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## ENVIRONMENTAL LAW

# EPA Moves to Require New All Appropriate Inquiries Standard

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*Special to the Legal*

As a result of a series of actions initiated by the U.S. Environmental Protection Agency (EPA) last summer to modify and upgrade its Standards and Practices for All Appropriate Inquiries Rule at 40 C.F.R. Part 312 (AAI Rule), prospective property purchasers, lenders and their environmental consultants have been eagerly awaiting greater clarity as to what practices to follow in performing pre-purchase environmental due diligence. On June 17, the EPA proposed a rulemaking intended to bring closure to the upgrading process that instead brought incremental clarity and some continuing confusion.

### BACKGROUND

The AAI Rule sets out the acceptable scope of inquiry to follow to secure three defenses to liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Sections 9601 et seq. (CERCLA): the innocent landowner defense (purchasers who look for, but don't find contamination), the bona fide prospective purchaser defense (purchasers who look for and do find contamination), and the contiguous property owner defense (purchasers adjacent to a contaminated property). All of these defenses require "all appropriate inquiries" into the previous ownership and uses of the property to be acquired



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"in accordance with good commercial and customary standards and practices" and satisfying other conditions. The AAI Rule specifies who must make the inquiries (primarily an "environmental professional" meeting the qualifications in the rule) and the basic elements of what the inquiries must include (e.g., interviews, government record reviews, environmental lien searches, visual inspections, and findings as to the presence of conditions indicating a release or threatened release of contamination).

### EPA STARTS TRANSITION TO NEW INDUSTRY STANDARD

Until last August, the EPA had specified in the AAI Rule that use of the 2005 Standard Practice for Environmental Site Assessments: Phase 1 (Phase 1 ESA Standard) developed by the American Society for Testing and Materials (ASTM)—ASTM E-1527-05—was the sole industry standard that was acceptable to meet the requirements in the AAI Rule (except for forested and rural

property, addressed by another ASTM standard). That standard, adopted by ASTM in 2005 when the AAI Rule was promulgated, provided a set of practices that gave further guidance to environmental professionals and prospective purchasers in carrying out the AAI Rule. While parties seeking the CERCLA defenses could meet the AAI Rule by simply following the rule itself, following the ASTM standard gave greater comfort of compliance and is often required by lenders.

Last August, in anticipation of ASTM's adoption of an upgraded version of its Phase 1 ESA Standard (ASTM E-1527-13), the EPA published a direct final rulemaking that allowed for the use of both E-1527-05 and, when adopted, E-1527-13, to comply with the AAI Rule. That action yielded a final rule while the EPA still accepted comments on and reserved the right to withdraw the rulemaking in the face of adverse comments. No other changes were made to the AAI Rule. Apparently, the EPA expected the market would gravitate to E-1527-13 without direct EPA action to require a transition that might potentially disrupt ongoing transactions using E-1527-05.

### DIFFERENCES IN THE ASTM STANDARDS?

Some commenters have maintained that E-1527-13 represents a significant and more costly departure from E-1527-05, while others (including the EPA and ASTM) maintain that the new standard

merely provides guidance and clarification as to what the AAI Rule or the old standard required. For present purposes, the major differences between the two standards relate to the following:

- The scope of the government records review: The new standard clarified the nature of the records review so as to mandate a fuller (and more costly) records review instead of only a government database review in a far larger number of cases than previously.

- The definition of a “recognized environmental condition” (REC): REC is ASTM’s terminology for conditions indicative of a release or threatened release of contamination, that would point to the need for further investigation. E-1527-13 arguably narrowed the definition of “historic” RECs—RECs that have been remediated to the satisfaction of the regulatory agency and are no longer considered to be RECs—and added a new category called “controlled” RECs—considered to be RECs even though they are controlled with engineering or institutional controls. This change might increase the number of RECs at some sites, giving pause to purchasers or lenders.

- Vapor migration assessment: Changes made under E-1527-13 clarify that part of the evaluation of the property for the presence of RECs was an assessment of the actual or potential migration of vapors. Previously, assessment of vapor migration was not uniformly evaluated and, therefore, this could also lead to more costly Phase 1 ESAs.

## **EPA REEVALUATES, ASTM ACTS, EPA REACTS**

Adverse comments were submitted to the August 2013 AAI Rule proposal on (1) the asserted differences in the ASTM standards, (2) the confusion that would be engendered by allowing use of both standards, and (3) the counterproductive nature of an EPA action intended to foster the use of the new ASTM standard while also allowing the use

of an arguably less costly and less protective earlier standard. In the face of adverse comments, the EPA withdrew the rulemaking Oct. 29, 2013, at which point the only acceptable industry standard under the AAI Rule was E-1527-05.

Shortly thereafter, on Nov. 12, 2013, the ASTM adopted E-1527-13 and superseded E-1527-05 and on Dec. 30, 2013, the EPA again published a final rule amending the AAI Rule that allowed for

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the use of the newly final E-1527-13 and the ASTM-superseded E-1527-05. This time, however, the EPA recognized that it would have to develop a scheme to force transition to the new standard, and promised future action toward that end.

Notably, in the December 2013 rulemaking, in allowing use of both ASTM standards, the EPA continued to take the position that E-1527-13 merely provided clarification and guidance as to what was already required under the AAI Rule (and presumably by E-1527-05), and that the AAI Rule itself had not changed. In doing so, it made specific reference to the government records review and vapor migration assessments, which some had felt were expansions of the previous AAI requirements. These EPA statements are likely to haunt those who believed they had valid Phase 1 ESAs under E-1527-05 dating back to 2005 that lacked adequate government records reviews or vapor assessments. Such statements could be used in future litigation by parties seeking to pierce a CERCLA defense to liability

based on a Phase 1 ESA using the 2005 ASTM standard.

## **EPA REQUIRES TRANSITION TO ASTM E-1527-13**

The latest incremental step toward replacing E-1527-05 with E-1527-13 in the AAI Rule took place June 17, at which time the EPA finally proposed a rule for public comment that would eliminate use of E-1527-05. The EPA also noted that because “some parties” may still be using E-1527-05, it was proposing to apply a delayed effective date of one year after publication of the final rule to afford sufficient time to fully transition to E-1527-13. In doing so, the EPA recognized that transactions were likely in process for which Phase 1 ESAs had been completed or Phase 1 ESAs were ongoing using E-1527-05 and in light of the E-1527-13 “modifications,” environmental professionals, real estate professionals and lenders might need time to become familiar with the new standard.

Although parties are still free to use ASTM E-1527-05, potentially until late 2015 (taking account of the one-year effective date and the time needed to finalize the rule), that seems to be a risky proposition in view of EPA’s caution that there has been no change in the rule and that some, if not all, of what E-1527-13 contemplates was already contemplated under the AAI Rule and/or E-1527-05. Moreover, conservative lending institutions are likely to push the standard practice toward E-1527-13 sooner than later. Whether the cost of compliance will increase, as many have predicted, will play out in short order, but purchasers that want to preserve their CERCLA defenses are best advised to insist that their environmental professional follow ASTM E-1527-13. •

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