

## EPA Recognizes the New ASTM Standard for Environmental Due Diligence

Effective December 30, 2013, the US Environmental Protection Agency (EPA) revised its regulations at 40 C.F.R. part 312 that outline due diligence standards and procedures that are of interest to purchasers and prospective tenants of real property, as well as to secured lenders. Following the revised due diligence standard should result in better and more informative environmental site assessment reports; however, some increased cost is likely, and some of the requirements may cause delays that should be taken into account in planning the schedule for a transaction.

The due diligence standard, conducting “all appropriate inquiries” (AAI) before an acquisition, is one of the bases for a prospective purchaser of real property, or a prospective tenant in certain circumstances, to qualify for a defense to liability for pre-existing contamination under the Comprehensive Environmental Response, Compensation and Liability Act.<sup>1</sup> In adopting the AAI standard in 2005, EPA referenced ASTM E1527-05, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, and authorized its use as a way to satisfy the AAI requirement. As revised, the regulations now state that the newly released standard for Phase I assessments, ASTM E1527-13, may be used to satisfy the AAI standards that are outlined in EPA’s regulations. The regulations still allow reliance on the earlier standard, but EPA recommends use of the new standard and states that it plans to propose a rule change to delete any reference to ASTM E1527-05 from the AAI regulation.

The new ASTM standard requires some additional steps in the due diligence process that seem likely to increase the cost of the standard Phase I environmental site assessment, and possibly increase the lead time a purchaser, tenant or lender needs to take into account in its planning. Some changes that could result in additional cost or delay are outlined below.

- **Clarification on vapor intrusion:** The earlier ASTM standard excluded indoor air quality from the scope of the Phase I assessment. ASTM E1527-13 now provides that the potential for petroleum or hazardous substance vapors to migrate through the subsurface and affect indoor air quality should be addressed in the Phase I assessment. EPA stated in the notice accepting the new standard that identification of vapor intrusion arguably was already part of the earlier ASTM standard and EPA’s AAI standard; however, it acknowledged that the indoor air quality exclusion could have caused some property assessors to overlook that risk. The standard is now clear that AAI includes assessment of the real or potential occurrence of vapor migration and associated releases to indoor air.
- **Evaluation of regulatory records on the target property or adjoining property:** AAI requires review of environmental records about a target property and other properties within a certain distance from a

<sup>1</sup> The standard also affects persons receiving Brownfields grants and seeking to demonstrate qualification for other CERCLA landowner defenses, including the contiguous property owner and innocent landowner defenses to liability. In guidance issued December 2012, EPA stated it could exercise enforcement discretion to treat a tenant as a bona fide prospective purchaser if it follows the AAI standard and otherwise meets requirements for the defense.

target property to identify potential environmental concerns. The records are identified through an environmental database search and provide limited information. For example, a record may identify cleanup of a previous release of contaminants, but it may not include details on the work itself or any contamination that may remain at the property. ASTM E1527-13 states that the environmental professional should review the underlying regulatory records and evaluate the sufficiency of the information available or justify the failure to conduct the review in the Phase I report. That kind of record review may require ordering copies of agency records or an inspection of the records at the regulatory agency office. The standard does not require review without regard to cost or delay, and does not change the earlier standard of what is “reasonably available” for review (accessible within 20 days of the request). The standard also allows the environmental professional to rely on available alternative sources of information. Although some Phase I reports completed under the old standard already included this kind of review, many did not take that extra step to evaluate the underlying regulatory records.

Some other changes to the ASTM standard do not appear likely to increase costs or delays, and are worth noting as enhancements to the standard. The new standard identifies “recognized environmental conditions” (RECs) as the presence or likely presence of hazardous substances from a release or threatened release. The revised standard now recognizes two kinds of prior releases that qualify as RECs but have been addressed to the satisfaction of regulatory authorities: “historical” RECs are those prior releases remediated to a standard allowing unrestricted use of the property and “controlled” RECs are those where regulatory authorities have signed off on the remediation subject to maintenance of engineering or other controls to prevent exposure to remaining hazardous substances.

Prospective purchasers that already have assessments underway may want to consider asking the consultant to upgrade the report to satisfy the new ASTM standard, even before the rule changes, based on EPA’s recommendation to follow ASTM E1527-13. Purchasers looking at new acquisitions should ensure that they are aware of the potential for delays and plan accordingly.

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