

Brownfields

Parties Object to EPA Decision to Allow Two Standards for All Appropriate Inquiries

EPA Rule on All Appropriate Inquiry Standards

Key Development: Some parties object to EPA's decision to allow use of a 2005 and a 2013 standard for conducting all appropriate inquiries on potentially contaminated sites.

Potential Impact: Use of both standards could lead to confusion and less environmental protection.

What's Next: If no adverse comments are received by Sept. 16, the rule will take effect Nov. 13. If adverse comments are received, EPA will withdraw the final rule.

By [*Pat Ware*](#)

An Environmental Protection Agency decision to allow the use of two versions of a voluntary industry standard for its rule on “all appropriate inquiry” assessments for brownfields is ill-advised, an environmental attorney told BNA.

“I believe it will undermine the intent behind the revisions [in the new standard] which was to correct deficiencies in the quality of Phase 1 all appropriate inquiry reports,” Larry Schnapf of the environmental law firm Schnapf LLP said in an Aug. 16 email.

As such, EPA's decision may not be as noncontroversial as the agency contended in its Aug. 15 final rule, said Schnapf, who also was chair of the legal subcommittee that worked on the more recent, ASTM E1527-13 revisions. E1527-13 will update a 2005 standard, known as ASTM E1527-05.

On April 15, EPA published a final rule providing notice that E1527-13 will take effect Nov. 13 unless the agency receives adverse comment by Sept. 16. EPA published a proposed rule the same day, saying it did not expect the final rule to be controversial and did not expect to receive adverse comment (158 DEN A-6, 8/15/13).

Environmental Due Diligence.

All appropriate inquiry, also called environmental due diligence, is the process of evaluating a property for potential environmental contamination and assessing potential liability for contamination.

Phase 1 assessments, conducted by environmental engineers or consultants, are reviews of the current and historical use of a property or building and are designed to determine whether the potential for contamination exists on a site.

The assessments also are intended to inform potential buyers, lenders, insurers, and others of the risks and liabilities they may assume with acquiring a particular property being considered for redevelopment.

New Standard More Costly?

Schnapf told BNA he believed use of both standards would undermine Phase 1 reports, as it is “widely anticipated” that complying with E1527-13 will be more costly than compliance with E1527-05. “I anticipate that many purchasers--and brownfield applicants--will opt for the less costly alternative,” he said.

“Thus I also believe that many of these consultants are going to try to urge their clients to use E1527-05,” he said.

Julie Kilgore, chair of ASTM's Phase 1 Environmental Assessment Task Force that developed E1527-13, told BNA in May 2012 that in revising E1527-05, “the complaint we heard over and over was about the poor quality of the [Phase 1] reports.” Kilgore also is president of Wasatch Environmental Inc., a Salt Lake City-based company that provides environmental engineering science and infrastructure services (98 DEN A-1, 5/22/12).

Substandard Phase 1 Reports.

Schnapf said he had been raising the issue of substandard all appropriate inquiry (AAI) reports since 2007.

“The people at ASTM who suggested that we should give the market more time to adjust to AAI and not tighten up the standard are the same ones who now profess optimism that the market will gradually migrate to using E1527-13 instead of 05,” he said.

Mark Eisner, founder, president, and principal hydrogeologist of Advanced Land and Water Inc., who conducts environmental services for clients, said in

an Aug. 18 blog post that the price and certainty of price are the primary criteria most clients use in selecting consultants for Phase 1 environmental site assessments.

Reasons to Switch.

But Matt Fox, senior engineering consultant at the real estate company EMG, said in an Aug. 19 blog post that most consultants will switch to the new standard because:

- “There is unnecessary liability is using an outdated version of the standard.”
- “It is too much trouble to offer separate product lines.”
- “Consultants will want to market the fact that they are using the new standard.”
- “The E1527 revisions are not really that big of a deal. I doubt it will change pricing in the industry much, if at all.”
- “Clients will expect consultants to use the new standard.”

Fox performs Phase 1 environmental site assessments and property condition assessments.

Schnapf told BNA, “I still think all EPA had to say was that E1527-13 would apply to transactions that occur after the effective date.”

“It will probably take only one adverse comment to the docket to derail this effort and inject some common sense into the process,” Schnapf said on the Aug. 18 blog post.

Schnapf told BNA he does not know yet if any of his lender or real estate clients will want to file a comment with EPA.

Public Review Could Be Insufficient.

Another issue raised by interested parties is that EPA is providing only a [comparison](#) of the two standards, and not a copy of the 2013 standard, for public comment.

Eisner said he finds it curious that EPA is seeking comment on the proposed rule now, although the standard has not yet been published.

“One would think the two would be timed, to give those who comment the opportunity to read the new standard before offering comments to the agency,” he said.

Schnapf said, “How can EPA expect people to comment if they can't review the underlying document?” He added that the summary made available for public comment was written by EPA and some might not agree with the agency's analysis.

Changes to Standard.

According to EPA's comparison of E1527-13 and E1527-05, among the changes in the new standard are:

- ASTM updated the definition of “recognized environmental condition”;
- ASTM updated its definition of “historical recognized environmental condition”;
- ASTM added a definition of “controlled recognized environmental condition” to the standard; and
- ASTM revised the definition of “migrate/migration” to specifically include vapor migrations.

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EPA's Aug. 15 final rule on all appropriate inquiries is available at <http://www.gpo.gov/fdsys/pkg/FR-2013-08-15/pdf/2013-19764.pdf>.

EPA's comparison of the 2013 and 2005 standards is available at <http://op.bna.com/env.nsf/r?Open=r1en-9arnup>.

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