

After EPA Rule Changes, Which ASTM Phase I ESA Standard Should You Use?

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On November 1, 2021, ASTM International released its revised standard for Phase I Environmental Site Assessments. On March 14, 2022, the U.S. Environmental Protection Agency (the “EPA”) published a Direct Final Rule that confirmed the new ASTM standard, ASTM E1527-21, could be used to satisfy the EPA’s All Appropriate Inquiry (“AAI”) regulations. That, in turn, would mean that satisfying the ASTM E1527-21 standard could help a potential buyer of contaminated property satisfy some of the EPA’s requirements to qualify as a Bona Fide Prospective Purchaser, which may lead to being protected from liability under the federal Superfund statute.

However, on May 2, 2022, EPA withdrew the Final Rule it had published on March 14, 2022, and indicated it would address the comments it received concerning the previously Final Rule in a subsequent final action.

Why the change and, more importantly, which ASTM standard should a potential purchaser of contaminated property use when having a Phase I Site Assessment prepared?

EPA withdrew its Direct Final Rule in response to the negative comments it received concerning that rule. EPA had planned to allow both the November 2021 ASTM standard and its predecessor from 2013 (the ASTM E1527-13 standard) to be used to satisfy certain AAI requirements. Those commenting said that approach would lead to confusion in the marketplace, and would allow reports that did not meet the ASTM E1527-21 standard to be considered adequate, even though the 2021 ASTM standard represented what the real estate and environmental community had determined to be good commercial and customary practice. In other words, because the 2021 standard required a more rigorous approach to the relevant environmental due diligence work needed to prepare a Phase I Environmental Site Assessment, EPA’s approach would have meant that less thorough reports could have been deemed sufficient. As noted in the comment letter submitted to the EPA by the Environmental Bankers Association, “ASTM E1527-21 includes important updates that will reduce the risk of Users [of the ESA report] failing to identify conditions indicative of hazardous substance releases, potentially jeopardizing landowner [and prospective purchaser] liability protections to [potential] CERCLA [liability].” All of that makes sense: the better the environmental due diligence, the less risk of unpleasant surprises later.

But, where does that leave potential purchasers of contaminated real estate? Should they have their consultants prepare their Phase I Site Assessment reports based on the 2021 ASTM standard, or its 2013 predecessor, or both?

Contaminated real estate buyers, and any other parties involved in the transaction, such as lenders and equity investors, should require their environmental consultants to prepare their Phase I Environmental Site Assessment in conformance with the ASTM E1527-13 standard, because that is the ASTM standard that is currently referenced in EPA's AAI regulations. It is necessary to do so, at least for now, in order to be able to qualify for Bona Fide Prospective Purchaser protection from CERCLA liability.

Those parties should also consider having their environmental consultants prepare the same Phase I Environmental Site Assessment in conformance with the updated ASTM E1527-21 standard. While some additional cost may be involved, nonetheless it may be worthwhile in order to meet what ASTM sees as the current standard of practice regarding these reports.

Another important consideration in the preparation of these reports is whether additional issues that are not formally included in the scope of either the ASTM E1527-13 or the ASTM E1527-21 standard should be addressed. For example, as noted in an appendix to the E1527-21 standard, petroleum products are within the scope of the practice "because they are of concern with respect to commercial real estate, and current custom and usage is to include an inquiry into the [past or present] presence of petroleum products when doing an environmental site assessment of commercial real estate." That is so even though petroleum products generally do not lead to liability under CERCLA.

The non-scope issues appendix to the ASTM E1527-21 standard also addresses "substances not defined as hazardous substances" and does a good job addressing why a user of an ASTM-compliant report should at least consider whether to include certain emerging contaminants such as per- and polyfluoroalkyl substances, also known as PFAS, within its scope. The point is to think about whether to evaluate potential environmental liability for PFAS on a case-by-case basis in light of state law considerations, even though PFAS compounds have not yet been designated "hazardous substances" under CERCLA.

EPA's recent rule-making activities have not provided clear guidance for potential purchasers of contaminated property regarding which ASTM standard should be used in preparing environmental site assessment reports that comply with EPA's AAI regulations. At the moment, what seems to make the most sense is to have these reports prepared so that they comply with the ASTM E1527-13 standard and to consider whether to comply with the E1527-21 standard in addition. The user should also carefully evaluate whether certain considerations, such as potential PFAS contamination, should be included within the scope of the report.

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National Law Review, Volume XII, Number 209

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