

Superfund Report - 08/19/2013

EPA Backing Of Dual Brownfields Due Diligence Standards Draws Concern

Posted: August 16, 2013

EPA has officially endorsed an updated private-sector standard for meeting the agency's due diligence requirements that are used to determine whether parties are exempt from cleanup liability at brownfields, but the agency's decision to continue to allow use of an earlier version of the standard is raising concerns from those who crafted the new approach.

Larry Schnapf, a brownfields attorney who was involved in drafting the new standard, says in an Aug. 15 blog post that EPA's approach "is a terrible idea that will continue to allow the market forces that caused substandard phase I [site assessment] reports to be issued under the old . . . standard to continue."

The agency was widely expected to declare that the new standard developed by ASTM International, and known as E1527-13, is equivalent to EPA's All Appropriate Inquiries (AAI) rule, which outlines the due diligence steps for documenting previous ownership, uses and environmental conditions of a former industrial property in order to qualify for certain landowner liability protections under the Superfund law (*Superfund Report*, July 22).

But in a direct final rule and proposed rule published Aug. 15 in the *Federal Register*, EPA says that while E1527-13 is equivalent to the AAI rule, the agency is not requiring use of the standard and will allow an earlier version of the ASTM standard, E1527-05, as well as a similar standard known as E2247-08, to continue to be used. *The rule is available on InsideEPA.com. (Doc ID: [2444151](#))*

If EPA does not receive adverse comments on the rule by Sept. 16, the amendment to the AAI rule will go into effect Nov. 13. But if EPA receives negative comments on the direct final rule, as appears likely, the agency will withdraw the rule and respond to comments.

Sources involved in crafting the new ASTM standard say they are outraged over EPA's decision to allow continued use of the older standard, which is generally less stringent because it requires less detailed record searches to determine possible contamination and does not require consideration of possible vapor intrusion risks on par with other potential exposures as the new standard does.

"This is a surprise to me and was not discussed within the ASTM Task Group that I recall," says one source. "This will cause unnecessary confusion and undermine the attempt at greater clarity that the proposed revision was intended to achieve."

This source says EPA may be trying to ensure that existing preliminary studies of potential contamination at a site, known as phase I environmental site assessments, would not be undermined by endorsement of a new standard, but that could better be addressed by a clarification rather than considering the old standard equal to the new one.

And Schnapf adds that the ASTM task force "worked long and hard to reach an agreement with numerous stakeholders on ways to improve E1527-05 standard. EPA's proposed amendment will do nothing but undermine this effort," he says.

Schnapf tells *Inside EPA* that he is considering submitting negative comments on the direct final rule.

Schnapf says the new standard is likely to increase the cost of conducting phase I assessments because it presumes that reviews of state and local agency files on the property will be performed.

While many clients presumed that a detailed search of agency records was conducted as part of their phase I assessment, some firms producing the reports use independent contractors who are paid a flat fee and have no incentive to conduct additional work beyond a database search and a cursory site visit, a second source familiar with the task force says.

But because EPA is allowing the continued use of the older standard, many property owners and lenders will opt for the cheaper and quicker E1527-05 version of the standard, Schnapf says in his blog post.

"We suspect the fact that ASTM considers the 05 version as outdated or replaced will be trumped by the regulatory language until and unless a court decides otherwise," Schnapf writes.

He concludes by saying, "Should EPA really be in the business of encouraging recipients of federal funds to use a less rigorous investigation?"

A second significant change between the older version and E1527-13 clarifies the role of vapor intrusion in phase I reports, saying that it is the same as any other exposure pathway in identifying a "recognized environmental condition" (REC), sources say.

While some attorneys are nervous EPA will say the vapor intrusion pathway should have been identified all along, the second source believes the change will have little effect in most cases because if there is the potential for vapor intrusion, there is likely another underlying REC, such as contaminated groundwater or soil, that is already recognized.

2444242

Superfund Report - 08/19/2013, Vol. 27, No. 17

© 2000-2013. Inside Washington Publishers