

USEPA Formally Adopts Most Recent ASTM Standard for Meeting All Appropriate Inquiry Requirements

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Federal and state environmental laws can impose significant liabilities on parties buying or leasing commercial real estate unless they qualify for one of the few defenses available. It is important for new property owners and operators to perform environmental due diligence in the form of an all appropriate inquiry (“AAI”) before taking title or possession of a property to qualify for at least one of the liability defenses available. Historically, federal agencies, local governments, and lenders have adopted prior versions of ASTM E1527, issued by ASTM International, as the preeminent standard for meeting due diligence requirements.

Interested parties in real estate transactions (including in connection with mergers and acquisitions transactions), including owners, operators, developers, lenders, insurance providers, bond issuers, and underwriters, will all be affected by the newly adopted standard.

All Appropriate Inquiry

The AAI rule, implemented by the United States Environmental Protection Agency (“USEPA”), establishes a minimum level of environmental due diligence required to be performed to afford certain liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) – also known as the U.S. federal “Superfund” law. In order for prospective purchasers to qualify for defenses provided under CERCLA such as innocent landowner, contiguous landowner, or other bona fide prospective purchaser defenses, they must conduct AAI.

AAI examines the current and past uses of a property for evidence of a release of hazardous substances or petroleum products. These inquiries assist buyers, investors, and lenders in understanding potential environmental liabilities at a property and evaluating the need for additional investigations to assess the extent of any release, associated impacts on health risks, property operations, and need for cleanup of such hazardous substances or petroleum products. The most straightforward approach for conducting AAI is to do a Phase I Environmental Site Assessment (“Phase I ESA”) according to the ASTM E1527 standard.

ASTM E1527-21

The highly anticipated fifth revision of the ASTM [Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process](#) was approved by the ASTM Environmental Assessment, Risk Management, and Corrective Action Committee on November 1, 2021. First published in 1993 to define “good commercial and customary practice[s]” for conducting a Phase I ESA, this latest revision, which will be replacing the ASTM E1527-13 version, represents over three years of ongoing collaboration and consensus-building by more than 150 industry professionals. The updated standard is based upon lessons learned, as shared by environmental professionals and other users of the standard, as well as a review of litigation and claims arising from Phase I ESA disputes.

Highlights of the changes in the updated standard include:

- Changes have been made to the information that must be included in a Phase I ESA, including expanded findings and opinions sections, and required photographs and figures.
- Terminology clarifications and robust explanations including updated language for Recognized Environmental Conditions (“REC”), Controlled Recognized Environmental Conditions (“CREC”), and Historical Recognized Environmental Conditions (“HREC”).

- The obligations of the user of a Phase I ESA to perform a search for environmental liens have been clarified. The search should include land title records for documents back to 1980, the year CERCLA was enacted.
- New definitions including “Property Use Limitation” and “Significant Data Gap” have been added to provide clarity on these existing concepts.
- The historical records review section has been restructured to reflect “good commercial and customary practice” and this revision provides clarification on the use and research objectives for both the property and adjacent properties; and new parameters have been established for the use of standard historical sources.
- Appendices have been revised, including the previously mentioned REC/HREC/CREC examples and a decision flow chart to aid in identifying the type of REC at issue, and a revised report outline, together with an updated discussion of business environmental risks (including emerging contaminants).
- Emerging contaminants, such as per- and polyfluoroalkyl substances (“PFAS”), have been identified as a non-scope consideration.
- Clarification that various components of the Phase I ESA must be completed within 180 days prior to the transaction date.

RECs/CRECs/HRECs

To assist environmental professionals in performing consistent assessments, the new standard adds an appendix with examples of conditions that represent RECs, CRECs, and HRECs. In addition, a flow chart has been added to aid in identifying the type of REC at issue.

These clarifications may lead to identification of RECs or business environmental risks that would not have been previously identified, and may lead to the elimination of RECs previously identified out of an abundance of caution or the misapplication of the standard.

The new version of the standard also calls for a more detailed discussion of the logic behind each REC, CREC, and HREC determination and conclusion. This clarification is an attempt to standardize the inherent subjectivity in identifying RECs.

