) has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a *hazardous substance* under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).”

3.2.23 *IC/EC registries*—databases of *institutional controls* or *engineering controls* that may be maintained by a federal, state or local environmental agency or a private entity for purposes of tracking sites that may contain residual contamination and *AULs*. The names for these databases may vary from program to program and state to state, and include terms such as the Declaration of Environmental Use Restriction database, “deed restrictions” lists, environmental covenants lists, and Brownfields site lists. ~~They also include lists, and~~ environmental covenant registries established under the Uniform Environmental Covenants Act.

3.2.24 *innocent landowner (ILO)*—a person who meets the criteria set forth in CERCLA §§101(35), 107(b)(3) (42 U.S.C. §§9601(35), 9607(b)(3)) qualifies as an innocent landowner. ~~qualifies for LLPs~~. A person may qualify as one of three

types of *innocent landowners*: (i) a person who “did not know and had no reason to know” that *hazardous substances* existed on the *property* at the time the purchaser acquired the *property*; (ii) a government entity which acquired the *property* by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; and (iii) a person who “acquired the facility by inheritance or bequest.” To qualify for the first category of *innocent landowner*, such person must have, among other things, made *all appropriate inquiries* on or before the date of purchase, must exercise due care with respect to *hazardous substances* and take precautions against foreseeable acts or consequences—omissions of third parties and the consequences that could foreseeably result from such acts or omissions pursuant to 42 U.S.C. §9607(b)(3), and must perform continuing obligations. Furthermore, the *all appropriate inquiries* must not have resulted in knowledge of *hazardous substances*. If it does, then such person would typically “know” or “have reason to know” of *hazardous substances* and would not qualify as an *innocent landowner*. See Legal Appendix X1.3.4 for the other necessary requirements that are beyond the scope of this guide.

3.2.25 *institutional controls (ICs)*—a legal or administrative restriction ~~on~~ mechanism designed to limit, prohibit, or condition the use of, or access to, to a site or facility (for example, “deed restrictions,” restrictive covenants, environmental covenants, easements, or zoning) to (1) reduce or eliminate eliminate or minimize potential exposureexposure(s) to chemicalschemical(s) of concernconcern. in the soil or ground water on the property, or (2) to prevent activities that could interfere with the effectiveness of a response action in order to ensure maintenance of a condition of no significant risk to public health or the environment. An institutional control is a type of AUL.

3.2.26 *land title records*—records that affect the title of real estate, which may include, among other things, deeds, mortgages, leases, land contracts, court orders, easements, and AULs recorded within the recording systems or land registration systems created by state statute in every state and ordinarily administered in the local jurisdiction (usually the county) in which the property is located. Such records are publicly accessible, though the process of searching for and finding land title records often requires specialized expertise or knowledge of the local system. Information about the title to the property that is filed or stored in any place other than where land title records are, by law or custom, recorded for the local jurisdiction in which the property is located, are not considered land title records.

3.2.27 *landowner liability protections (LLP)*—~~landowner means liability protections~~ CERCLA LLPs, under CERCLA, which include the as well as liability protections provided under state law to property purchasers, parties performing cleanup actions under certain state programs (e.g., voluntary cleanup programs offering liability protection upon completion), or other property owners. In order to qualify for LLPs, CERCLA and state laws set requirements for the liability protection seeker to perform one or more bona fide continuing obligations, prospective purchaser, such as a contiguous property owner, complying with or maintaining the integrity or effectiveness of AULs, and/or taking innocent landowner reasonable steps with respect to LLPs. ~~See 42 U.S.C. §§9601(35)(A)-(B), 9601(40), of environmental contaminants, such as 9607(b), 9607(q), hazardous substances. 9607(r).~~

