

August 29, 2013

Practice Group(s):

Environmental, Land
and Natural
Resources

Real Estate

EPA Authorizes New Standard for Phase I Environmental Site Assessments and “All Appropriate Inquiries”

By David A. Franchina, Michael F. Tomlinson, William C. Cleveland, IV, James L. Joyce, Chris S. Walker

On August 15, 2013, the U.S. Environmental Protection Agency (“EPA”) published an [amendment to the All Appropriate Inquiries Rule](#) that introduces a new industry standard for completing a Phase I Environmental Site Assessment (“Phase I”). A Phase I is an industry-accepted snapshot of a property’s conditions, history, and environmental status that can satisfy the “all appropriate inquiry” requirement of certain defenses to environmental liability, including the bona fide prospective purchaser, innocent landowner, and contiguous landowner defenses under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). Currently, parties can satisfy the “all appropriate inquiries” requirement by meeting the regulatory requirements in the All Appropriate Inquiries Final Rule (40 C.F.R. 312) or by conducting a Phase I that complies with ASTM E1527-05 Standard Practice for Environmental Site Assessments.¹ The amended rule will allow—but not require—parties to use a new ASTM standard, E1527-13, to satisfy the “all appropriate inquiries” requirement. ASTM standard E1527-13 is reported to differ from E1527-05 in several important respects and thus raises a host of issues that could impact real property transactions.

The new ASTM standard is not yet available to the public. However, the EPA’s notice of its proposed amendment included a [summary](#) of the reported differences between E1527-05 and E1527-13. Some of the most notable differences relate to releases that have been closed by regulatory authorities with contamination remaining in place, vapor intrusion, and agency file reviews. The new standard revises the definitions of “Recognized Environmental Condition” (“REC”), “Historical Recognized Environmental Condition” (“HREC”) and “*de minimis* condition,” and it adds a new defined term: “Controlled Recognized Environmental Condition” (“CREC”). CREC will describe past releases that obtained regulatory closure but were not cleaned up to unrestricted use standards (i.e., contaminants were left in place after completion of a cleanup). This new category will help ensure that a Phase I does not gloss over the fact that contamination remains on a property and that the landowner may have obligations regarding its management, or that the contamination may limit the property’s current or future use. Under the old standard, these releases were often identified as HRECs or a *de minimis* condition and not given significant attention during diligence.

The definition of “migrate/migration” has been revised to explicitly include vapor intrusion as a consideration for evaluating RECs. Phase Is conducted under the old standard vary in how they address vapor intrusion, with many reports considering it an indoor air quality issue that was beyond the scope of the Phase I. The new standard also clarifies that non-scope indoor air quality issues differ from vapor intrusion and are limited to conditions unrelated to releases of contaminants. The

¹ A Phase I conducted in accordance with ASTM E2247-08 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property also satisfies the All Appropriate Inquiries Final Rule.

EPA Authorizes New Standard for Phase I Environmental Site Assessments and “All Appropriate Inquiries”

increased attention to vapor intrusion should align Phase Is with a trend in environmental law to consider and evaluate the effects of vapor intrusion on building occupants.

The new standard also clarifies the requirements for an environmental professional’s agency file review. In particular, environmental professionals should review agency files for adjoining properties identified in the records database report, and a Phase I must justify any decision not to review regulatory records for a site identified in the database report. The delays associated with records requests from some agencies may make it difficult to meet transaction deadlines while conforming with the new standard.

Use of the new ASTM E1527-13 standard should improve the overall understanding of a parcel’s condition, but it may have several adverse impacts in the marketplace, including:

- **Increased Complexity in Transactional Diligence:** New attention to past releases closed out with contamination remaining in place, vapor intrusion, and adjoining property regulatory records likely will produce Phase Is with more areas of concern that need to be considered during transactions. Some of the questions posed by the issues likely to be raised under the new standards are quite complex and often do not lend themselves to easily negotiated solutions. For example, how much time and effort will parties expend in evaluating vapor intrusion concerns where vapor intrusion is a possibility, but no laws are on the books to address it?
- **Increased Cost and Time:** Conducting a Phase I that complies with E1527-13 might be more costly and time-consuming, and a rift may arise between purchasers and their consultants or lenders who disfavor use of the old standard. This may be a particularly difficult challenge in the months following the rule’s adoption, as parties on all sides of a transaction try to determine how the new standard should be implemented and whether it is necessary in all transactions.
- **Uncertain Reliability:** It remains unclear how the courts, agencies, lenders, equity investors, and transacting parties will view Phase Is conducted under the old standard.
- **Gaming the System:** Given the significant changes between the standards, parties could look to game the system by selecting an ASTM standard that will give them maximum leverage at the negotiating table. For example, a seller concerned about an old underground storage tank cleanup that left contamination in place could push for a Phase I under the old standard, which may gloss over the closure as a fully resolved HREC.

These regulatory and legal uncertainties, and the fact that it is difficult to have any meaningful public input on the rule amendment until E1527-13 is available for public review, make it unlikely that the rule amendment will be “noncontroversial” as the EPA predicts.

The EPA published the rule amendment as a “direct final rule,” which means the rule will take effect on November 13, 2013, if no adverse comments are received by September 16. Comments should reference Docket ID No. EPA-HQ-SFUND-2013-0513, and may be submitted online at www.regulations.gov, via e-mail to superfund.docket@epa.gov, via fax to 202-566-9744, or by mail to Superfund Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. N.W., Washington, DC 20460.

K&L Gates Environmental and Real Estate attorneys will continue to monitor this rule.

EPA Authorizes New Standard for Phase I Environmental Site Assessments and “All Appropriate Inquiries”

Authors:

David A. Franchina

dave.franchina@klgates.com
+1.704.331.7543

Michael F. Tomlinson

michael.tomlinson@klgates.com
+1.704.331.7560

William C. Cleveland, IV

will.cleveland@klgates.com
+1.843.579.5639

James L. Joyce

jim.joyce@klgates.com
+1.919.743.7336

Chris. S. Walker

chris.walker@klgates.com
+1.704.331.7515

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt
Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto Paris
Perth Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco São Paulo Seattle Seoul Shanghai Singapore Spokane
Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates practices out of 48 fully integrated offices located in the United States, Asia, Australia, Europe, the Middle East and South America and represents leading global corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2013 K&L Gates LLP. All Rights Reserved.