

EPA Clarifies Standards for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Assessments

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In a move designed to provide greater certainty to those purchasing, selling, or evaluating industrial or commercial properties, the **Environmental Protection Agency (EPA)** recently proposed to remove any lingering effect of ASTM International's E1527-05, a nine-year-old industry standard practice for evaluating potentially contaminated sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

As explained in detail in our February 24, 2014 E-Alert, "[Amended All Appropriate Inquiries \(AAI\) Rule Offers New Due Diligence Standard, Focuses on Vapor Releases](#)," the EPA referenced and countenanced ASTM International's updated framework, E1527-13, as an alternative due diligence standard to ASTM E1527-05. Issued on June 16, 2014, the Proposed Rule would clarify Phase I Environmental Site Assessment (ESA) standards by replacing ASTM E1527-05 with ASTM E1527-13. Yet these requirements still leave significant uncertainty in the absence of more detailed guidance about how to conduct vapor intrusion evaluations.

I. Background

International standards organization ASTM International modeled E1527-05 on the EPA's All Appropriate Inquiries (AAI) Rule in 2005. The AAI Rule is a due diligence standard that allows buyers of potentially contaminated properties who conduct an investigation meeting the rule's requirements to preserve certain defenses to federal cleanup liability under CERCLA when conducting Phase I ESAs. See 40 C.F.R. § 312 (2013). The ASTM E1527-05 framework was developed to provide guidance for such investigations, and instructed would-be purchasers to

undertake all appropriate inquiries regarding the condition of a property before completing its sale. Any buyer who conducted such inquiries in compliance with ASTM E1527-05 could then qualify for certain landowner liability protections under CERCLA, including the innocent landowner, bona fide prospective purchaser, and contiguous property owner defenses.

Last December, the EPA amended the AAI Rule to allow a purchaser to satisfy Phase I ESA requirements by following either ASTM E1527-05 *or* ASTM E1527-13. See 78 Fed. Reg. 79319 (Dec. 30, 2013). As explained in our February 24, 2014 E-Alert, the 2013 framework included new regulatory file review requirements, updated definitions of certain key terms, including “de minimis condition,” “release,” “Recognized Environmental Condition,” and “Historical Recognized Environmental Condition,” and expanded ASTM E1527-05’s definition of “migrate/migration” to include vapor migrations.

II. Proposed Rule

The EPA amended the AAI Rule through direct final rulemaking, an approach whereby an agency publishes a rule and a notice of proposed rulemaking simultaneously because it expects that the rule will prove non-controversial. But the move nonetheless introduced confusion because in endorsing both ASTM E1527-05 and ASTM E1527-13, it recognized two distinct standards.

Responding to that criticism, the EPA has now proposed to replace ASTM E1527-05 with ASTM E1527-13 for purposes of the AAI rule so as “to reduce any confusion associated with the regulatory reference to a historical standard” and “promote the use of the standard currently recognized by ASTM International as the consensus-based, good customary business standard.” Amendment to Standards and Practices for All Appropriate Inquiries, 79 Fed. Reg. 34480 (proposed June 16, 2014) (to be codified at 40 C.F.R. 312), at 11. Besides removing all references to ASTM E1527-05, the Proposed Rule would not alter the substance of the AAI Rule.

III. Implications

ASTM E1527-13 incorporates new language about the need to evaluate soil vapor risk when conducting Phase I ESAs. Soil vapor intrusion is of particular focus with respect to TCE and other volatile organic compounds, but can also involve other contaminants. The EPA has suggested, however, that a vapor intrusion evaluation may already have been required under ASTM E1527-05. In its preamble to the rule offering ASTM E1527-13 as a new due diligence standard, the agency stated that it “in its view, vapor migration has always been a relevant potential source of release or threatened release that, depending on site-specific conditions, may warrant identification when conducting all appropriate inquiries.” 78 Fed. Reg. 79319 (Dec. 30, 2013). It is unclear, however, whether the EPA intended this statement to reflect near contemporary Phase I ESAs (conducted after ASTM E1527-13 was developed) or instead intended to suggest that the obligation has always existed. Consequently, there may be future disputes as to whether a Phase I ESA not describing an evaluation of soil vapor intrusion actually satisfied the AAI Rule.

ASTM E1527-13 leaves open a number of key questions about vapor intrusion evaluations. Neither ASTM E1527-13 nor the AAI Rule describes, for example, what levels in soil gas or groundwater should lead to concern or what levels would require mitigation. The EPA and various states are developing guidance in this area to further clarify acceptable levels, how evaluations are to be conducted, whether one can evaluate risk based upon groundwater conditions alone, whether an evaluation must consider multiple lines of evidence, what vapor levels would be deemed acceptable in a residential setting, and what actions are required to mitigate risk.^[1]

IV. Conclusion

Consultants have already been transitioning toward the ASTM E1527-13 standard. Should the Proposed Rule be adopted, ASTM E1527-05 will still satisfy the AAI Rule for properties acquired between November 1, 2005 and the effective date of the new action. The EPA also anticipates providing for a delayed effective date of one year following any final action, to give those still using the previous framework time to complete ongoing investigations and become familiar with the updated standard.

However, it is important to recognize the potential that the EPA may claim that a failure to evaluate soil vapor, where otherwise appropriate, is a requirement under ASTM E1527-05 and not only ASTM E1527-13. It is therefore essential that potentially-affected individuals keep current on EPA developments with respect to the evaluation of soil vapor intrusion, and obtain sound and up to date advice from environmental professionals.

^[1] See <http://www.epa.gov/oswer/vaporintrusion/index.html>.

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