3.2.28 *land use restrictions (LURs)*—a term added to CERCLA §§101(35)(A)-(B), 101(40), 107(q)(1)(A)(v)(I), 42 U.S.C. §§9601(35)(A), 9601(40), 9607(q)(1)(A)(v)(I), by limitation placed on the use or enjoyment of real property. This term was used, but not defined, in the *Brownfields Amendments of 2002* that prescribes as a condition of eligibility for ((42 U.S.C. 9601(35)(A), 9601(40), 9607(q)(1)(A)(v)(I)) as one of the criteria with which a landowner liability protection person must be that in compliance in order to qualify for one of the *property CERCLA LLPs*. ~~owner “is in~~ Specifically, a property owner must be “in compliance with any *land use restrictions* established or relied on in connection with the response action at the facility.” The statute contains no definition of “*land use restrictions, response action*” suggesting that Congress may have intended to give these terms their ordinary meaning and leaving it to future judicial interpretation to define the scope of “at the facility.” *land use restrictions.*” For additional background on this term, see Legal Appendix X1.7.

3.2.29 *material threat*—a physically observable or *obvious* condition, fact or circumstance that could reasonably be expected to lead to a *release*.

3.2.30 *natural resource*—includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, any state, local government, foreign government, any Indian tribe, or under some circumstance, by any member of an Indian Tribe. See CERCLA §101(16), 42 U.S.C. §9601(16).

3.2.31 *obvious*—that which is plain or evident; a condition or fact that could not be ignored or overlooked by a reasonable observer while visually or physically observing the property.

3.2.32 *operator*—a person satisfying the definition of *operator* as defined in section 101(20)(A) of CERCLA, 42 U.S.C §9601(20)(A), as interpreted by the courts, which generally includes *operators* which possess control over *property* use. Under certain circumstances, a tenant may qualify as an *operator*.

3.2.33 *owner*—a person satisfying the definition of *owner* as defined in section 101(20)(A) of CERCLA, 42 U.S.C §9601(20)(A), as interpreted by the courts, which generally includes the fee simple *owner* of record for the *property*.

3.2.34 *petroleum products*—those substances included within the meaning of the petroleum exclusion to CERCLA, 42 U.S.C. §9601(14), as interpreted by the courts and EPA, that is: petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a *hazardous substance* under Subparagraphs (A) through (F) of 42 U.S.C. §9601(14),

natural gas, natural gas liquids, liquefied natural gas, and synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). (The word “fraction” refers to certain distillates of crude oil, including gasoline, kerosene, diesel oil, jet fuels, and fuel oil, pursuant to *Standard Definitions of Petroleum Statistics*.)

3.2.35 *Phase I Environmental Site Assessment or Phase I*—the process described in Practice **E1527** (covering *commercial real estate*) and Practice **E2247** (covering forestland or rural property).

3.2.36 *potentially responsible party (PRP)*—any individual or entity including *owners, operators*, transporters, or generators who may be liable under CERCLA §107(a), 42 U.S.C. §9607(a).

3.2.37 *practically reviewable*—information that is practically reviewable means that the information is provided by the source in a manner and in a form that, upon examination, yields information relevant to the *property* without the need for extraordinary analysis of irrelevant data. The form of the information shall be such that the *user* can review the records for a limited geographic area. Records that cannot be feasibly retrieved by reference to the location of the *property* or a geographic area in which the *property* is located are not generally *practically reviewable*. Most databases of public records are *practically reviewable* if they can be obtained from the source agency by the county, city, zip code, or other geographic area of the facilities listed in the record system. Records that are sorted, filed, organized, or maintained by the source agency only chronologically are not generally practically reviewable. Listings in publicly available records which do not have adequate address information to be located geographically are not generally considered practically reviewable. For large databases with numerous facility records (such as RCRA hazardous waste generators and registered underground storage tanks), the records are not *practically reviewable* unless they can be obtained from the source agency in the smaller geographic area of zip codes. Even when information is provided by zip code for some large databases, it is common for an unmanageable number of sites to be identified within a given zip code. In these cases, it is not necessary to review the impact of all of the sites that are likely to be listed in any given zip code because that information would not be *practically reviewable*. In other words, when so much data is generated that it cannot be feasibly reviewed for its impact on the *property*, it is not *practically reviewable*.