Historical Use Research

The 2013 standard states that the environmental consultant is only required to review as many historical sources as needed to “achieve the objectives” of identifying whether past uses could have led to a REC. The 2021 revised standard requires the review of at least aerial photographs, topographic maps, fire insurance maps, and city directories, provided they are reasonably ascertainable, applicable to the subject property, and likely to be useful in determining whether activities were conducted that would be expected to result in a release.

In addition, if the property use is industrial, manufacturing, or retail, the review of building department records, property tax files, interviews, and zoning may be required if they are readily ascertainable and the Environmental Professional believes they are likely to be useful.

Further, the 2021 revision requires an expanded scope of historical research of adjoining properties. In general, the same historical use research required for the subject property will also be required for each adjoining property, or an explanation of why the review was not completed will be required.

Emerging Contaminants

PFAS are addressed for the first time in the ASTM E1527-21 standard, though not fully incorporated into the scope of a Phase I ESA. As indicated above, the new ASTM standard states that PFAS diligence will be considered a “non-scope consideration.” Non-scope considerations are those issues that may present environmental risks associated with a property, but which are not required to be assessed under the AAI rule for claiming applicable CERCLA defenses, because they are not regulated as hazardous substances.

The updated standard includes guidance suggesting that emerging contaminants, such as PFAS, be included in a Phase I ESA to satisfy any applicable state or local requirement for claiming liability defenses if the state defines the contaminant as hazardous. As such, the necessity to evaluate the potential for PFAS at a subject property as a non-scope consideration will increase as local regulatory agencies continue to adopt standards and protocols for addressing emerging contaminants.

Further, the new standard includes the option that any party seeking a Phase I ESA can request the inclusion of emerging contaminants as a non-scope consideration, even if the state where the property is located does not regulate the contaminant. Given the increasing state and federal regulatory emphasis on PFAS, purchasers and lessees face risks associated with acquiring

or leasing property with PFAS contamination. Those who want to understand the potential liabilities associated with purchasing or leasing a particular property should consider evaluating whether PFAS contamination may be present on a subject property, regardless of how the revised ASTM standard formally addresses PFAS.

Shelf Life of a Phase I ESA Report

The new standard establishes that the Phase I ESA must be completed no more than 180 days prior to the date of acquisition for the report to remain viable or up to one year, if five specific components have been updated. These five specific components include: (1) interviews, (2) searches for recorded environmental cleanup liens, (3) review of government records, (4) site reconnaissance of the subject property, and (5) the Environmental Professional Declaration.

In addition, the revised standard requires that the Phase I ESA identify the specific dates on which each component was completed and further provides that the 180-day or one-year time period commences on the date when the first of these components was completed, not the date that the report itself was issued.

USEPA Adoption of the ASTM E1527-21 Standard

After issuing and subsequently withdrawing a direct final rule¹ that would have adopted the new ASTM E1527-21 standard for the EPA's AAI rules, on December 15, 2022, the EPA published a [final rule](#) to amend the AAI Rule to allow for the use of the recently revised ASTM International standard ASTM E1527-21 to satisfy the all appropriate inquiries requirements under CERCLA for establishing the bona fide prospective purchaser, contiguous property owner, and innocent landowner liability protections. The rule took effect on February 13, 2023, and establishes a sunset period of one-year from publication of the final rule for the use of the old standard, E1527-13, which will then be retired.

The formal EPA adoption of the ASTM standard will add additional rigor and formality to the process of preparing a Phase I report as environmental professionals get up to speed and implement the revised standard. This will likely result in a longer timeline to complete due diligence and increased cost as well, both of which will need to be accounted for in the due diligence process.

Should you have any questions, please contact **Dana B. Mehlman** at dmehlman@vedderprice.com, **Benjamin O. Williams** at bwilliams@vedderprice.com or your Vedder Price attorney with any questions you may have or assistance you may need.

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¹ The EPA received thirteen comments on the proposed rule published March 14, 2022. Most commenters supported the Agency's proposed action to amend the AAI Rule to add a reference to ASTM E1527-21.