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Update: EPA's Issues Final Rule on ASTM E1527-13 Standard for "All Appropriate Inquiries"

EPA reversal on continued acceptance of ASTM E1527-05 modifies rules for CERCLA defenses and redefines baseline for environmental diligence.

On December 30, 2013, the US Environmental Protection Agency (EPA) published a final rule (Final Rule) adopting ASTM E1527-13 as a standard satisfying the "all appropriate inquiries" (AAI) requirement for landowner liability defenses under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[1] In contrast to its August 2013 direct final rule, which EPA subsequently withdrew, EPA affirmatively recommends that Phase I environmental assessments follow the standards set forth in ASTM E1527-13 and has announced its intention to publish a proposed rule to replace the regulatory reference to ASTM E1527-05 with ASTM E1527-13, rather than referencing both as acceptable standards for Phase I assessments.

Background

AAI is a critical element in establishing certain landowner liability defenses available under CERCLA. While CERCLA imposes strict liability for current owners of contaminated property, the Act also establishes statutory defenses for current owners who acquire contaminated property but are not responsible for the contamination and do not impede the remediation process. One element common to each such defense is AAI, a showing that, prior to acquiring the property, the landowner made reasonable inquiries to determine whether the property had existing contamination. The requirements for AAI have been set forth as part of the All-Appropriate Inquiries Rule (AAI Rule) promulgated by EPA.[2] Once EPA adopts a standard developed by ASTM International[3] as AAI-compliant, prospective landowners may satisfy the AAI element of the CERCLA landowner liability defenses by obtaining an assessment that meets the ASTM standard. Generally, the ASTM E1527 standard establishes requirements for conducting environmental site assessments, commonly known as Phase I assessments.

In August 2013, EPA released a direct final rule adopting ASTM E1527-13 as AAI-compliant (based on the draft ASTM E1527-13 standard released in early 2013), along with a companion proposed rule inviting public comment.[4] EPA typically issues a direct final rule when the agency does not expect a rule to be controversial, with the direct final rule becoming final if no negative comments are received. With respect to the August 15 direct final rule, EPA received a number of negative comments and, as a result, withdrew the direct final rule on October 29, 2013.[5] EPA has now adopted the Final Rule, based on the companion proposed rule that it issued concurrently with the direct final rule.

EPA received a number of comments focused on the potential issues with the dual-standard regime created by the proposed rule, which would allow purchasers to satisfy AAI by completing a Phase I complying with either ASTM E1527-13 or the prior standard, ASTM E1527-05. Some commenters were

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concerned that, unless EPA expressly required use of E1527-13, parties would continue using E1527-05 as a less expensive and less rigorous way to satisfy the AAI requirement.[6]

On November 1, 2013, the final version of "ASTM E1527-13: Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" became effective with its formal release by ASTM International.[7] ASTM E1527-13 is the first update of the ASTM E1527 standard for Phase I Environmental Site Assessments since 2005.[8]

EPA's Final Rule

In its Final Rule, EPA formally adopts E1527-13 as compliant with the AAI Rule,[9] and states the agency's intent to amend the AAI Rule by removing references to the E1527-05 standard.[10]

The final ASTM standard is consistent with the draft standard released in February 2013 (discussed in Latham & Watkins Client Alert: EPA Adopts ASTM E1527-13 as Additional Standard for "All Appropriate Inquiries") and the final standard is very similar to the prior standard, ASTM E1527-05. The most significant changes from ASTM E1527-05 include:[11]

- *New Designation for Risk-Based Closures*: A new term, "Controlled Recognized Environmental Condition" (CREC) now applies to situations where hazardous substances remain in place post-remediation under risk-based restrictions or conditions (*e.g.*, engineering or institutional controls). The definition of "Historical Recognized Environmental Condition" (HREC) is now limited to situations where past contamination has been addressed to unrestricted residential standards.

- *Vapor Intrusion Pathway Must be Considered*: The definition of "migrate" now expressly includes releases that migrate in the subsurface as vapor. Consultants preparing Phase I assessments under the updated standard will need to assess possible indoor air quality impacts from vapor intrusion pathways if there is subsurface soil or groundwater contamination at or near the subject site.

