

ALERTS

Environmental Law Alert - Environmental Site Assessments In The New Year

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By final rule issued Dec. 30, 2013, U.S. EPA has updated the environmental site assessment standard for “all appropriate inquiries” (AAI) under the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The EPA rulemaking adopts the new version of the ASTM Phase I environmental site assessment standard (E1527-13) which replaces the 2005 version previously approved by EPA as satisfying AAI.

AAI requirements are critical to assess environmental conditions arising from past operations at a property, so that an owner or operator can qualify for the bona fide prospective purchaser, innocent landowner or contiguous property owner defenses to CERCLA strict liability (and often for state law counterparts).

As we [previously reported](#), EPA on Aug. 15, 2013 promulgated direct final and proposed rules allowing the use of either the 2005 or 2013 ASTM Phase I standard to satisfy AAI. In response to adverse comments objecting to this uncertainty and suggesting the 2013 ASTM standard was superior, EPA withdrew its previous direct final rule on October 29 ([as we predicted in September](#)).

However, the EPA's Dec. 30 final rule effectively adopts the previously proposed rule providing that ASTM E1527-13 is equivalent to AAI, but does not remove the 2005 ASTM standard from the regulation. Rather, EPA only recommends use of the 2013 ASTM Phase I standard, and also indicates that it will propose to remove the reference to the 2005 ASTM Phase I standard in the “near future” by a subsequent rulemaking.

In endorsing the 2013 ASTM Phase I standard, EPA states that utilizing the new version will provide “greater clarity for prospective purchases with regard to potential contamination at a property.” 78 Fed. Reg. 79319 at 79321. Differences between the 2005 and new 2013 ASTM standards include definitions of different types of Recognized Environmental Conditions (RECs) (including “Controlled” and “Historical” RECs), regulatory file review procedures, and clarifications on vapor migration assessment in the Phase I process as described [in our previous Alert](#).

For more information, contact the Barnes & Thornburg attorney with whom you work, or one of the following attorneys in the firm's Brownfields & Environmental Transactional Diligence group: David R. Gillay, Chair, at david.gillay@btlaw.com, 317-231-7474; Charles Denton at charles.denton@btlaw.com, 616-742-3974; Timothy Haley at timothy.haley@btlaw.com, 317-231-6493; Joel Bowers at joel.bowers@btlaw.com, 574-237-1287; or Bruce White at 312-214-4584 or bruce.white@btlaw.com.

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