

PERSPECTIVE

Diffuse Anthropogenic Pollution and Its Potential Affect on Brownfield Development and the Landowner Liability Protections to CERCLA

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Diffuse anthropogenic pollution (DAP) is derived from human activities, as opposed to those occurring in natural environments without human influences. The term is often used in the context of environmental externalities in the form of chemical or biological wastes that are produced as by-products of otherwise purposeful human activities. For instance, it is widely believed that the production of carbon dioxide is the primary factor driving anthropogenic climate change.

DAP sources result from broad-scale activities that cannot be differentiated as readily as single, site-specific discharges. The most obvious of these activities is agriculture, but urban land development, forestry, the urine of mammals, wastewater treatment plant effluent discharges, and atmospheric deposition can also be important general sources. A second wave of pollutants, the so-called emerging contaminants, is suspected of causing even greater adverse effects in both humans and wildlife. These intermediates and end products of the chemical and pharmaceutical industry are often not regulated and minute in concentration, and, as a consequence, no routine monitoring programs exist.

By its very nature, the management of DAP is complex and requires the careful analysis and understanding of various natural and anthropogenic sources. It has been recognized that, with respect to the ubiquitous occurrence of anthropogenic and natural chemical substances, soils pose a key zone since this environmental compartment may store, filter, and transport water and dissolved pollutants. Moreover,

soils can act as a secondary source that releases pollutants into adjacent compartments, such as groundwater, surface water, or sediments.

Another challenge posed by DAP is the need to evaluate these contaminated compartments on a large scale, which necessarily requires a fundamental understanding of processes in a multicompartmental environment, requiring the involvement of resources from different scientific-technical disciplines, in addition to socioeconomic factors and other driving forces.

The challenges posed by the presence of DAP becomes even more complicated when considering the legal framework and liability scheme established through the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the Superfund (enacted by Congress on December 11, 1980), and its negative effects on brownfield redevelopment. Brownfield sites are defined by the EPA as “abandoned or underutilized industrial or commercial properties where redevelopment is hindered by possible environmental contamination and potential liability under Superfund for parties that purchase or operate these sites.”

Landowners often choose to abandon or *mothball* their property and develop on *greenfields* instead because of the uncertain liability they may otherwise face. Mothballing increases urban sprawl and reduces tax revenues. Additionally, environmental justice issues are raised because poorer communities often feel the brunt of the mothball problem since brownfields are usually located in the more economically depressed communities.

The more recent landowner liability protections (LLPs) afforded through the Small Business Liability Relief and Brownfields Revitalization Act (signed into law on January 11, 2002) were designed to encourage brownfield redevelopment. These so-called Brownfield Amendments created two new types of defenses to CERCLA liability to accompany the original *innocent landowner defense*, wherein there is no knowledge of historical contaminant re-

leases on the property. The new LLPs are (a) the bona fide prospective purchaser (BFPP), who knowingly purchases contaminated property, and (b) the contiguous property owner (CPO), wherein the subject site groundwater and/or soil is impacted, as it turns out, by releases from other properties.

To qualify for any of the LLPs, a purchaser must conduct All Appropriate Inquiry (AAI); provide full cooperation with environmental agencies; comply with land-use restrictions and preserve the integrity and effectiveness of institutional and engineering controls; not be contractually affiliated with a potentially responsible party; take “reasonable steps” and exercise “appropriate care” to prevent continuing releases or threatened releases; and comply with legally required release reporting obligations.

The United States Environmental Protection Agency (EPA) final AAI Rule was published on November 1, 2005 (69 *Fed. Reg.* 66, 070), and went into effect (codified at 40 CFR Part 312) on November 1, 2006. During this same time, ASTM International updated its *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process* in order to satisfy the final AAI Rule. The updated version is known as ASTM E 1527-05.

The performance factors necessary to demonstrate AAI (i.e., to obtain an LLP) haven't changed. One must still gather information that is publicly available, obtainable within a reasonable time and cost, and practically reviewable; review the thoroughness and reliability of information gathered; comment on any material data gaps that may impact the environmental professionals' ability to draw a conclusion about releases or threatened releases; and identify conditions indicative of releases or threatened releases. Herein lies the question—that is, how does the presence or likely presence of DAP affect brownfield development and the landowner liability protections to CERCLA? To answer this question, one must address a series of underlying issues pertaining to CERCLA and the ASTM standard practice.

Does the Presence of DAP Constitute an ASTM E 1527-05 Recognized Environmental Condition (REC)?

ASTM defines RECs as

the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing *release*, a past *release*, or a material threat of a *release* [emphasis added] of any hazardous substances or petroleum products into structures on the property or into the ground, groundwater, or surface water of the property. The term includes hazardous substances or petroleum products 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 recognized environmental conditions. (ASTM 1.1.1)

Is/Was There a Release?