- *HRECs Evaluated Against Current Regulatory Criteria*: The revised definition of HREC requires consultants to assess whether a past release that would otherwise be identified as a HREC should, in fact, be designated as a Recognized Environmental Condition (REC) under current regulatory standards. Consequently, a release previously fully investigated and remediated may need to be designated as a current REC if the past remediation does not satisfy current, more stringent regulatory criteria.

In its Federal Register release publishing the Final Rule, EPA recommends use of the updated ASTM standard, which the agency considers an improved, more rigorous standard that incorporates evolving best practices.[12] EPA believes that ASTM E1527-13 will result in a clearer presentation of information of interest to prospective landowners, particularly regarding prior contamination or potential obligations or restrictions on future use.[13]

Although parties may avail themselves of the updated standard to demonstrate compliance with the AAI Rule, as with the prior ASTM standard, an ASTM-compliant Phase I is not the exclusive means of establishing that a party has conducted AAI under the AAI Rule. Moreover, establishing AAI is not alone sufficient to establish CERCLA landowner liability defenses, which have other requirements — for example, compliance with continuing obligations such as land use restrictions. Whether a party has complied with the AAI Rule and established the other necessary elements of a CERCLA landowner liability defense is a fact-specific inquiry, and that determination inherently depends on the circumstances presented by the subject property and the steps taken by the prospective purchaser.

Conclusion

EPA's Final Rule adopts ASTM E1527-13 as the standard for satisfying AAI. Prospective landowners whose goal is to qualify for CERCLA landowner liability defenses should use the updated ASTM E1527-13 standard to avoid raising questions regarding compliance with the AAI component of the defense. In all events, environmental assessments based on the ASTM standard are frequently used in the lending and acquisition markets and participants in such markets should anticipate that ASTM E1527-13-compliant Phase I assessments will become the market standard with this Final Rule.

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Endnotes

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1 78 Fed. Reg. 79319 (Dec. 30, 2013).

2 40 C.F.R. Part 312.

3 The ASTM Phase I Environmental Site Assessment standards are released by ASTM International, an organization which develops various technical standards.

4 78 Fed. Reg. 49690 (Aug. 15, 2013); 78 Fed. Reg. 49714 (Aug. 15, 2013).

5 78 Fed. Reg. 64403 (Oct. 29, 2013).

6 In reality, this risk may have been mitigated by market pressure from lenders and buyers to use the newer standard, as well as the reluctance of prospective landowners to risk a court ruling in any future CERCLA litigation that an assessment under the old ASTM standard no longer satisfied the AAI requirement.

7 *See* ASTM Release #9504, ASTM International Approves Latest Revisions to Standard for Phase I Environmental Site Assessment Process (Nov. 6, 2013), available at http://www.astmnewsroom.org/default.aspx?pageid=3254; BNA Daily Environment Report, "New ASTM Standard for Phase 1 Property Assessments Updates Condition Definitions," 246 DEN A-14 (Dec. 23, 2013).

[8] EPA adopted ASTM E1527-08, a standard for environmental site assessments for forestland and rural property, as a separate standard in 2008. That standard is not impacted by the current rulemaking.

[9] 78 Fed. Reg. 79319 (Dec. 30, 2013).

[10] 78 Fed. Reg. 79321 (Dec. 30, 2013).

[11] To facilitate an understanding of the differences between the updated ASTM E1527-13 Phase I Environmental Site Assessment Standard and the previous ASTM E1527-05 ''Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,'' EPA placed in the docket for the new rule a document entitled ''Summary of Updates and Revisions to ASTM E1527 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process: How E1527-13 Differs from E1527-05.'' EPA identifies 11 differences between the ASTM E1527-05 and E1527-13 standards.

[12] 78 Fed. Reg. 79321-79322 (Dec. 30, 2013).

[13] 78 Fed. Reg. 79322 (Dec. 30, 2013).