**EPA's Rule On ASTM May Bring Confusing Two-Tier System**

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In a direct final rule and proposed rule published in the Aug. 15 issue of the Federal Register[1], the U.S. [Environmental Protection Agency](http://www.law360.com/agencies/environmental-protection-agency) announced that parties seeking to comply with the “all appropriate inquiries”[2] (AAI) rule may use a forthcoming version of the ASTM standard practice for performing phase I environmental site assessments (known as E1527-13)[3].

Owners and operators of property who seek to qualify for various liability protections under the federal Comprehensive Environmental Response, Compensation and Liability Act[5] are required to comply with AAI prior to taking title or control over property.

However, to the dismay of many in the commercial real estate and financing sectors and to the astonishment of many on the ASTM task force that worked on E1527-13, the agency also said that the less stringent and less expensive earlier version of the ASTM standard (E1527-05) could continue to be used to satisfy AAI.

Property owners, lenders and their counsel are concerned that this dual standard will cause confusion in the marketplace and make it more difficult to qualify for the already elusive CERCLA liability protections. Because of these concerns, several negative comments have been filed, and more will be filed before the public comment period ends on Sept. 16.

**Background**

CERCLA imposes strict liability on four categories of responsible parties including current owners or operators of property for the cleanup of releases of hazardous substances even if the contamination occurred prior to the time the owner acquired title, or the operator came into possession of the property.[6]

Property owners or operators may try to qualify for one of the following CERCLA affirmative defenses: the third-party defense,[7] innocent landowner (ILO),[8] the Bona Fide Prospective Purchaser (BFPP)[9] and the contiguous property owner (CPO).[10] The ILO, BFPP and CPO are commonly known as the landowner liability protections (LLPs).

To qualify for one of the LLPs, a property owner or operator must put “all appropriate inquiries” into the past use and ownership of the site[11] prior to taking title or possession among other requirements.[12] After taking title or possession, parties must also comply with certain “continuing obligations” to maintain the LLPs.[13]

When the EPA promulgated its AAI rule in November 2005,[14] the EPA determined that E1527-05 could be used to satisfy AAI. This decision was largely applauded by the commercial real estate and financing industry because the ASTM is more proscriptive than the performance-based AAI.

ASTM standard practices expire after eight years. In anticipation of the expiration of E1527-05, an ASTM task force met over the past few years to determine if the standard could simply be reissued in its current form or if changes were warranted. The task force made minor definitional changes to help environmental consultants better understand their responsibilities.[15]

However, the task force also adopted a significant change to the section of the standard that discusses the obligations of the environmental professional to review agency files and records. Many low-cost and high-volume providers of phase I reports do not routinely include file reviews in the standard phase I scopes of work, but they included this work as an additional task, for which they charged an additional fee.

E1527-13 now creates a presumption that consultants should review agency files or explain why such a review is not necessary.

**EPA Erred in Concluding the Action Was Not Controversial**

A number of the low-cost phase I providers intensely objected to proposed agency file review at the task force meetings and conference calls because they said they would be unable to price the additional costs when bidding on projects. The majority of the ASTM task force supported this change, believing this would improve the quality of phase I reports and also put all consultants bidding for work on an even-playing field.

Despite the fact that an EPA representative was a member of the ASTM task force and was present at meetings where the agency file review was debated, the agency concluded in the preamble to the direct final rule and the proposed rule that the changes made to E1527-13 the new ASTM changes were not significant or controversial and that the agency did not anticipate any adverse comments.

To support this conclusion, the EPA placed a document titled, “Summary of Updates and Revisions to ASTM E1527 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” regulatory docket. This document mischaracterized the significance of the differences between E1527-13 and E-1527-05.

This document minimizes the differences between the two ASTM versions to the point that the EPA has essentially eviscerated the value of the revision. This document renders the changes so meaningless that it will give users little reason to use the more expensive E1527-13.

The EPA appears to have acted arbitrarily and capriciously when accepted representations from ASTM leadership that the changes were noncontroversial and mere clarifications without independently verifying this conclusion by soliciting input from the industry sectors impacted by the rule.

