Standards and Practices for All Appropriate Inquiries: U.S. Environmental Protection Agency Direct Final Rule Adopting ASTM Standard

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The United States Environmental Protection Agency ("EPA") published a direct final rule in the March 14th Federal Register Notice amending the Standards and Practices for All Appropriate Inquiries ("AAI") pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA or Superfund"). See 87 Fed. Reg. 14174.

EPA states it is publishing the amendments as a direct final rule without prior proposal because it views this as a noncontroversial action.

AAI is generally described as the process of evaluating a property's environmental conditions and assessing potential liability for contamination.

CERCLA provides that a person (broadly defined) may be held strictly liable for cleaning up hazardous substances at property they either currently own or operate, or owned or operated in the past. In other words, CERCLA strict liability means that liability for environmental contamination can be imposed based solely on property ownership.

CERCLA was amended in 2002 to provide liability protections for certain landowners and potential property owners who did not cause or contribute to contamination at the property and can demonstrate compliance with specific provisions outlined in the statute. These amendments also directed EPA to establish due diligence standards for the purposes of qualifying for the defenses. The due diligence was denominated AAI. EPA published a final rule in 2005 setting the standards for conducting AAI. See 70 Fed. Reg. 66070.

The objective of AAI is to conduct inquiries into past uses and ownership of a property. This includes visually inspecting it to identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.

The AAI rule has allowed the use of standards that the American Society for Testing and Materials ("ASTM") developed for conducting Phase I Environmental Site Assessments.

The recognized ASTM Standards include E1527-13 and ASTM E2247-16. The need for the direct final rule is due to ASTM's recent publishing of a revised standard for conducting Phase I Environmental Site

Assessments. ASTM's revisions are intended to address questions that had arisen in applying the standard since its last amendment in 2013.

EPA states in the March 14th Federal Register preamble for the direct final rule that:

This standard, ASTM E1527–21, ''Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,'' was reviewed by EPA, and determined by EPA to be compliant with the requirements of the All Appropriate Inquiries Rule.

The direct final rule amends the AAI rule to reference E1527-21.

As a result, parties seeking the previously referenced liability relief under CERCLA's landowner liability provisions will be considered in compliance with the requirements for AAI if they comply with the procedures provided in ASTM E1527-21. It is also relevant to recipients of brownfield grants.

Note that the direct final rule does not require any party to use ASTM E1527-21. Such parties can continue to follow the provisions of the AAI rule at 40 C.F.R. Part 312.

A copy of the Federal Register Notice can be downloaded here.