

| Brownfields

EPA Moves To Eliminate Confusion Over Brownfields Rule Standards

EPA has finalized a "due diligence" rule that aims to clarify which private-sector standards can be used to determine whether parties are exempt from cleanup liability at brownfields, encouraging the use of the latest voluntary standard and pledging to conduct a separate rulemaking to remove all references to an older industry standard.

In the final rule, published in the Dec. 30 *Federal Register* and effective immediately, EPA says that parties seeking liability relief under the Superfund law's landowner liability protections, as well as recipients of brownfields grants for conducting site assessments, will be considered to have met the requirements in the All Appropriate Inquiry (AAI) Rule if they follow the procedures in an ASTM International voluntary standard known as E1527-13. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc ID: 2456800)*

The agency's earlier proposed version of the rule, issued before ASTM had finalized E1527-13 in November, said either the new ASTM standard or an older version issued in 2008 would satisfy AAI requirements.

But that proposal drew sharp criticism from some attorneys and others who lambasted the agency's backing of dual standards for creating confusion over which standard should apply (*Superfund Report*, Sept. 16).

EPA officials told ASTM members in October the agency would clarify the issue in the final rule, and sources said they expected EPA to encourage the use of the new standard in the rule's preamble but not remove references in the rule to the older standard (*Superfund Report*, Oct. 14).

Larry Schnapf, an attorney who was one of the critics of EPA's proposal, says in a Dec. 31 blog posting that the final rule is an improvement over the proposal in that it attempts to remove confusion over which standard should be used. But he says the agency's comments on the new standard's discussion of vapor intrusion may open the door to retroactive liability for sites where the vapor intrusion pathway was not evaluated.

EPA says in the final rule that it "agrees with commenters that the revised ASTM E1527-13 standard includes improvements to the previous standard and its use will result in greater clarity for prospective purchasers with regard to potential contamination at a property. Therefore, EPA recommends that environmental professionals and prospective purchasers use the ASTM E1527-13 standard."

The agency adds that, "[i]n the near future," it plans to publish a proposed rulemaking to remove references to the older ASTM standard, E1527-08, from the AAI rule. "By taking such action the Agency's intent will be to promote the use of the current industry standard and reduce confusion associated with the regulatory reference to a standard no longer recognized as current by ASTM International and no longer marketed by the standards development organization as reflecting its current consensus-based standard," EPA says.

Key differences between the two standards include a presumption in the new standard that detailed record searches be conducted and a call for the potential for vapor intrusion to be considered like any other contaminant pathway.

The new standard also creates a new definition to address past contamination that may still be present on the site but that has been addressed through a risk-based cleanup.

EPA says in the final rule that it views the changes in the new standard "as valuable improvements and strongly encourages" the use of E1527-13 when conducting all appropriate inquiries. The agency, however, notes in a response to comments document that while parties may use industry standards to comply with regulatory requirements, the baseline standard for conducting all appropriate inquiries remains the standards and practices outlined in the underlying AAI rule.

On the issue of vapor intrusion, "EPA wishes to be clear that, in its view, vapor migration has always been a relevant potential source of release or threatened release that, depending on site-specific conditions, may warrant identification when conducting all appropriate inquiries," the agency says, noting that both the AAI rule and the older ASTM standard

already call for the identification of potential vapor releases or migration, to the extent they are indicative of a release or threatened release. Nonetheless, the revised standard "will help reduce previous confusion on how to conduct a thorough all appropriate inquiries investigation," EPA says.

Schnapf says in the blog post that EPA's statements "seem to reinforce the fears that many lawyers expressed to me as chair of the legal sub-committee that was working on the ASTM revision process." These include concerns that parties who thought they had qualified for landowner liability protections because they had performed an AAI-compliant investigation may now suddenly not qualify because they did not consider the vapor intrusion pathway, Schnapf says, as well as concerns over the possibility that EPA's statements could be used by clients in malpractice or breach of contract against consultants who failed previously to evaluate the vapor pathway.

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"[T]he uncertainty created by EPA's statements in the preamble and response document is going to be unsettling to some property owners," Schnapf writes. "It will also provide ammunition to plaintiffs' counsel who could use these statements as evidence that the defendant property owner" breached a duty it owed to plaintiffs and was therefore negligent because of its failure to comply with a regulatory requirement.

Schnapf concludes, "EPA may not have been the Grinch that stole Christmas but this certainly was not a good New Year's Eve present for property owners and environmental professionals."

ASTM officials have said industry will naturally transition to the newer standard, in part because contracts for performing a phase I environmental assessment often include clauses requiring the use of the more recent industry standard. But some attorneys have raised concerns that as long as the references to the older standard remain in the AAI rule, some parties will continue to use the older version.

EPA in the response to comments says it "intends to monitor the uptake of the new ASTM E1527-I3 across the commercial and industrial real estate sector to see if" the expectation for a quick transition to the newer standard is borne out.

Several commenters, including some who were part of the original Federal Advisory Committee Act panel that developed consensus language for the AAI rule in 2004, also urged the agency to change its definition of environmental professional in the AAI rule.

But EPA says in the final rule that such comments were outside the scope of the proposed rulemaking, and the agency therefore did not respond to those comments.