**Proposed Rule Will Result in a Confusing Two-Tier Phase I Market**

The EPA’s decision to approve ASTM E1527-13 while also allowing ASTM E1527-05 to remain as an acceptable alternative for complying with AAI will create chaos and confusion in the marketplace and create a permanent two-tier diligence market that will facilitate the generation of substandard phase I reports.

The phase I market is very cost-sensitive. The existence of two equally valid standards will inevitably lead to the market selection of the lower-priced E1527-05. Indeed, the EPA appears to have recognized this possibility in the preamble when it states that the direct final rule would not result in significant economic costs because parties had the flexibility to continue using E1527-05.[16]

There was much debate within the ASTM task force on how the revised agency file review requirement will add to the cost of the standard phase I. Despite the fact that an EPA representative was present for these heated debates, the agency concluded in the preamble to the direct final rule that E1527-13 will not result in significant costs to small businesses. It appears that EPA did not make any effort to evaluate the cost issue raised at the ASTM meetings and conference calls.

Despite this awareness about the concerns over pricing of phase I reports, the EPA made no effort to independently assess the financial impact of the change before concluding that the changes embodied by E1527-13 were not controversial and mere clarifications.

By so doing, the EPA appears to have acted arbitrarily and capriciously. Indeed, by simply posting a question on a social media page used by environmental professionals and lawyers, this author was able to solicit comments that estimated the costs of the file reviews could increase phase I costs from anywhere from a few hundred dollars to up to 60 percent of the phase I cost, depending on the state and the type of property.[17]

For example, originators of commercial mortgage-backed securities (CMBS), who play a vital role in commercial real estate financing, compete for mortgage applicants in an extremely cost-competitive business environment. As a result, CMBS lenders are always concerned about getting out in “front of the market.”

CMBS originators comply with underwriting guidelines issued by rating agencies. Currently, the rating agencies require CMBS originators to comply with E1527-05. Despite the important role that the rating agencies play in the CMBS market, the rating agencies did not actively participate in the ASTM task force work.

Until the rating agencies change their underwriting guidelines to mandate use of E1527-13, it is unlikely that CMBS lenders will start requiring the more expensive version of E1527 out of fear that the additional costs associated with E1527-13 will put them at a competitive disadvantage with lenders only requiring E1527-05.

The existence of concurrent standards will not only cause confusion in the market but also will likely result in increased litigation challenging the sufficiency of the phase I investigations performed over the past seven years that used the E1527-05 standard.

Moreover, one can also envision litigation arising from the continued use of E1527-05 after the EPA's approval of the E1527-13. This will cause property owners to become confused over how to comply with AAI and could unnecessarily inject further uncertainty about liability concerns over brownfield sites, which already have a host of challenges.

Since ASTM first issued E1527 in 1993, the standard has been revised four times. The EPA appears to have accepted the assurances of ASTM that having both E1527-05 and E1527-13 as acceptable methods for achieving AAI will not create market disruptions because the market has, in the past, transitioned to the newer version of E1527 when ASTM stopped selling the prior version.

However, what is different from the prior experience with adoptions to E1527 is that this time, the expiring version of E1527 is embedded in regulatory language. Prior to the 2002 amendments to CERCLA that required the EPA to promulgate its AAI rule, there was no regulatory or statutory standard.

The EPA did issue a notice in the Federal Register when it began developing AAI that E1527-00 would serve as an "interim rule," but this interim standard ceased to be effective when AAI was promulgated. The continuing presence of E1527-05 in the AAI rule is a game changer.

Instead of having the industry coalesce around one standard, the EPA's action will cause a two-tier system to become set in stone. So long as the AAI allows for use of E1527-0505, cost-sensitive borrowers and lenders are going to use this standard. It is the regulatory language that is the key determinative factor, not whether ASTM is selling a new and improved product.

The legislative history of CERCLA and numerous judicial opinions have held that Congress intended all appropriate inquiries to reflect evolving notions of "good commercial or customary practice.[18] The ASTM task force identified deficiencies in the E1527-05 standard that required the changes reflected in E1527-13. This calls into question whether E1527-05 remains "good commercial or customary practice,” which is what AAI is supposed to represent.

