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U.S. Environmental Protection Agency
EPA Docket Center
Docket ID No. EPA-HQ--OLEM-2021-0946
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

I am submitting this comment objecting to EPA's proposed rule (87 FR 14224-14227, March 14, 2022) and direct final rule amending 40 CFR Section 312.11 (87 FR 14174- 14177, March 14, 2022) proposing to and amending its All Appropriate Inquiries Rule (AAI) to reference the ASTM E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" (E1527-21) and allowing it use to satisfy the requirements of AAI. My objection is based on EPA's proposal to retain E1527-13 as an option to demonstrate compliance with AAI.

It defies credulity that EPA would adopt this approach after its experience in 2013 when EPA also published a proposed and direct final rule to recognize the then new E1527-13 while retaining the reference to the replaced E1527-05. This proposed approach resulted in numerous negative comments that forced EPA to withdraw the final direct rule and then commence a separate rulemaking to remove the reference to the superseded E1527-05.¹ The definition of insanity has been said to be repeating the same thing and expecting a different result. At the very least, this seems to be arbitrary and capricious.

I was extensively involved in the 2013 and 2021 revisions to ASTM E1527 Phase 1 Standard and served as chair of the legal focus group for both revisions. However, I am submitting my comments in my individual capacity as the principal of Schnapf LLC and are informed from my 38 years as a transactional-based environmental lawyer. My practice primarily concentrates on environmental risks associated with corporate, real estate and brownfield transactions; commercial financing including asset-based lending, syndicated loans, mezzanine loans and distressed debt; bankruptcy, workouts and corporate restructuring. My clients include national and local brownfield developers and a variety of lenders. I also have extensive experience with brownfield redevelopment and financing, including representing affordable housing developers and assisting local development corporations or not-for-profit organizations with their brownfield planning programs.

¹ 79 FR 60087- 60090, October 6, 2014)



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I have also written numerous articles on environmental law, am the author of “Managing Environmental Liability in Transactions and Brownfield Redevelopment” published by JurisLaw Publishing as well as a contributing author for several chapters of “Brownfield Practice and Law: The Cleanup and Redevelopment of Contaminated Properties” and the “Environmental Law Practice Guide,” both published by Lexis Publishing. I was also the general editor/contributing author of “Environmental Issues in Business Transactions” published by the Business Law Section of the ABA.

I served as the chair of the Environmental Law Section of the New York State Bar Association (NYSBA) and co-chair of the NYSBA Brownfield Task Force. I also served as the chair of the Brownfield Committee of the Environmental Business Association of New York from 2002-2008.

EPA’s proposed and final direct rule would establish a dual standard for meeting the requirements of its AAI rule which is which necessary to establish the CERCLA landowner liability protections and for brownfield grantees. Having two standards also conflicted with congressional intent when it established the CERCLA landowner liability protections.

The legislative history of CERCLA and numerous judicial opinions clearly state that Congress intended all appropriate inquiries (AAI) to reflect evolving notions of “good commercial or customary practice.” The ASTM task force spent several years reviewing E1527 and current industry practices, and determined that E1527-13 needed to be revised because of the proliferation of inconsistent and deficient reports as well as to reflect current industry practices, particularly the scope of research into the historic use of properties. Thus, E1527-21 represents what the industry now considers to be “good commercial and customary practice”. E1527-21 was also revised to response to some litigation involving deficient Phase I reports issued since E1527-13 became effective.²

EPA says in its proposed and direct final rule that retaining E1527-13 will provide brownfield developers and grantees with greater flexibility. However, the only flexibility EPA’s approach will create is to give low-cost phase providers more freedom to issue deficient reports while potentially exposing brownfield developers and grantees to greater liability. In other words, the touted flexibility will be outweighed by the consequences of this approach.

EPA’s decision to approve ASTM E1527-21 while also allowing ASTM E1527-13 to remain as an acceptable alternative for complying with AAI, will create chaos and confusion in the

² See *Von Duprin vs Major Holdings, LLC*, 12 F.4th 751 (7th Cir. 2021); *United States v. P.R. Indus. Dev. Co.*, 2021 U.S. App. LEXIS 34123 (1st Cir. 11/17/2021); *TC Rich, LLC v. Shaikh*, 2021 U.S. Dist. LEXIS 69483 (C.D. Cal. 02/22/21); *BankUnited, N.A v. Merritt Envntl. Consulting Corp.*, 360 F. Supp. 3d 172 (S.D.N.Y. 2018); *105 Mt. Kisco Assocs. LLC v. Carozza*, 2017 U.S. Dist. LEXIS 47855 (S.D.N.Y. Mar. 30, 2017); *Coppola v. Smith*, 2015 U.S. Dist. LEXIS 5127 (E.D.Cal. Jan. 15, 2015)



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marketplace. It will undermine AAI, expose these parties to potential liability and complicate brownfield redevelopment. Instead of allowing the industry to coalesce around one standard, the EPA's action will create a two-tier system.

Permitting E1527-13 to continue to satisfy AAI will allow the providers of low-cost, inferior quality reports to continue to skimp on the kind of critical historical research that E1527-21 clarifies is necessary and consistent with good commercial and customary practices. By retaining the reference to E1527-13, EPA will enable the very shoddy work that ASTM tried to address when it issued E1527-21.

Furthermore, retaining E1527-13 may continue to cause sites to be erroneously identified as having Recognized Environmental Conditions (RECs) instead of Controlled RECs (CRECs) which will cause an unknown number of brownfield sites to be unduly stigmatized since many developers and lenders are wary of sites with RECs.

Moreover, the existence of dual standards with differing requirements will result in litigation challenging assertions of property owners or operators that they complied with AAI. Concurrent standards will also expose consultants to breach of contract and professional malpractice claims.

As mentioned above, recent caselaw has injected uncertainty into what parties have to do to demonstrate compliance with AAI.³ Retaining dual ASTM standards will cause property owners to become further confused over how to comply with AAI and could unnecessarily inject further uncertainty about liability concerns over brownfield sites, which already have a host of challenges.

Since ASTM has concluded that E1527-13 no longer represented "good commercial or customary practice" and needed to be revised, EPA has a statutory obligation to select E1527-21 as the ASTM alternative standard for complying with AAI. EPA's action will actually contravene its Congressional direction for AAI to reflect evolving notions of good commercial and customary practice.

Accordingly, I request EPA follow the process it previously used by withdrawing the direct final rule and issuing a new proposed rule recognizing that that E1527-21 may be used to satisfy AAI and removing the reference to E1527-13 for commercial real estate transactions after the effective date of the amended rule.

³ The Von Duprin case, *supra*, is particularly problematic. I urge EPA to intervene in the remand to the district court. See also <https://www.environmental-law.net/2021/09/17/continuing-to-struggle-with-cercla-liability-the-7th-circuit-holds-that-a-phase-2-esa-satisfies-aa/>



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Very Truly Yours,

A handwritten signature in black ink, which appears to read 'Larry Schnapf', is written over the typed name. The signature is fluid and cursive, with a large initial 'L' and 'S'.

Lawrence Schnapf