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Brownfields

Petition to Reopen All Appropriate Inquiries Rule Planned to Address Two Key Flaws

Interested parties are planning to ask the Environmental Protection Agency to reopen its rule setting standards for conducting assessments of potentially contaminated properties to fix two "fundamental flaws," an environmental lawyer told Bloomberg BNA.

First, the parties will ask the EPA to strengthen the definition of environmental professional (EP) in the "all appropriate inquiries" rule (40 C.F.R. 312) published in 2005, said Larry Schnapf, principal of Schnapf LLC.

Second, they will ask the EPA to modify the rule to require at least some of the work on sites slated for redevelopment to be performed by the environmental professional, he said March 14.

The "consensus so far is that the site visit should be done by the EP, but we're still looking at this," he said.

The EPA proposed the rule in August 2005, which, among other things, set forth a definition of an environmental professional. In April of that year, the agency said it was considering changing the definition, either making it more stringent or more relaxed. The EPA said it received more than 400 comments on the proposed rule, the bulk of them on the proposed definition.

When it published the final all appropriate inquiries rule in November 2005, EPA chose not to strengthen the definition of environmental professional (70 Fed. Reg. 66,070, Nov. 1, 2005; [14 EDDG 88, 11/17/05](#)).

In fact, the agency "watered it down," Schnapf said.

The final rule also referenced ASTM International's Standard E1527-05 as satisfying all appropriate inquiries under the Comprehensive Environmental Response, Compensation, and Liability Act.

Nothing to Do With ASTM Standard

The upcoming petition has "nothing to do with 1527," Schnapf said. However, if the EPA modifies the AAI rule, E1527 also will have to be modified, he said.

In August 2013, the EPA published a direct final rule referencing a revised version of the ASTM standard (E1527-13) (78 Fed. Reg. 49,690, Aug. 15, 2013; [22 EDDG 72, 9/19/13](#)).

Before the 2013 rule was promulgated, some parties submitted comments to the agency urging it to strengthen the definition of EP by including minimum education requirements and relevant experience.

Other comments discussed how the current approach has led to the lowering of due diligence when Congress actually intended to strengthen the process, Schnapf said (22 EDDG 72, 9/19/13).

In its final rule, however, the EPA said the definition of an EP was outside the action for which it sought comment (78 Fed. Reg. 79,319, Dec. 30, 2013).

Bad for Small Business

E1527 is hurting small businesses because the EPA has facilitated the "commoditization" of Phase I reports with its "weak" requirements, Schnapf said in a recent LinkedIn posting. "The due diligence industry is dominated by small businesses and the standard makes it difficult for small businesses to compete with the high volume shops who have exploited the loophole that only requires AAI activities to be done under the supervision of EPs," he said in the posting.

These high volume shops have created a business model where non-EPs who are paid as independent contractors do all the work and input data on a form template report, Schnapf said. "The only 'supervision' by EPs is to put their stamped signature at the end of the report," he said in the posting.

"The many small businesses that comprise the due diligence industry are being decimated by the commoditization of the Phase I industry. And, of course, the foregoing does not include the public health risks from poorly performed Phase I reports," according to Schnapf.

Petition in Early Stages

Schnapf told Bloomberg BNA the parties interested in filing the petition are in the early stages of organizing, planning and developing the petition. The group also plans to launch a website as well as a campaign on Facebook and Twitter and organize political outreach to help effect changes, he said.

Schnapf said it was "premature" to provide names of parties interested in the petition but added there will be some "nationally recognized consulting organizations, firms and individuals" who have agreed to sign it.

Although he is pessimistic the agency will re-open the rule, Schnapf said he "would hope for a negotiation."

If the EPA denies the petition or fails to act in a timely manner on it, "we would then file a lawsuit," he said.

The planned petition wouldn't preclude potential lawsuits over other provisions of the AAI rule, he said.

The EPA told Bloomberg BNA it will review the petition once it receives it