3.2.38 *primary containment*—the tank, drum, vessel, tote, other container, or bermed containment, surface impoundments, and lagoons, that is in immediate contact with a *chemical of concern*.

NOTE 3—The loss of structural integrity of the primary containment may result in a release of the *chemical of concern* into the environment.

3.2.39 *property*—real *property* that is *commercial real estate*, and which is described by a legal description or is otherwise adequately described or identified. Real *property* includes buildings and other fixtures and improvements located on the *property* and affixed to the land.

3.2.40 *proprietary control*—controls based on the rights associated with private ownership, particularly ownership of a limited interest in real property as specified in a legal instrument, such as an easement or a restrictive covenant.

3.2.41 *publicly available*—information that is *publicly available* means that the source of the information allows access to the information by anyone upon request.

3.2.42 *reasonable steps*—the *landowner liability protections* require persons seeking such protections to demonstrate, among other things, that they have taken *reasonable steps* to stop or prevent existing or threatened *releases of hazardous substances*, and prevent or limit any human, environmental or *natural resource* exposure to any previously released *hazardous substances*.

3.2.43 *reasonably ascertainable*—for purposes of this guide, information that is (1) *publicly available*, (2) obtainable from its source within reasonable time and cost constraints, and (3) *practically reviewable*.

3.2.44 *recognized environmental conditions (RECs)*—recognized environmental conditions (RECs) are defined by Practice E1527 as the presence or likely presence of any hazardous substances or petroleum products on, in, on, or at a property property: under conditions that indicate an existing release, a past release, or a material threat(1) of a due to release of any to hazardous substances or petroleum products into structures on the the environment; property(2) or into the ground, ground water, or surface water of the under conditions indicative of a property release The term includesto the environment; hazardous substancesor petroleum products(3) even under conditions in compliance with laws. The term is not intended to include de minimis conditions that generally do not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies. Conditions determined to be de minimis are not under conditions that pose a material threat of a future release to the environment. recognized environmental conditions.

3.2.41 *recorded land title records*—records of historical fee ownership, which may include leases, land contracts, and *AULs* on or of the *property* recorded in the place where land title records are, by law or custom, recorded for the local jurisdiction in which the *property* is located. (Often such records are kept by a municipal or county recorder or clerk.) Such records may be obtained from title companies or directly from the local government agency. Information about the title to the *property* that is recorded in a U.S. district court or any place other than where land title records are, by law or custom, recorded for the local jurisdiction in which the *property* is located, are not considered recorded land title records.

3.2.45 *release*—as defined by §101(22) of CERCLA, 42 U.S.C. §9601(22), “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).

This term has received varying interpretation by federal courts in different parts of the country. In some federal court jurisdictions, *release* attributed to a *property owner* only encompasses *releases* caused by human intervention. In some jurisdictions, *releases* attributed to a *property owner* could include the passive migration of *hazardous substances* through soil or ground water.

3.2.46 *remedial action*—activities conducted to reduce or eliminate current or future *exposures* to receptors or relevant ecological receptors and habitats. These activities include monitoring, implementing *activity and use limitations*, and designing and operating clean-up equipment. *Remedial action* includes activities that are conducted to reduce sources of *exposure* to meet corrective action goals, or to sever *exposure pathways* to meet corrective action goals.

3.2.47 *relevant ecological receptors and habitats*—the ecological resources that are valued at the site. Identification of *relevant ecological receptors and habitats* is dependent upon site-specific factors and is a technical policy decision important to the planning and scoping phase of ecological evaluation. Examples may include species or communities afforded special protection by law or regulation; recreationally, commercially, or culturally important resources; regionally or nationally rare communities; communities with high aesthetic quality; and habitats, species, or communities that are important in maintaining the integrity and biodiversity of the environment. These may be functionally equivalent to assessment end points. See Guide E2205.