ASTM has essentially concluded that E1527-05 was not satisfying "good commercial or customary practice” and needed to be revised. Accordingly, the EPA appears to have a statutory obligation to select E1527-13 as the ASTM alternative standard for complying with AAI and could make the agency susceptible to a finding that it acted arbitrarily and capriciously if the agency’s failure to identify E1527-13 as the sole ASTM standard for performing AAI on commercial real estate is challenged in court.

The ASTM task force worked hard to improve E1527 and the author who chaired the legal subcommittee believes that it is a better product than the current ASTM E1527-05 standard practice. The EPA’s decision to approve ASTM E1527-13 while also allowing ASTM E1527-05 to remain as an acceptable alternative for complying with AAI undermines all of that hard work and will facilitate the generation of substandard phase I reports.

The ASTM phase I standard is critical for property owners to qualify for the CERCLA liability protections. The EPA should withdraw its direct final rule, issue a new proposed rule that provides that E1527-13 would be the sole alternative for complying with AAI standard for commercial real estate transactions after the effective date of the amended rule.

In the meantime, ASTM should publish E1527-13 and embark on an educational process while the EPA completes its rulemaking.

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[1] The direct final rule is at 78 FR 49690 -49693 (8/15/13) and the proposed rule is at 78 FR 49714 – 49716 (8/15/13)

[2] 40 C.F.R. 312

[3] ASTM International's E1527-13 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process”

[4] 42 U.S.C. 9601 et seq.

[5] 42 U.S.C. §9607(a)(1)

[6] 42 U.S.C. §9607(b)(3). To satisfy the third-party defense, an owner or operator has to demonstrate by a preponderance of the evidence that (i) the release was solely caused by a third party;(ii) whom the defendant did not have a direct or indirect contractual relationship; (iii) the defendant exercised due care with respect to the contamination; and (iv) took steps against foreseeable acts or omissions of third parties.

[7] 42 U.S.C. §9601(35)(A)

[8] 42 U.S.C. §9601(40)

[9] 42 U.S.C. §9607(q).

[10] 42 U.S.C. §9601(40)(B). EPA promulgated its AAI rule at 40 C.F.R. 312.

[11] The other pre-acquisition requirements include All disposal of hazardous substances occurred before the purchaser acquired the property, 42 U.S.C. §9601(40)(A), and the purchase did not have an improper affiliation with a responsible party. 42 U.S.C. §9601(40)(H).

[12] 42 U.S.C. §9601(40)(C)-(G)

[13] 70 FR 66070 (11/1/05). The rule became effective on November 1, 2006. In December 2008, EPA amended AAI to recognize ASTM E2247-08 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property” as compliant with AAI. The E1527 is used for performing phase 1 investigations on commercial property while E2247 is used for large rural or undeveloped properties.

[14] A complete analysis of the changes will be discussed in a future article once the fate of E1527-13 is determined.

[15] “Today’s action will potentially increase flexibility for some parties who may make use of the new standard, without placing any additional burden on those parties who prefer to use either the ASTM E1527–05 standard, the ASTM E2247–08 standard, or follow the requirements of the All Appropriate

Inquiries Final Rule when conducting all appropriate inquiries.” 78 FR at 49692.

[16] This thread is available at: http://www.linkedin.com/groups/How-Much-Will-ASTM-E1527-3607181.S.269595794?qid=3746caf3-ad46-44b5-afa8-307dd58215ac&trk=groups\_most\_popular-0-b-ttl&goback=%2Egmp\_3607181%2Eanp\_3607181\_1378261265967\_1%2Egmr\_3607181%2Egmp\_3607181

[17] See H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. (1986)(“ the standard of "all appropriate inquiry" was intended to evolve continuously and "[defendants] shall be held to higher standards as public awareness of the hazards associated with hazardous substance release has grown. . . .”). See also EPA 1989 “De Minimis Landowner Settlements, Prospective Purchaser Settlements” (acknowledging evolutionary nature of all appropriate inquiry).