

ALERTS

Environmental Law Alert - “Innocent” Purchasers Beware: U.S. EPA Withdraws New Environmental Site Assessment Standard

September 12, 2013 | [Atlanta](#) | [Chicago](#) | [Columbus](#) | [Delaware](#) | [Elkhart](#) | [Fort Wayne](#) | [Grand Rapids](#) | [Indianapolis](#) | [Los Angeles](#) | [Minneapolis](#) | [South Bend](#)

As discussed in our Aug. 15, 2013 Alert, U.S. EPA promulgated a direct final rule with a new standard of “All Appropriate Inquiry” (AAI) for would-be “innocent” or “bona fide” prospective purchasers and tenants published that same date, in which EPA proposed to allow the use of either the current 2005 ASTM standard for “Phase I” Environmental Site Assessments or the new ASTM standard E1527-13 to satisfy AAI.

There have been several adverse comments that criticize the uncertainty created by the concurrent applicability of both alternative standards – which have important differences-- because EPA’s direct final rule failed to provide one standard practice applicable to all transactions after its effective date.

Whenever EPA issues a direct final rule, they also issue a proposed rule in case (as occurred here) the Agency receives adverse comments. If EPA withdraws the direct final rule (as indicated here), the Agency merely moves forward with the proposed rulemaking process. The direct final rule withdrawal does not mean that EPA might not promulgate the comparable regulation through the regular rulemaking procedure merely because the direct final process did not work due to its strict administrative limitations. Note also that the direct final rule on AAI would not have become effective until Nov. 13, 2013 anyway – while unlikely that EPA would act that quickly, it is not impossible for EPA to respond to comments and issue a final rule around that time – so perhaps there would effectively be no “gap” period.

Because EPA received adverse comments, it now appears that EPA will withdraw the direct final rule and will promulgate a revised AAI rule; however, it is unclear whether the new proposal will simply adopt the new 2013 ASTM standard, clarify that EPA intends for there to be a transition period during which both Phase I ESA standards might be applicable, or leave the existing 2005 standard as the only federally endorsed AAI standard. The last alternative would potentially undermine and de-value the lengthy ASTM process recently concluded to develop the new Phase I standard, and would also invite inconsistencies in the marketplace where real estate developers, lenders and consultants may employ the new ASTM standard but the legal requirement for contaminated property liability protections would remain based on the old Phase I standard.

Stay tuned...

For more information, contact the Barnes & Thornburg attorney with whom you work, or one of the following attorney’s in the firm’s Brownfields & Environmental Transactional Diligence group: David R. Gillay, Chair, at

RELATED PEOPLE



Joel T. Bowers

Partner
South Bend

P 574-237-1287
F 574-237-1125
joel.bowers@btlaw.com



Charles M. Denton

Partner
Atlanta, Grand Rapids

P 616-742-3974
F 404-264-4033
charles.denton@btlaw.com



David R. Gillay

Partner
Indianapolis

P 317-231-7474
F 317-231-7433
david.gillay@btlaw.com



Bruce White

Partner
Chicago

P 312-214-4584
F 312-759-5646
bruce.white@btlaw.com

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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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