3.2.48 *response action*—means actions to respond or a response, as those terms are defined in CERCLA §101(25), 42 U.S.C §9601(25), to *releases of hazardous substances*. Generally, *response action* operates as an umbrella term to cover any type of *hazardous substance* cleanup at a *property*, including “removal actions” and “remedial actions” as those terms are defined in CERCLA §101(23)-(24), 9601(23)-(24). Response action also covers corrective action measures, including risk-based corrective action measures, taken to address chemicals of concern in general, or under state cleanup programs or voluntary cleanup programs.

3.2.49 *risk-based corrective action*—a consistent decision making process for the assessment and response to *releases of chemicals of concern* based upon protection of human health and the environment. Assessment and responses to such *releases* may consider the use of *activity and use limitations*.

3.2.50 *site conceptual model or SCM*—the integrated representation of the physical and environmental context, the complete and potentially complete exposure pathways and the potential fate and transport of *chemical(s) of concern* at a site. The *site conceptual model* should include both the current understanding of the *property* and the understanding of the potential future conditions and uses for the site. It provides a method to conduct the exposure pathway evaluation, inventory the exposure pathways evaluated, and determine the status of the exposure pathways as incomplete, potentially complete or complete.

3.2.51 *state cleanup programs*—programs administered by state government agencies with legal authority to compel, oversee, or approve *remedial actions* or *response actions*. State cleanup programs include *voluntary cleanup programs*.

3.2.52 *voluntary cleanup program*—*voluntary cleanup programs* include programs administered by state government to oversee, review, and/or approve *response actions* upon the request of eligible persons (eligibility is defined differently among states). As such, *voluntary cleanup programs* provide an alternative to the conventional CERCLA or state Superfund-like enforcement approach to cleaning up contaminated sites. Many states, and in some cases local agencies, have developed *voluntary cleanup programs* to speed the cleanup of non-National Priorities List sites, which, generally, pose a lower risk than those sites listed on the National Priorities List (NPL). These *voluntary cleanup programs* are designed to achieve results that are acceptable to the State in terms of costs and protection of human health and the environment.

3.2.53 *user*—the person using Guide E2790 to obtain guidance about *continuing obligations* or on how to perform *continuing obligations* at *commercial real estate*. Accordingly, this guide anticipates that the primary *users* will include, without limitation, (1) persons who recently purchased *property* (or tenants of such persons) after performing a *Phase I* that identified *RECs*, or (2) persons who recently gained knowledge or reason to know of *releases of chemicals of concern* at their *property* where such *releases* occurred prior to their ownership or by the migration from neighboring *property*, or (3) potential purchasers that seek information about potential *continuing obligations*. Other *users* may include, without limitation, property managers, lenders, or environmental regulators.

4. Significance and Use

4.1 *Uses*—This guide is intended for use on a voluntary basis primarily by parties who desire to satisfy *continuing obligations* at *commercial real estate* or at forestland or rural properties. As such, this guide provides information and suggested procedures that could be useful to persons who wish to ~~assert~~ establish a defense to one of the CERCLA liability LLPs and to establish or similar liability one of the LLPs protections offered under state law. This guide may apply where *response actions* have already occurred, where *response actions* remain ongoing, or where *response actions* may be necessary in the future. As noted in ~~4.1.61.1.2~~, however, the use of this guide need not be necessarily limited to ~~CERCLA~~ CERCLA LLPs.

4.2 Clarifications on Use:

4.2.1 *Use is Property-Specific*—*Continuing obligations*, and the process to identify and implement *continuing obligations*, is necessarily *property-specific*. Therefore, this guide includes information to consider when performing a *property-specific*, fact-based evaluation to determine appropriate *continuing obligations*.

