

EPA Recognizes New ASTM Phase I ESA Standard as Compliant with All Appropriate Inquiry Rule

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On December 30, 2013, EPA issued a final rule determining that ASTM International's recently issued standard practice for Phase I Environmental Site Assessments, E1527-13, is compliant with the federal "all appropriate inquiries" ("AAI") rule. The AAI rule sets forth the standards and practices that are required for conducting sufficient due diligence in order to establish defenses to liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). EPA had previously determined that use of the ASTM standard was compliant with the AAI rule, and had issued a direct final rule that allowed for the use of both the E1527-13 standard, and the previous E1527-05 standard. The direct final rule was withdrawn by EPA on October 29, 2013 after receiving significant adverse comment, primarily related to EPA's determination that the standards were substantially similar.

Because many of the adverse comments on its prior direct final rule surrounded EPA's decision to allow both standards as AAI, and because the ASTM's E1527-05 standard is no longer recognized as current by ASTM, EPA plans to remove the reference to the E1527-05 standard in a subsequent rulemaking and will accept public comment in that rulemaking. EPA did not remove the reference to the prior standard in yesterday's rule because it had not proposed doing that in the earlier rule, upon which it accepted public comment.

Prospective buyers, lenders, and other parties to commercial transactions should be aware of the need to use the ASTM E1527-13 standard in lieu of the 2005 standard because it has officially been recognized by EPA as constituting AAI. Please see our prior client briefing for a discussion of the principle differences between the two standards.

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