CERCLA section 101(22) defines *release* as 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).” The definition specifically excludes the following: any release that results in exposure to persons solely within a workplace; emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine; certain releases of source, by-product, or special nuclear material from a nuclear incident; and the normal application of fertilizers.

On its face, the presence of DAP does not appear to apply to the subject definition as there is (was) no deliberate (e.g., pumping/dumping) or accidental (e.g., spilling/

leaking) “release.” Furthermore, the fact that the EPA saw fit to exclude “emissions from the engine exhaust of a motor vehicle” seems to further support that it was not the intent of the law to regulate DAP in this fashion. That being the case, and using this line of thinking, the presence of DAP would not constitute an ASTM REC, because there is no CERCLA release.

Alternatively, one may argue that even passive migration of a hazardous substance in the form of DAP constitutes disposal, and where the source is not naturally occurring, even if that source cannot be identified, there is a CERCLA release. Such a determination of a release would necessarily lead one to the second portion of the ASTM REC definition wherein it states, “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.” Note that the issue is not whether an appropriate governmental agency actually seeks enforcement, but rather whether the presence of DAP could be subject to enforcement. Thus, the *de minimis* determination is complicated but could lead one to determine that the DAP does constitute a REC.

To bring even further complication into the mix, consider that the ASTM REC definition also states that a REC can occur when there exists “hazardous substances or petroleum products even under conditions in compliance with laws.” Remember, the occurrence of a release does not mean that liability can be established or, if it can be established, that it would be assigned to the owner of the subject property. If the source of the contamination/release is not the subject property, the property owner and purchaser are not liable for the contamination, if they have not and do not add to the extent of the release or exacerbate the impacts. Thus, there can be a release without a determination of liability (or the assignment of liability) to every property owner whose property is contaminated. The contamination and the release are still there, but the liability for the contamination may lie elsewhere.

The dilemma is that the decision to not consider the DAP a REC could result in a purchaser buying a property without full disclosure of the property conditions. Liability does not equate with cleanup costs. A new owner may not be legally liable for contamination but still be faced with the cost of cleaning up the property. Therefore, knowing it is contaminated prior to setting the purchase price is very valuable information. Furthermore, when considering the specific case of a brownfield redevelopment, and where the BFPP defense is sought, there are so-called continuing obligations, including, for example, taking “reasonable steps” and exercising “appropriate care” to prevent continuing releases or threatened releases, and complying with legally required release reporting obligations. These obligations must be honored in order to maintain the defense, and yet they could be completely missed if the DAP was not identified as a REC at the conclusion of the Phase I Environmental Site Assessment.

How Should DAP Be Treated in the Context of an E 1527-05 Phase I Environmental Site Assessment?

The ASTM standard actually allows for considerable interpretative flexibility in this regard. Whether or not one believes that there is a “release” does not preclude one from appropriately alerting the user regarding the risk(s), liabilities, and potential continuing obligations (reasonable steps and notifications, as applicable) regarding the presence of DAP. The user alert can come in many forms, but I have specifically selected two examples, one reflecting the conclusion of a REC and the other embracing the ASTM concept of business environmental risk, to address the issue.

You may be of the camp that acknowledging the presence of DAP as a REC is consistent with the original CERCLA directives of exercising due care with respect to hazardous substances by identifying commonly known or reasonably ascertainable information and the presence or likely presence of contaminants that are obvious (e.g., polyaromatic hydrocarbons (PAH) in soils). If this is your position, then you may be able to justify inclusion of DAP as a REC in the same manner that petroleum prod-

ucts were added to the ASTM standard to begin with. [That is, even though petroleum products are not defined as hazardous substances, the statute directs the defendant to undertake all appropriate inquiry “consistent with good commercial or customary practice.” Paragraph 9601(35)(B) and thus the presence (or likely presence) of a petroleum release has been added to the ASTM standard.] Furthermore and consistent with the ASTM standard, you could offer an opinion regarding “additional appropriate investigation” to ascertain the nature and scope of the continuing obligations, which ensures that your concerns are expressed within your report.

You may determine that the presence of DAP does not constitute a REC, but you do believe that it represents a “Business Environmental Risk,” as defined by ASTM (3.2.11), and thus your concerns regarding that risk can be properly identified within the Opinions section of your report.

In conclusion, the entire matter of addressing the presence of DAP within the context of a due-diligence effort in connection with a commercial real estate transaction simply comes down to a matter of interpretation. Reasonable professionals can (and will) disagree in this regard. Personally, I am less concerned with the direc-

tion of one’s answer than I am with their ability to connect the dots properly in such a manner as another environmental professional can follow their logic in the use of the standard, and the user (i.e., the client) and individual who will be relying on the defense is properly sensitized to the importance of the presence of DAP.

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