4.2.2 *Partially Addresses Eligibility for CERCLA LLPs*—Users wishing to establish ~~CERCLA~~ CERCLA *LLPs* should be aware that the *continuing obligations* covered by this guide comprise only part of CERCLA’s statutory eligibility requirements for *LLPs*. For example, *users* seeking to qualify for *LLPs* must perform *AAI* before *property* acquisition. *Users* seeking the *BFPP* or *CPOLLP* must also demonstrate that they are not liable or potentially liable or affiliated with any person who is liable or potentially liable for *releases* of *hazardous substances* under CERCLA. 42 U.S.C. §9607(q)(1)(A)(ii); 42 U.S.C. ~~§9601(40)(H)~~ §9601(40)(B)(viii). Further, *users* seeking the *BFPP* or ~~LLPILO~~ *LLP* must establish that disposal of *hazardous substances* occurred on the property prior to its acquisition. 42 U.S.C. ~~§9601(40)(A)~~ §9601(40)(B)(i); 42 U.S.C. §9601(35)(A). *Users* seeking the *CPOLLP* must establish that they did not cause, contribute or consent to the *release* of *hazardous substances*. 42 U.S.C. §9607(a)(A)(i) ~~§9607(q)(A)(i)~~. Finally, *users* seeking to qualify for the *ILOLLP* must establish that a third party was the sole cause of the *release* of *hazardous substances* and that they held no employment, agency, or contractual relationship with the third party, among other requirements. In addition, *users* asserting the *ILO* defense must also establish that they had no knowledge (or reason to know) of any such *releases*. 42 U.S.C. §9601(35)(A)(i), ~~9607(b)~~ §9607(b)(3). The foregoing list is not meant to be exhaustive.

4.2.3 *Certain Continuing Obligations Not Detailed in this Guide*—As noted in ~~1.1.13~~ 1.1.13, this guide focuses only on certain *continuing obligations*, namely those pertaining to *land use restrictions*, *institutional controls*, and taking *reasonable steps* with respect to *releases* of *chemicals of concern*.

4.2.4 *Use Will Depend on Context*—The context for *continuing obligations* may differ between *BFPPs*, *ILOs* and *CPOs*.

4.2.4.1 *BFPPs* acquire *property* after performing *AAI*, and, therefore may have knowledge of the presence or likely presence of *chemicals of concern* at the *property*, as well as the potential need for additional appropriate investigation, if any. This knowledge would guide the *BFPP* as to what measures it may employ in order to satisfy *continuing obligations*.

NOTE 4—The presence of *chemicals of concern* on the subject *property* may be the result of historical, area-wide land uses (for example, heavy metals in the soil due to the *property* being down-wind of smelters or foundries or area-wide ground water contamination) and such area-wide concerns could affect *continuing obligations*.

4.2.4.2 To establish eligibility for CERCLA *LLPs* as *ILOs* or *CPOs*, CERCLA requires, among other things, that, after performing *AAI*, there was neither knowledge nor a reason to know that any *hazardous substances* were disposed on, in, or at the *property* (*ILO*) or that the *property* was or could be contaminated by a *release* (*CPO*). 42 U.S.C. §9607(q)(1)(A)(viii)(II) (setting *CPO* standard); 42 U.S.C. §9601(35)(A)(i) (setting *ILO* standard). Even though *ILOs* and *CPOs* would have no knowledge of *hazardous substances* when they acquired *property*, compliance with *continuing obligations* would be triggered if the persons seeking the *ILO* or *CPO* protection thereafter learned of *hazardous substances* on the *property* due to *releases* of *hazardous substances*.

4.3 *Who May Conduct*—This guide does not suggest minimum qualifications for persons implementing or evaluating the need for *continuing obligations*. *Continuing obligations* may, in some cases, require professional judgment. *Property owners* should closely evaluate whether, under site-specific circumstances, the evaluation of *continuing obligations* suggested by this guide would benefit from the experience and judgment of an *environmental professional* with appropriate education and training relevant to the conditions at the *property*. Similarly (see ~~1.1.13~~ 1.1.13) *continuing obligations* issues are likely to warrant legal advice. ~~-20~~

4.4 *Consultation with Government Agencies*—A *user* may also wish to consult (or may be required by state or local laws to consult) appropriate governmental agencies when implementing *continuing obligations*.

