

EPA Seeks Comments on New ASTM Standard for Phase I All Appropriate Inquiry

Article By:

Lisa Rushton

Jimmy F. Kirkland

On March 14, 2022, the United States Environmental Protection Agency (“EPA”) issued a proposed and direct final rule, which amends the Standards and Practices for All Appropriate Inquiries (“AAI”) by referencing the ASTM E1527-21 Phase I standard adopted by the American Society for Testing and Materials (“ASTM”) in November 2021. The EPA’s proposed rule provides prospective purchasers of property the **option of using either** the new ASTM E1527-21 standard or continuing use of the ASTM E1527-13 standard to comply with the CERCLA AAI requirements and thereby establish a defense to CERCLA liability. If no adverse comments are received by April 13, 2022, EPA will take no further action on the proposed rule and the direct final rule will take effect. If adverse comments are received prior to the date, the EPA will withdraw the direct final rule and address the public comments in any subsequent final rule based on the proposal.

The ASTM standard is reviewed and updated every eight years using a consensus-based process, which includes input from both the environmental professionals conducting the Phase I and users of the reports such as developers and lenders. The ASTM E50.02 Task Group began reviewing the existing standard back in 2018. The revisions in ASTM E1527-21 are intended to correct what was viewed as deficiencies in implementation of the current standard and to provide greater consistency in the language of the standard.

When the EPA proposed revisions to the AAI rule at 40 CFR Part 312 in 2013, it followed the same course by issuing a direct final rule that provided for users to establish a CERCLA defense by following the requirements of either the then existing ASTM E1527-05 standard or the proposed STM E1527-13 standard. EPA also stated if no adverse comments were received during the comment period the proposed rule would become final, allowing the use of either the ASTM E1527-05 standard or the ASTM E1527-13 standard. In 2013, EPA received 41 comments during the comment period both in support of the proposed rule and raising concerns regarding EPA’s decision to continue to recognize the previous ASTM standard ASTM E1527-05 as compliant with the AAI Rule. EPA ultimately agreed that the revised ASTM E1527-13 standard included improvements to the previous standard and would result in greater clarity for prospective purchases with regard to potential contamination at a property. In response to the comments, EPA issued a final rule that amended the standards and practices for conducting an AAI by removing reference to the ASTM E1527-05

standard and replacing it with the ASTM E1527-13 standard. It appears action is needed again by stakeholders to prevent a proliferation in approaches to AAI or any dilution of confidence in the reports generated by purchasers, sellers, lenders or other stakeholders in real estate transactions.

The ASTM E1527-21 standard contains numerous improvements including clarifications of key terms, an expansion in the scope of historical research, clarification of the report's shelf life, and a recognition of emerging contaminants which the ASTM E1527-13 standard does not do. Anyone with experience reviewing Phase I reports knows that, under the ASTM E1527-13 standard, three different Environmental Professionals could review conditions at a site and end up with three completely different opinions about whether and why Recognized Environmental Conditions (RECs) exist at a site. The objectives of the revision process were to provide more clarity to the requirements in the ASTM E1527-13 standard, update the current good commercial and customary practices to produce a higher quality report and improve the standard to address deficiencies identified as a result of litigation and insurance claims. Included within the new ASTM E1527-13 standard are revisions to the definition of a REC in order to obtain more consistent findings. The revised definition is supplemented with a new Appendix intended to provide examples to place parameters around terms such as "release to the environment" and "material threat". Another notable change relates to the use of more robust historical research to identify conditions at a site. The existing (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 the "Big 4" historical sources for the subject property (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. Additionally, if the property use is industrial, manufacturing, and (now) retail, the review of additional resources (including building department records, property tax files, interviews, and zoning), may be needed if they are readily ascertainable and likely to be useful. While many consultants already meet these requirements for the subject property research, these changes will raise the bar for those that provide less thorough reports as well as for retail properties as a whole.

Lenders, investors, developers and others who may acquire an interest in real property should support a complete transition to the use of the ASTM E1527-21 standard rather than permitting parties to continue relying on ASTM E1527-13 standard.

Copyright © 2025 Womble Bond Dickinson (US) LLP All Rights Reserved.

National Law Review, Volume XII, Number 77

Source URL: <https://natlawreview.com/article/epa-seeks-comments-new-astm-standard-phase-i-all-appropriate-inquiry>