

ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



EPA Allows New Standard for Conducting Environmental Due Diligence

On August 15, 2013, the United States Environmental Protection Agency (EPA) published a proposed and “direct final” rule that expands the options available to parties seeking to qualify for certain defenses to liability under Superfund and other laws. This change will provide prospective purchasers with additional choices when conducting environmental due diligence. Although it will take some time for the market to catch up with this change, it is likely that conducting due diligence using this newest approach will add additional cost and time to a proposed real estate transaction.

Background

When acquiring commercial or industrial real estate, it is critical to conduct due diligence into the environmental conditions and prior uses of the target property. Understanding these conditions not only allows the purchaser to evaluate the potential limitations and risks associated with the property, but this due diligence can also be used to establish defenses to environmental liability. For example, under the federal Superfund law (CERCLA), *bona fide* prospective purchasers and other “innocent” landowners can be protected from certain environmental liability if they undertake “all appropriate inquiry” (AAI) into the prior ownership and uses of a property before acquiring it.

EPA has established specific standards and practices for conducting AAI (the AAI Rule), and in doing so, specifically recognized ASTM’s 2005 Standard for conducting Phase I Environmental Site Assessments (ASTM E1527-05) as being compliant with the AAI Rule. ASTM is currently revising its 2005 Standard, which will be published as ASTM E1527-13 (the 2013 Standard) when finalized. EPA’s proposed rule would provide parties with the option of using either the 2005 Standard or the new 2013 Standard when conducting AAI.

The 2013 Standard

EPA noted in the proposed rule’s preamble that the agency reviewed the 2013 Standard and determined that there are only “slight differences” between the AAI Rule, the 2005 Standard and the 2013 Standard. ASTM has not yet finalized the 2013 Standard, therefore EPA developed and placed a document in the proposed rule docket that provides a comparison of the two ASTM standards. Among the significant revisions in the 2013 Standard noted by EPA are the following:

- Vapor Intrusion: ASTM’s revisions to the 2013 Standard clarify that vapor migration of contaminants may constitute a Recognized Environmental Condition. An environmental professional performing a Phase I under the 2013 Standard, therefore, must assess potential impacts to a subject property from vapor migration in much the same way that potential groundwater contamination concerns are addressed.

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- Regulatory Record Review: ASTM added guidance in the 2013 Standard that an environmental professional should review regulatory agency files and records when the subject property or an adjacent facility is identified in a government database search.
- Definitions: ASTM revised several definitions which, in effect, require an environmental professional to review past corrective actions at a subject property as well as some neighboring sites, and provide available information on contamination left in place and related use limitations and restrictions.

From EPA's perspective, the use of the 2013 Standard would be completely voluntary. In the proposed rule's preamble, EPA expressly states that the action "does not require any party to use" the 2013 Standard, and parties may continue to follow the requirements of the AAI Rule or use the 2005 Standard when performing AAI. The decision of which standard to use will be up to the party seeking protection and will be based on several factors, including costs, timing, property type and business risk tolerance. Of course, if a lender is involved in the transaction, it is possible that it will require that the more stringent 2013 Standard be followed – whether EPA considers the newly revised Standard voluntary or not. With the additional procedures of looking deeper into completed cleanups at a property, addressing vapor migration and expanded review of regulatory agency files, there is little doubt that Phase I assessments performed under ASTM E1527-13 will involve additional costs and require more time to complete.

EPA is accepting written comments on the proposed rule until September 16, 2013, and the rule will become effective on November 13, 2013 if the agency does not receive adverse comments. If timely negative comments are received, EPA will withdraw the "direct final" rule and will respond to the comments in deciding whether to move forward as currently proposed.

If you have any questions regarding the use of ASTM's 2013 Standard for conducting AAI or any other issue regarding environmental due diligence, please contact Lindsay P. Howard at (412) 394-5444 or lhoward@babstcalland.com, Michael C. Murphy at (412) 394-6428 or mmurphy@babstcalland.com, or any of the other attorneys in our Environmental Services Group.