

The EPA's New Enviro Site Assessment Standard: Key Points

By **Sedina Banks** (February 6, 2023, 5:53 PM EST)

On Dec. 15, 2022, after a yearlong wait, the U.S. Environmental Protection Agency took final action to approve the new ASTM International standard for conducting Phase I environmental site assessments, officially known as ASTM E1527-21, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process."

This action, effective Feb. 13, approves the use of ASTM E1527-21 to satisfy the requirements of the all appropriate inquiries rule, codified at Title 40 of the Code of Federal Regulations, Part 312, for conducting all appropriate inquiries under the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, also known as the Superfund law.



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While the EPA will continue to allow the use of the previous standard, ASTM E1527-13, for another year, the revised standard now represents the best practice for conducting environmental site assessments.

The Importance of Compliance With the All Appropriate Inquiries Rule

CERCLA imposes strict, joint and several retroactive liability on certain past and present owners and operators of contaminated sites. In other words, a current owner of a contaminated property can be held strictly liable for all costs to clean up the contamination, even if they did not cause it, unless they qualify for one of CERCLA's few statutory defenses to liability.

To qualify for one of these defenses — such as those for bona fide prospective purchasers, innocent landowners and contiguous property owners — a prospective purchaser must comply with CERCLA's all appropriate inquiries rule before property acquisition.

Although compliance with the rule is not the only requirement to qualify for one of CERCLA's liability defenses, it is an essential first step. The EPA's approval of ASTM E1527-21 provides guidance to ensure that environmental professionals conduct environmental site assessments, or ESAs, consistent with the rule.

The EPA's Approval of the New Standard

ASTM revises the ESA standard every eight years with input from industry professionals, users and regulators to ensure that it continues to reflect the current best practices for conducting ESAs. The EPA

approved the last revision, known as ASTM E1527-13, in 2013. In 2021, ASTM adopted ASTM E1527-21.

On March 14, 2022, the EPA published a direct final rule, which amended the all appropriate inquiries rule to reference ASTM E1527-21. However, the agency withdrew the final rule on May 2, 2022, due to the receipt of adverse comments, primarily directed toward the EPA's allowance of the use of ASTM E1527-13 indefinitely,

To address this concern, the final rule includes only a one-year sunset period, ending Feb. 13, 2024, in which ESAs performed under the prior standard will continue to be recognized as compliant with the all appropriate inquiries rule. After that time, use of ASTM E1527-13 will no longer comply with the all appropriate inquiries rule.

Changes in the New Standard

Although the new standard contains many of the same provisions as the old, there are some notable differences, including the following.

Potentially Shorter Shelf Life for Phase I Reports

One of the most significant changes that will affect commercial real estate transactions is the potentially shorter shelf life of a Phase I report.

Critically, in contrast to the former standard, the new standard requires a Phase I report to include the dates on which the environmental professional completes key components of the ESA, such as interviews, review of government records and site reconnaissance. Whether the Phase I needs to be updated or a new Phase I done depends on the date of completion of these components, rather than on the final report date.

Under ASTM E1527-13, purchasers can wait until shortly before the acquisition date to finalize the Phase I report, in order to ensure that a new or updated report is not required. Now, prospective purchasers with extended diligence periods may be required to update components of the Phase I prior to property acquisition — or even obtain an entirely new report, if the key components were conducted more than a year earlier.

Key Terminology Revisions

The new standard clarifies the definitions for "recognized environmental conditions," "controlled recognized environmental conditions" and "historical recognized environmental conditions" to reduce misclassification of known or likely hazardous material and petroleum product releases affecting subject properties.

A new appendix provides useful guidance regarding these terms, as well as an updated discussion of business environmental risks — which are risks that may affect planned uses of commercial real estate, but that are outside the scope of the standard.

Treatment of Emerging Contaminants

The new standard clarifies how emerging contaminants — i.e., contaminants that are not hazardous substances under CERCLA, but that may be regulated under state law or federally regulated in the future

— may be addressed in ESAs.

Although the presence of these substances amounts to nonscope considerations, they may be evaluated as a business environmental risk, and must be evaluated as part of the ESA if later designated as a CERCLA hazardous substance.

The standard also expressly identifies per- and polyfluoroalkyl substances as emerging contaminants. PFAS are human-made chemicals used for decades and found in many different commercial, industry and consumer products such as nonstick cookware and water-repellent clothing.

PFAS are known as "forever chemicals" because they do not readily break down. Notably, the EPA proposed last summer to designate two of the most commonly used PFAS — perfluorooctanesulfonic acid and perfluorooctanoic acid, including their salts and structural isomers — as hazardous substances under CERCLA.

Although the EPA has not taken final action on this designation, if the agency designates PFAS as CERCLA hazardous substances, ESAs will be required to identify past and present PFAS use as part of site assessments.

Greater Historical Research Requirements

The new standard imposes more stringent historical records review requirements, including requiring environmental professional to review, at a minimum, four historical sources for both the subject property and any adjoining properties: aerial photographs, fire insurance maps, local street directories and historical topographic maps.

The standard also includes retail use with industrial or manufacturing uses, to address the possibility of dry cleaning operations, a known potential contamination source, occurring at a retail location.

These and other records review requirements could increase the scope of work for an ESA depending on the location of the subject property — e.g., rural versus urban — and types of adjoining properties — e.g., commercial or industrial versus residential.

Conclusion

Use of ASTM E1527-21 is an effective way to ensure compliance with the all appropriate inquiries rule. This being the case, prospective purchasers and environmental and real estate practitioners involved with environmental due diligence matters should be familiar with the standard.

Even though the EPA will allow the use of ASTM E1527-13 for the one-year phase out period, the revised standard represents the best practice for conducting ESAs. Parties should carefully consider whether the new or old standard should be used during the phase-out period.

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