

# EPA Plans To Withdraw Controversial Rule On Brownfields Due Diligence

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EPA will withdraw a controversial direct final rule updating brownfields due diligence requirements used to assess whether parties are exempt from cleanup liability, following adverse comment from observers who warned the plan risked creating regulatory confusion given that the agency also continues to endorse an earlier standard.

Instead, the agency will formally rescind the direct final rule published in the Aug. 15 *Federal Register* and proceed with a simultaneously proposed version of the regulation issued the same day. EPA will now assess comments received on the proposed version and use that to inform an upcoming final rule, the agency says. According to the statement, the reason for pulling the direct final rule is that EPA has "received adverse comments on the proposed rule."

At press time at least two comments critical of amending the standards and revising practices for all appropriate inquiries (AAI) on brownfields cleanups to recognize dual industry standards had been submitted to EPA's regulatory docket for the rule, and sources say at least one more negative comment is expected to be filed before the Sept. 16 comment deadline.

Numerous law firms issued legal alerts or posted blogs after EPA issued the direct final rule, raising concerns that allowing the continued use of the older environmental diligence standard while endorsing the new approach could be very confusing for landowners, potential purchasers, environmental consultants and attorneys. At least one of the comments EPA received on the rule said it risked creating "chaos and confusion" for brownfields cleanups.

And an Aug. 28 comment by Samuel Johnson, a professional geologist with Targus associates, says EPA's rule "is fundamentally flawed in that it states that two different levels of diligence both meet the standard of all appropriate inquiry." *Relevant documents are available on InsideEPA.com. (Doc ID: [2446412](#))*

Several attorneys say they will advise their clients that using the newer standard will result in a better work product but that the older standard is still valid for AAI requirements. But there remains a lot of confusion over having two standards, a one attorney says. "Lots of people are upset that there is no guidance on when to use which standard."

EPA in the statement says budget constraints related to the sequestration played no role in the agency's decision to allow use of the dual standards. But some attorneys doubt that

claim, with a second attorney questioning whether EPA has the budget to quickly conduct a more thorough rulemaking than the direct final rule.

The first attorney says, "EPA really punted on the issue." ASTM International, the private-sector organization that developed the standard, is recommending changes based on industry pressure that there are some deficiencies in the current standard, the source says. But EPA "took the path of least resistance," the source says, adding that doing so makes it seem as if a limited budget played a role.

Ahead of the rule's release, EPA had been expected to declare ASTM's latest version of the standard, known as E1527-13, as meeting the process-based requirements in the 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.

Instead, EPA in the rule said that while the updated standard 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 (*Inside EPA*, Aug. 23).

EPA's decision surprised many brownfields experts who had been following the ASTM standard revision process, with several sources saying allowing continued use of the older standard will cause unnecessary confusion and undermine ASTM's attempt to provide greater clarity on the actions necessary to meet AAI. The sources had expected that the agency would say E1527-13 replaces the older version for AAI requirements.

Key differences between E1527-05 and -13 are 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.

Attorneys and other brownfields experts say the new record search mandate is likely to increase the cost of performing phase I assessments, but estimates of the amount of the increase vary widely. Some sources, especially those who are already performing record searches or who work in states with extensive online records, say the extra cost will only be \$400 to \$500 per assessment. Other sources say costs could increase by \$1,000 or more per report.

**In the direct final rule's preamble, EPA says it determined it was reasonable to promulgate the clarification to the AAI rule as a rule that is effective immediately,** rather than delay promulgation of the clarification until after the receipt and consideration of public comments. The E1527-05 standard is scheduled to expire at the end of the year, and ASTM has the options of allowing it to expire, reissuing the standard unchanged or issuing an updated version. Attorneys following the revision process say ASTM could

issue the updated version of the standard without EPA approval but that ASTM prefers only to issue the new standard if EPA's approval is final.