4.5 *Residential Properties*—This guide does not cover properties with four or less *dwelling* units. Rather, this guide covers *commercial real estate*. *Dwelling* purchasers and *owners* should be cautioned, however, that depending on the circumstances, *dwelling*s could qualify as facilities under CERCLA § 101(9) and, therefore, CERCLA liability could exist if *hazardous substances* were *released* at *dwelling*s. Thus, purchasers of *dwelling*s that conducted *all appropriate inquiries* prior to acquiring the property may wish to seek liability protection associated with *releases* of *hazardous substances* in some circumstances, and if they do, the recommendations in this guide could be useful.

4.6 *Principles*:

4.6.1 *Striking A Balance Between Remediation Liability and Redevelopment Incentives*—As more fully discussed in Legal Appendix X1.3.1, Congress sought to strike a balance between the broad liability and remedial goals imposed by CERCLA on responsible parties and the goal of promoting redevelopment of Brownfields sites by removing the disincentives to redevelopment that result from the strict CERCLA liability scheme. Under this ~~balance~~, balance as discussed in the Legal Appendix (Appendix X1), those performing *continuing obligations* for the purpose of meeting a ~~CERCLA~~ CERCLA *LLP* would not ordinarily need to undertake the same *response actions* as parties responsible for the *release*. This guide reflects that balance and when suggesting various *continuing obligation* steps, does so based on the principle that those performing *continuing obligations* do so within the balanced paradigm desiring property reuse on one hand with adequate environmental and human health protection on the other.

4.6.2 *Proportionality to Nature of Release and Exposure Potential*—The nature and extent of the *continuing obligations* should be proportional to the nature, extent, and complexity of the *release* as well as the potential for *exposure* under the site-specific *property* conditions and land uses. Environmentally impaired properties range from extremely large and severely contaminated sites (for example, Superfund sites) to small lightly contaminated sites (for example, small service station leaks). The procedures suggested in this guide, and particularly those in Sections 7 through 9, should be tailored to the site conditions. Thus, the magnitude

and frequency of *continuing obligation* efforts will be more or less involved depending on the site specifics. Based on the procedures recommended in the guide, the *continuing obligations* plan (see Section 9) designs tailored procedures to perform site-specific *continuing obligations*.

4.7 *Applicability of Other Environmental Laws*—Users are reminded that all persons, including those seeking eligibility for the LLPs, have an affirmative obligation to comply with local, state, federal (and tribal if appropriate) rules and statutes governing the management and disposal of hazardous materials and hazardous waste (many of which encompass *chemicals of concern*), the details of which are beyond the scope of this guide. In addition, some locally enforced national codes (for example, the *Uniform Fire Code* or *International Fire Code*) provide standards for the management of hazardous materials and include rules governing the prevention and mitigation of unauthorized *releases of chemicals of concern*.

5. Step 1: Reviewing a Phase I Findings for Whether Continuing Obligations Apply

5.1 *Scope*—This section suggests a screening process relying on the *Phase I* (or other methods that satisfy *all appropriate inquiries*) for determining whether *continuing obligations* apply and, in turn, should be performed at the *property*.

5.2 *Determination of Whether Continuing Obligations Are Required*—For many *property* transactions, a screening evaluation will allow *users* to conclude that there is no current need to perform *continuing obligations* covered by this guide (refer to [1-1-1.1.2](#) and [1-1-2.1.4](#) for a summary of *continuing obligations* not covered by this guide and by a determination of no *continuing obligations* made pursuant to this guide) if all of the following findings are made: (1) no *RECs* have been identified at the *property* or a *REC* has been identified but no further action is reasonably required based on further evaluation (see [5.2.5.5.2.6](#)); (2) no *institutional controls* were employed in connection with a *response action* at the *property*; and (3) no *land use restrictions* were established or relied upon by a *response action* at the *property*. In the case where *users* make these conclusions, [Appendix X3](#) provides a form for documenting a determination of no *continuing obligations*. See [5.4.1](#), however, discussing the case where future circumstances could arise that would cause *users* to reevaluate determinations that no *continuing obligations* are required.

