

## ALERTS

### Environmental Law Alert - Phase I Environmental Site Assessments: EPA Proposes To Drop 2005 ASTM Standard From AAI Rule

June 19, 2014 | [Atlanta](#) | [Chicago](#) | [Columbus](#) | [Delaware](#) | [Elkhart](#) | [Fort Wayne](#) | [Grand Rapids](#) | [Indianapolis](#) | [Los Angeles](#) | [Minneapolis](#) | [South Bend](#)

On June 17, EPA proposed to remove reference to the 2005 ASTM Phase I environmental site assessment standard (1527-05) from EPA's "All Appropriate Inquiry" (AAI) rule under the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). EPA's proposed rule follows the December 30, 2013, promulgation of a direct final rule in which EPA added the 2013 ASTM Phase I environmental site assessment standard (1527-13) to the AAI rule, 78 Fed. Reg. 79319.

As we reported in [Januar](#), under the December 2013 rule, EPA did not remove reference to the 2005 ASTM standard, effectively leaving in place two different ASTM standards under which AAI could be satisfied. EPA's action on June 17 fulfills the promise it made in the Dec. 30, 2013, rule to propose removal of the 2005 Phase I standard in the "near future," 78 Fed. Reg. 79320. However, EPA is also considering delaying the effective date of removing E1527-05 for one year following publication of the final rule in recognition that some parties may still be using the old E1527-05 standard to comply with AAI once EPA publishes the final rule, 79 Fed. Reg. 34482.

AAI requirements are critical to assess environmental conditions arising from past operations at a property, so that an owner or operator can qualify for the bona fide prospective purchaser, innocent landowner, or contiguous property owner defenses to CERCLA strict liability (and often for state law counterparts). Regardless of when the EPA-proposed rule becomes effective identifying the 2013 standard as the basis for satisfying AAI prospectively, the industry standard at the time environmental diligence was conducted will still apply to previous assessments; *i.e.*, a prior Phase I environmental site assessment conducted when the 2005 ASTM standard was endorsed by EPA will still provide these liability protections.

As EPA stated in today's proposed rule, "[t]he updated 2013 standard is the currently recognized industry consensus-based standard to conduct All Appropriate Inquiry under CERCLA." 79 Fed. Reg. 34481. Because the 2005 ASTM standard is no longer the "industry consensus-based standard," removing its reference in the AAI rule should eliminate any confusion for those seeking to conduct AAI as part of their environmental due diligence.

EPA will accept public comments on the proposed rule until July 17, 2014. If finalized in its current form, purchasers of real property, lenders and environmental site assessors, among others, will want to ensure that Phase I site assessments for the prospective purchase, leasing and

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financing of real property conform to the 2013 Phase I standard to qualify for liability protection under CERCLA. As we previously [reported](#), the 2013 ASTM standard includes definitions of different types of Recognized Environmental Conditions (RECs) (including “Controlled” and “Historical” RECs), regulatory file review procedures, and clarifications on vapor migration assessment in the Phase I process as described in our previous Alert.

A copy of the proposed rule is [available here](#).

As stated above, comments are due to EPA by July 17, 2014, and EPA will not remove E1527-05 from the AAI Rule until it considers all public comments.

For more information, contact the Barnes & Thornburg attorney with whom you normally work, or one of the following attorneys in the firm’s Brownfields & Environmental Transactional Diligence group: David R. Gillay, Chair, at [david.gillay@btlaw.com](mailto:david.gillay@btlaw.com) or 317-231-7474; Charles Denton at [charles.denton@btlaw.com](mailto:charles.denton@btlaw.com) or 616-742-3974; Timothy Haley at [timothy.haley@btlaw.com](mailto:timothy.haley@btlaw.com) or 317-231-6493; Joel Bowers at [joel.bowers@btlaw.com](mailto:joel.bowers@btlaw.com) or 574-237-1287; Tammy Helminski at [Iminski@btlaw.com](mailto:Iminski@btlaw.com) or 616-742-3926; or Bruce White at 312-214-4584 or [bruce.white@btlaw.com](mailto:bruce.white@btlaw.com).

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