EPA's decision to withdraw the direct final rule and conduct a notice-and-comment rulemaking, therefore, would likely delay ASTM's ability to issue a revised standard, the sources say.

Julie Kilgore, principal and managing partner at Wasatch Environmental, Inc., and the chairwoman of the ASTM E1527 task group, said in an online discussion on the LinkedIn social networking site after EPA issued the rule that ASTM only asked EPA to reference E1527-13 as in compliance with the AAI rule, which is the same procedure ASTM followed in 2005, and there was nothing ASTM or EPA did that would render the older standard non-compliant with AAI.

Because the underlying AAI rule has not changed since 2005, "EPA has no basis for stating in 2013 that the 2005 version is no longer compliant with AAI, and ASTM did not ask EPA to withdraw its reference to the 2005 version," Kilgore said. EPA's role is only to determine that an alternate industry standard is no less stringent than the federal program, and in the case where there are multiple alternate standards compliant with the federal regulations, EPA does not typically state a preference for one over the other, she said.

The second attorney says EPA may have been concerned that if the agency replaced references to the older standard with the newer version, it could be charged with promulgating a retroactive standard, as the older standard may be seen as less stringent than the newer version.

Additionally, attorney Larry Schnapf said in the LinkedIn discussion that EPA may be concerned that deleting references to the older standard would raise arbitrary and capricious issues since the agency already found that the 2005 standard was compliant with AAI.

But Schnapf and the first attorney say EPA could address such concerns by saying that transactions conducted or reports prepared before the new rule was final could continue to use the older standard, and that after the rule's promulgation, the new standard would be considered equivalent to AAI.

**ASTM and some other sources, such as Sept. 9 comments to EPA from Robert Chute**, a senior project manager with Trammel Crow Company's Environmental Asset Services, say industry will naturally gravitate to the newer standard, as occurred when ASTM updated the 2000 version of E1527 in 2005.

Kilgore, in the LinkedIn discussion, says EPA asked ASTM what happens to the 05 standard once the newer standard is published. ASTM told EPA that while the older standard would remain a historical standard, and could still be used, the newer version would become the industry standard.

"By the virtue of ASTM replacing the -05 standard, EPA was satisfied that the -13 would become the industry standard and saw no need to go through a rigorous and arguable unnecessary rulemaking process that would basically duplicate what naturally occurs in industry anyway," Kilgore said.

But the second attorney says "that's a head in the sand" kind of thinking. At some point, a lawyer is going to challenge the validity of an environmental site assessment performed under the older standard, the source says.

Attorney Kenneth Gray, who served in EPA's Office of General Counsel in the 1980s, said in the online discussion that there will be continued use of the older standard because it is specifically mentioned in the AAI rule, something that was not the case during the transition from the 2000 standard to the 2005 standard.

Schnapf in Sept. 9 comments to EPA "filed on behalf of several originators and issuers of Commercial Mortgage-Back Securities and private equity clients," also raised concerns about the dual standards.

"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 sub-standard phase 1 reports," wrote Schnapf, who chaired the legal subcommittee that worked on the E1527 changes. "Indeed, my clients would have instructed me to cast a negative vote in the ASTM balloting procedure had it been known that EPA planned to adopt a dual standard approach because of their concerns over market disruptions that will flow from this ill-conceived proposal."

In his Aug. 28 comment to EPA, Johnson said that if EPA believes the scope of the older standard is sufficient and the additional elements outlined in the newer version are unnecessary, then a new rule is unnecessary.

But if EPA agrees that the changes in the newer standard "are appropriate for guiding the industry toward consistently fulfilling the intent of all appropriate inquiry, then this rule should not endorse a prior version of the standard that will be withdrawn and replaced by its publisher," he added.

"The only reasonably-anticipated outcome of this rulemaking will be the inevitable drift toward multiple standards of care (both more and less thorough) and greater uncertainty about what degree of due diligence satisfies 40 CFR [section] 312," Johnson wrote. --  
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