



EPA Issues Final Rule Adopting New ASTM Phase I Standard

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BY: CHANNING J. MARTIN

On December 30, 2013, EPA issued a final rule to amend its “All Appropriate Inquiries” Rule (AAI Rule) that sets forth the standards and practices for conducting all appropriate inquiries under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The final rule references the recently adopted ASTM International E1527–13 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,” commonly referred to as the “ASTM Phase I Standard,” and encourages all persons conducting all appropriate inquiries to use the new ASTM standard to comply with the AAI Rule. The amended rule became effective when issued.

The AAI Rule sets standards and practices (i.e., all appropriate inquiries) that prospective purchasers of property must undertake with respect to past ownership and use of the property to qualify for protection from liability under CERCLA. Under the amended rule, persons seeking to qualify for one of CERCLA’s landowner liability protections will meet the standards and practices for all appropriate inquiries if they follow the procedures provided in the new ASTM E1527–13 Standard. EPA made this determination based upon the agency’s finding that the ASTM E1527–13 Standard complies with the AAI Rule.

The ASTM E1527-13 Standard is similar to the previous ASTM E1527-05 Standard and was issued by ASTM International in accordance with its protocol for review of its standard practices and guides. (ASTM typically reviews and revises or re-issues its standards every eight years.) The changes to the standard are based upon expertise and experience gained by ASTM members and practitioners in the field since the 2005 standard was published. In EPA’s view, these changes enhance the usefulness of the standard in identifying potential releases and threatened releases of hazardous substances at commercial and industrial properties.

Now that the ASTM E1527-13 Standard is available, EPA has concluded that the agency should not continue to recognize the prior ASTM E1527-05 Standard. This reverses the decision EPA made in

August, 2013 that both the old and new standard could be used. That decision led to an outcry from environmental attorneys, consultants, developers and lenders who said that having two standards would lead to confusion and possibly litigation between parties. Nevertheless, the old standard is not yet invalid for purposes of AAI and won't be until EPA formally amends the AAI Rule to remove the current reference to it. Deleting the old standard from the AAI Rule was not proposed in any of EPA's earlier actions, so the agency intends to propose this separately to provide an opportunity for public comment.

In issuing its amended rule, EPA said, "Although today's action will not remove the current reference in the All Appropriate Inquiries Rule to the ASTM E1527-05 standard, EPA agrees with commenters that the revised ASTM E1527-13 standard includes improvements to the previous standard and its use will result in greater clarity for prospective purchasers with regard to potential contamination at a property. Therefore, EPA recommends that environmental professionals and prospective purchasers use the ASTM E1527-13 standard." EPA commented that ASTM E1527-13 reflects evolving best practices. In particular, EPA believes it enhances the delineation of recognized environmental conditions and makes important revisions to clarify that Phase I environmental site assessments must include an assessment of the real or potential occurrence of vapor migration.

Based on our experience in reviewing ASTM Phase I site assessments, we anticipate it will take some time for purchasers and users to get comfortable with the new standard. We continue to believe that a legal review of site assessments for compliance with the AAI rule and the ASTM Phase I Standard is prudent to enhance the likelihood that the applicable CERCLA landowner liability defenses will be available.

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- Channing J. Martin – 804.420.6422 – cmartin@williamsmullen.com

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