5.2.1 *Review Phase I Findings and Opinions for RECs*—A determination of no *continuing obligations* may, in some cases, be based on the findings, opinions, evaluation of data gaps, and conclusions of a *Phase I* or other method of *all appropriate inquiries*. As explained in more detail within [Practice E1527](#): (1) *Phase I* findings identify known or suspected *RECs*, *Historical RECs* (*HRECs*), and de minimis conditions; (2) *Phase I* data gaps may, if significant, affect the ability of an environmental professional to identify *RECs*; (3) *Phase I* opinions recognize that suspected *RECs* and *HRECs* may or may not actually qualify as *RECs* and provide an *EP's* rationale for concluding whether identified conditions do or do not qualify as *RECs* and *Phase I* opinions may also address the need, if any, for additional investigation; (4) *Phase I* conclusions summarize any *RECs* identified at the *property*; (5) as part of the process of identifying *RECs*, the *Phase I* is required to review institutional control and engineering control registries (*IC/EC* registries) for the presence of *AULs*; and (6) the *Phase I* user has the responsibility to arrange for a review of reasonably ascertainable recorded land title records. The user should carefully review the *Phase I* (or *AAI*) report prepared pursuant to 40 C.F.R. §312.21).

5.2.2 *Presumption of Current Valid Phase I*—This guide presumes that any prior *Phase I* (or other method for performing *all appropriate inquiries*) relied on by the *user* of this guide would have been prepared in accordance with the *Phase I* and *AAI* procedures and, therefore, within all applicable time limits and will provide the basis for any subsequent *user continuing obligations* reliance rules set by that the *Phase I user* and decides *AAI* are procedures necessary.

NOTE 5—Professional practice has revealed that the *Phase I* process of searching *land title records* for *AULs*, while often reliable and while improving, has in many cases either not occurred at all or, if it has occurred, has failed to find *AULs* that actually were recorded in *land title records*. It would be prudent for *users* of this guide to verify, through a careful review of *land title record* review reports or *AUL* search reports or otherwise, that the *Phase I* search for *AULs* appropriately reviewed the *land title records* in a manner that would detect *AULs* recorded during the timeframe when *AULs* should have been recorded in the *land title records*, based on the site specifics.

5.2.3 *Do RECs Exist?*—For the purpose of Step 1, the identification of *RECs* means that *chemicals of concern* are present or are likely present under conditions indicating a release, past release or material threat of release at the *property*. If no *RECs* do not exist after considering the significance of any data gaps (and there are no were identified during the completion of *land use restrictions all appropriate inquiries*, or institutional controls employed, established or relied on in connection with a *response action*), a determination of no *continuing obligations* may be made. If *RECs* exist at the *property*, further evaluation (see [5.2.6](#) and Step 2) may conclude that conditions identified as *RECs* are actually not *releases of chemicals of concern* or do not warrant additional attention or action.

5.2.4 *Actual Knowledge of the Presence of Chemicals of Concern at the Property*—If the *user* has knowledge of the presence of *chemicals of concern* at the *property*, even if not identified by the *Phase I* (or other method of performing *all appropriate inquiries*) as a *RECs*, *users* should consider whether such conditions should be treated as closely evaluate whether and how such conditions trigger the need for a *continuing REC obligations* because the presence of remaining *chemicals of concern* is likely to trigger *continuing obligations*.

5.2.5 *Do LURs or ICs-Controlled Recognized Conditions (CRECs) Exist?*—If *CRECs* there are no exist, there will likely be certain *LURs continuing obligations* or triggered including either *ICs continuing obligations* directly applying to *AULs* that were employed, established, or relied upon in connection with a *response action* at the *property*, and/or there are *continuing obligations*