

EPA Proposes to Eliminate Dual Standard for “All Appropriate Inquires” under CERCLA

By Amy E. Gaylord

EPA Proposes Rule to eliminate the dual standard for compliance with the “All Appropriate Inquiries” requirement for the Innocent Purchaser, Bona Fide Prospective Purchaser and Contiguous Property Owner Defenses to CERCLA.

The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) imposes strict liability for the costs of environmental contamination on four classes of responsible parties, including current owners of contaminated properties. The statute provides liability for even “innocent owners” who had nothing to do with the contamination-causing activities. The Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Act”) of 2002 provided funds for brownfields revitalization and amended CERCLA to provide some liability relief for certain types of property owners. Specifically, the Brownfields Act limited CERCLA liability under Section 107 (42 U.S.C. § 9607) for bona fide prospective purchasers and contiguous property owners, and clarified the requirements for an innocent landowner defense. One of the requirements to qualify for these defenses is that a purchaser of contaminated property must undertake “all appropriate inquiries” (“AAI”) into prior ownership and prior uses of the site. 42 U.S.C. § 9601(35)(B).

In 2005, EPA promulgated regulations establishing standards and practices for conducting AAI. 70 Fed. Reg. 66070; 40 C.F.R. pt. 312 *et seq.* Specifically, EPA authorized use of ASTM¹ E1527-05 “Standard Practice for Environmental Site Assessment Process” (commonly called “Phase I” assessments) to comply with AAI requirements.² Phase I environmental site assessments are standard industry tools prepared by environmental professionals to evaluate the potential for environmental contamination at a property. They commonly include a review of databases and historical records to identify other potential sources in the vicinity of the property, a site inspection, interviews with key personnel about the property’s historical use, and an evaluation of known or reasonably ascertainable information about the property. Phase I assessments do not typically include sampling or laboratory analysis.

¹ ASTM International is an international standards organization that develops and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services.

² In 2008, EPA further authorized use of ASTM E2247-08 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property” (73 FR 78716) to comply with AAI requirements.

In November 2013, ASTM published an update to the Phase I standards contained in ASTM E1527-13. In addition to minor definitional changes, the 2013 revision to ASTM E1527 adopted one significant change; the new version requires the environmental professional conducting the Phase I to undertake a review of agency files and records about the property. This extensive review is not required by the 2005 standard and is commonly treated as an “add-on” for Phase I assessments.

On December 30, 2013, EPA published a final rule authorizing use of ASTM E1527-13 to comply with the AAI Rule. 78 Fed. Reg. 79319. This final rule did not remove reference to the 2005 standard. Thus, although EPA made clear that reliance on the updated ASTM Phase I standard would satisfy a purchaser’s AAI obligations under CERCLA, EPA left significant uncertainty as to whether a Phase I without agency file review was sufficient to meet AAI requirements because EPA did not remove the reference to the 2005 Phase I standard.

Commentators prophesized that this dual-qualification system for complying with the AAI Rule would result in significant confusion in the market, cost disadvantages to small businesses, uncertainty about liability concerns over brownfield sites, and ultimately litigation. While this predicted parade of horrors has not been observed at any significant level, last week EPA issued another Proposed Rulemaking to eliminate the potential confusion. On June 17, 2014, EPA proposed to amend the AAI Rule in 40 CFR 312 to remove the reference to ASTM E 1527-05. According to EPA’s proposal, the “proposed action removes the reference to a standard that ASTM International no longer recognizes as current and that it no longer represents as reflecting its current consensus-based standard.” 79 Fed. Reg. 34480.

For properties acquired between November 1, 2005 and the effective date of the Proposed Rule, the 2005 ASTM standard will satisfy the AAI Rule. Further, to accommodate investigations which may be ongoing at the time the rule goes into effect, EPA anticipates a one-year delay in the effective date of the final action to provide adequate time for parties to complete ongoing investigations and become familiar with the updated 2013 standard. EPA is accepting comments on the Proposed Rule until July 17, 2014.

Conclusion

Although use of the 2013 ASTM standard will be slightly more expensive, the elimination of the dual standard for compliance with the AAI Rule should not be controversial. A single standard will reduce uncertainty in the application of the innocent purchaser, bona fide prospective purchaser, and contiguous property owner defenses to CERCLA. It also will reduce the potential for litigation over compliance with this standard for purposes of the AAI defense.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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