

# US EPA Approves New Standard for Conducting Phase I Environmental Site Assessments

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The United States Environmental Protection Agency (EPA) recently issued its final rule amending the standards and practices for conducting environmental "all appropriate inquiries" to include a new standard recently made available by ASTM International, a widely recognized standards development organization ([see December 30, 2013 Federal Register](#)). The ASTM International's E1527-13 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" (ASTM E1527-13) now may be used by persons conducting environmental due diligence in property transactions to identify potential environmental contamination and as a means to establish an innocent landowner defense or take advantage of certain liability protections in accordance with the "All Appropriate Inquiries (AAI) Rule" ([40 CFR Part 312](#)) under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. §9601 *et seq.*).

## ***How does this change the standard typically used to conduct environmental due diligence, i.e., Phase I Environmental Site Assessments (Phase I ESAs)?***

The EPA does not consider the newly adopted ASTM standard as an amendment to the substance of the AAI Rule but, rather, as providing "clarifications and additional guidance for the environmental assessment of commercial and industrial properties and the determination of whether there are recognized environmental conditions or conditions indicative of releases or threatened releases of hazardous substances at a property."

Furthermore, the new EPA rule does not remove reference to the previous ASTM standard used since 2005 (ASTM E1527-05) from the AAI Rule, although the EPA now "strongly encourages" and "recommends that environmental professionals and prospective purchasers" use ASTM E1527-13 when conducting AAI Rule- compliant Phase I ESAs. In the December 30, 2013 Federal Register notice announcing the new rule, EPA explains that in order to provide an opportunity for public comment it intends to publish separately in the near future a new proposed rule to remove the reference to the ASTM E1527-05 standard in the AAI Rule.

The key changes from the ASTM E1527-05 standard and clarifications and added guidance contained in the new ASTM E1527-13 include:

- explicitly requiring an assessment of vapor migration and vapor releases from sources of contamination (which previously were often considered outside the scope of the ASTM standard by environmental consultants because they related to indoor air impacts);
- revising the "historical recognized environmental condition (HREC)" definition to limit the application of HRECs to past releases that have been addressed to the satisfaction of applicable regulatory criteria without subjecting the property to any required controls, and which past releases would have been considered "recognized environmental conditions (RECs)" at the time that the Phase I ESA is conducted (for example, if there has been a change in the regulatory criteria);
- further establishing, within the definition of "recognized environmental condition (REC)," a subset of "controlled recognized environmental conditions (CRECs)," which are to be applied to risk-based closures, where residual contaminants were allowed to remain in place under certain conditions and controls;
- clarifying that a "de minimis condition" is not to be used to describe a REC or CREC;
- an emphasis on conducting regulatory agency file reviews when the subject property or adjoining properties are listed in a public environmental database;
- extending the "User's Responsibilities" to parties seeking to qualify for Landowner Liability Protections under CERCLA and to EPA Brownfield Assessment and Characterization grantees;
- explicitly allowing nonsignificant changes to the conclusion statement; and

revising the appendices to the ASTM standard with the addition of guidance for common "Business Environmental Risks" related to common non-scope issues, such as asbestos-containing materials, mold and certain regulatory compliance matters.

Members of Proskauer's Environmental Group are available to assist in your environmental due diligence efforts and to ensure that Phase I ESAs are prepared in accordance with the updated "All Appropriate Inquiries (AAI) Rule."

#### [Related Professionals](#)

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