

It's Official: EPA Approves Phase I Standard ASTM E1527-21 as Meeting All Appropriate Inquiry, Effective February 13, 2023

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On December 15, 2022, the U.S. Environmental Protection Agency (EPA) published its **new final rule**, which amends 40 C.F.R Part 312 to recognize the ASTM's updated E1527-21 standard (the "2021 Standard") for conducting Phase I Environmental Site Assessments ("Phase Is") as satisfactory to fulfill the "all appropriate inquiries" (AAI) requirement under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). After EPA **withdrew its direct final rule** in May 2022, it began work to review and **address the public comments** which led to the rule's withdrawal in the first instance. The **final rule** amends the AAI requirement under CERCLA to reference compliance with the ASTM E1527-21 standard instead of the ASTM E1527-13 standard (The "2013 Standard"). The new rule is effective on February 13, 2023. The 2013 Standard will not automatically be deemed insufficient to meet AAI. Instead, the final rule provides for a sunset period for ASTM 1527-13 until December 15, 2023 (one year from the date of publication of the final rule) to allow time for consultants and users to become familiar with the new standard. A Phase I completed before December 15, 2023 using ASTM E1527-13 will be recognized as compliant with the AAI requirement.

As **previously reported**, purchasers of real property must fulfill the AAI requirement in order to assert the innocent landowner, contiguous property owner, or bona fide prospective purchaser defenses to CERCLA liability. These defenses limit a purchaser's liability for historic contamination that predates their ownership. The regulations at 40 C.F.R. Part 312 currently specify that a Phase I prepared in compliance with the 2013 Standard can be used to satisfy the AAI requirement. EPA's final rule does not implement any changes other than replacing the reference to the 2013 Standard with reference to the 2021 Standard.

Following withdrawal of the direct final rule, EPA addressed several comments to the rule, including concerns about the new definitions of "recognized environmental conditions" and "property use limitation." EPA responded indicating that requests to modify the definitions should be directed to ASTM International, not EPA, since the ASTM standard is not an EPA regulation. EPA is merely adopting reference to the ASTM Standard as a mechanism to satisfy the all appropriate inquiries requirement. In addition, EPA received comments that continuing to recognize the 2013 Standard as meeting AAI would cause confusion. As a result, the new final rule includes the sunset provision for the 2013 Standard discussed above.

As **previously reported**, there are **key differences** between the 2013 and 2021 Standard. The 2021 Standard provides:

- revised definitions and additional instructions for “review of land title records,” “property use limitations,” “likely,” “significant data gaps,” “presumed viability,” and the “level of inquiry” depending on the future intended uses of the subject property.
- that Phase Is should describe the specific features, activities, uses, and conditions which *both were and were not* present at the subject property.
- that a prior environmental site assessment may be used as guidance but *shall not* be relied upon as representative of current features, activities, uses, or conditions.
- that emerging contaminants such as PFAS can be considered for inclusion as non-scope considerations.
 - Importantly, once an emerging contaminant is defined as a hazardous substance under CERCLA, these substances must be evaluated within the scope of E1527-21.
- that an opinion should be given as to whether additional investigations may be appropriate, but that recommending a specific course of additional action *is not required and falls outside of the scope of the 2021 Standard*.

Key Takeaways

As of February 13, 2023, ASTM 1527-21 will meet the AAI requirement, and thus will become the relevant standard for conducting Phase Is. Phase Is conducted using the 2013 Standard will no longer be compliant with the AAI requirement after December 15, 2023. Users of Phase Is should update internal guidance or scopes of work with environmental professionals to confirm (1) reports are completed to the new standard beginning in February 2023 and (2) whether emerging contaminations, including PFAS, should be included in the property evaluation as a “non-scope consideration.”

Please note that government regulations on the federal, state, and local levels are changing every day, and the information contained herein is accurate only as of the date above.

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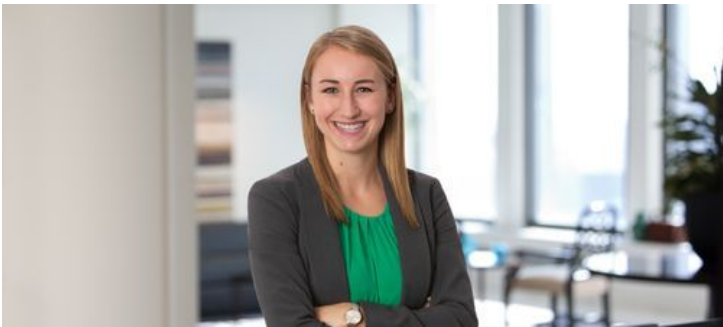
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