

EPA Defines Due Diligence For Property Acquisitions

When Congress amended the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in December, 2001, it required EPA to promulgate regulations by January 11, 2004 defining what a party must do to make “all appropriate inquiries” into the previous ownership and uses of a property in accordance with generally accepted good commercial and customary standards and practices. The regulation was to determine in part whether a property owner qualifies for the innocent landowner defense, the prospective purchaser defense, or the contiguous landowner defense to CERCLA liability. The requirement to make “all appropriate inquiries” also applies to environmental assessments performed by recipients of EPA brownfield assessment grants. Some state officials believe that “all appropriate inquiries” should be defined for the purpose of EPA Brownfield grants to include laboratory analysis of at least some soil or water samples in addition to a Phase I site assessment.

Congress provided that, until EPA promulgates a regulation to define “all appropriate inquiries,” ASTM Standard E-1527-97 (Phase I Site Assessments) applies as an interim standard for property acquired on or after May 31, 1997.

In January, 2003, EPA promulgated a direct final rule providing that, for properties purchased on or after May 31, 1997, the purchaser could satisfy its obligation to conduct “all appropriate inquiries” by complying with either ASTM Standard E1527-97, or the updated version of that standard that ASTM adopted in 2000, known as ASTM Standard E1527-00. EPA’s rule also provided that recipients of brownfield site assessment grants could satisfy their obligations by complying with either version of the ASTM Standard. EPA stated that the two standards are not significantly different. The 2000 Standard includes: provisions for possible expansion of the site assessment, guidance for better identification of the purpose of the

assessment, a provision for inquiring about historical remediation of the property, a provision for facilitating reconstruction of the assessment by a different assessor, and amended guidance for selecting an environmental professional.

In March, 2003, EPA withdrew its direct final rule because it received adverse comments on the rule from several parties. Around the same time, it announced that it would form an advisory committee to participate in a negotiated rulemaking process to develop a new rule.

In May, 2003, EPA issued a new final rule that is essentially the same as the direct final rule that promulgated in January, 2003. The new rule allows parties who acquire property on or after May 31, 1997, and recipients of brownfield assessment grants, to satisfy their obligations to perform “all appropriate inquiries” by using either the 1997 or the 2000 ASTM Standard. EPA made only one minor change in the text of this rule.

The only purpose of the new rule appears to be to provide parties the option of using the 2000 version of the ASTM Standard instead of the 1997 version. One reason for allowing parties to use the 2000 ASTM Standard is that the 1997 Standard is no longer readily available to some parties. In the preamble to its May 2003 rule, EPA states that it will continue to work on developing possible future changes to the regulation to address certain issues, such as the concern raised by one commentator that historical documents concerning the past uses of the site are not available in certain parts of the country. This suggests that in the future EPA may promulgate rules that will modify some of the provisions of the ASTM Standard.

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