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EPA Proposes to Delete Reference to Superseded 2005 ASTM Standard from “All Appropriate Inquiry” Rule

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On June 17, 2014, the United States Environmental Protection Agency published a proposal to delete reference to the 2005 version of the ASTM Phase I environmental site assessment standard from the federal “all appropriate inquiry” rule. This proposal would resolve a widely-criticized anomaly resulting from a December 2013 revision to the All Appropriate Inquiry (AAI) rule. The Federal Register notice of the proposed action is [here](#).

In the original AAI rule published in 2005, 40 C.F.R. Part 312, EPA recognized ASTM standard practice E1527 as an acceptable alternative means of performing the pre-purchase investigation necessary to qualify for certain landowner liability protections under the Comprehensive Environmental Response, Compensation and Liability Act. The ASTM standard referenced in the rule, revised in parallel with development of the AAI rule, was published the same year as E1527-05.

In accordance with its practice for periodic review of standards, ASTM revised and republished the Phase I standard in 2013 as E1527-13. In December 2013, EPA revised the AAI rule to recognize the new version as an alternative to AAI. In doing so, however, EPA only adopted the revised standard. The December 2013 rule change, summarized [here](#), did not delete reference to the 2005 version.

The retention of the reference to the superseded 2005 version of the ASTM standard in the AAI rule was widely criticized as a source of potential confusion. The differences between E1527-05 and E1527-13, though arguably incremental, are not insignificant. EPA itself, in the preamble to the December 2013 rule change, “recommended” and “strongly encouraged” use of the revised standard. The anomalous result was a Federal rule reference to a standard that the issuing

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organization viewed as superseded and the EPA itself seemed to disfavor.

The rule change EPA has now proposed would delete the reference to the 2005 version of E1527. The preamble to the proposal states that for properties acquired between November 1, 2005 (the effective date of the original AAI rule) and the effective date of this latest rule change, the procedures of E1527-05 will be deemed to comply with the AAI rule “as it was in effect at the time the property was acquired.” Implicitly acknowledging the transition challenge resulting from the sequence of rule revisions, EPA states that it anticipates providing in the final rule for “a delayed effective date [tentatively one year] ... to provide parties with an adequate opportunity to complete AAI investigations that may be ongoing and to become familiar with the updated industry standard (ASTM E1527-13).”

EPA’s proposed action is a logical follow-up to adoption of the revised version of ASTM E1527 and provides at least an orderly approach to addressing the much-criticized dual references to the 2005 and 2013 editions of the standard. But for parties seeking to qualify for CERCLA landowner liability protections, or simply to conduct pre-purchase inquiry consistent with “good commercial and customary standards and practices” for due diligence purposes, EPA’s proposed one-year sunset period would prolong the concerns critics have raised. In adopting the revised standard last year, EPA stated its expectation that “prospective purchasers and environmental professionals will embrace the increased level of rigor provided by the revisions and will adopt the ASTM E1527–13 standard.” This statement stands in obvious tension with the nominal retention of the 2005 standard. On the tentative implementation schedule EPA contemplates, this tension appears likely to persist at least into latter 2015 – two full years, more or less, after ASTM’s publication and EPA’s adoption of the 2013 revision.

Comments on the proposed rule are due by July 17, 2014.

Christopher P. McCormack, a member of Pullman & Comley's Environmental Department, serves as Membership Secretary to ASTM Committee E50 on Environmental Assessment, Risk Management and Corrective Action and was a member of the E1527 task group.

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