

Enviro Review Standard Tweaks May Clarify Cleanup Liability

By **Lorene Boudreau, Mitchell Wiest and Sara Redding**

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It's been eight years since the last update to the recognized standard for environmental site assessments, or ESAs. Now, a newly revised standard is imminent — and should afford new property owners and operators clearer protection from liability for hefty environmental cleanups.

The revisions are expected to provide much-needed clarification to ASTM E1527-13, the Phase I ESA standard issued in 2013, currently used by the vast majority of environmental professionals when completing all appropriate inquiries, or AAI, as part of real estate transaction due diligence.

Interested parties in real estate and mergers and acquisitions — including owners, operators, developers, lenders, insurance providers, and bond issuers and underwriters — will be affected by these clarifications. The revised standard is expected to be published by the end of the year.

Due Diligence Background

A recognized standard for completing Phase I ESAs did not exist until, at the direction of Congress, the U.S. Environmental Protection Agency codified the AAI rule in 2005 as the minimum level of environmental due diligence required to afford certain liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA, also known as the Superfund law.[1]

In parallel, in 2005, the American Society for Testing and Materials — now known as ASTM International — published the ASTM E1527-05 standard, which was written into the law as meeting the AAI requirements.

In accordance with ASTM's eight-year review cycle, ASTM published the next iteration of the standards for performing Phase I ESAs in 2013 as ASTM E1527-13 to replace the previously accepted standard, and the EPA amended the AAI rule to formally acknowledge this updated ASTM standard.

A Phase I investigation is essential to the transactional due diligence process. Often, purchasers and



Lorene Boudreau



Mitchell Wiest



Sara Redding

other interested parties, such as lenders, may have to rely solely on the Phase I ESA findings to evaluate environmental risks and liabilities associated with the property.

Phase I ESAs are also used by the EPA and state environmental agencies to determine whether sufficient environmental due diligence has been conducted for liability protection under CERCLA.

Anticipated Changes to the Standard

The current eight-year review began about three years ago. Its goal has been to review the wide range of customary practices used by environmental professionals, which have led in some cases to lawsuits and other disputes, and inconsistent application of the standards among consultants.

To address inconsistencies in the actual scope of work being performed across the country, a task group made up of over 200 professionals — including consultants, lenders, developers, attorneys, insurers, and representatives from the U.S. Department of Housing and Urban Development, the EPA and the Federal National Mortgage Association — was convened. The group's aim was to identify areas for improvement and clarification, including the following:

- Expanding the expected scope of historical research in determining which historical resources are appropriate for a particular property, including for adjoining properties.
- Providing additional guidance to assist in the determination of recognized environmental conditions, or RECs, controlled recognized environmental conditions, or CRECs, and historical recognized conditions, or HRECs. To help professionals perform consistent assessments, the revised ASTM standards will include an appendix with examples of conditions that represent RECs, CRECs and HRECs, and conditions that do not, including a flow chart. Those examples might be relevant to Phase I ESAs on properties with historical storage and/or use of hazardous substances or petroleum products, such as dry cleaners and gasoline stations.
- Adding a definition of the term "likely," to clarify that term in the context of whether there is the likely presence of hazardous substances or petroleum products, or a likely release to the environment.
- Clarifying the process by which a CREC can be identified, including the requirement to document a multistep process in assessing the logic behind the conclusion.
- Clarifying the Phase I ESA report viability period by better defining the shelf life of various elements required to ensure compliance with the AAI standard.
- Updating the role and duties of the environmental professional, including work conducted under the environmental professional's supervision.
- Expanding the definition of data gaps, including data failures, to better identify when data is significant such that it affects the environmental professional's ability to identify RECs or CRECs.

How the Revised Standards Will Address Emerging Contaminants

To address per- and polyfluoroalkyl substances, or PFAS, the task group is expected to add PFAS and other emerging chemicals of concern to the existing nonscope issues portion of the Phase I ESA

standard.

Nonscope items are those that may present environmental business risks associated with a property, but which are not required to be assessed under the AAI standard in order for the purchase to claim certain CERCLA defenses, because they are not regulated as hazardous substances under CERCLA. Nonscope items commonly evaluated and included in Phase I reports include lead-based paint and asbestos-containing materials.

The revised standards are expected to clarify that, given that PFAS are not yet listed as a hazardous substance, their presence or likely presence at a property should not be considered a REC, unless and until they are added to the EPA's list of CERCLA hazardous substances. Nevertheless, parties affected by the revised ASTM standards should pay close attention to this issue.

Because insurance companies and investors are increasingly weighing risks associated with PFAS when evaluating projects, a suggestion in a Phase I report that historic activities at or near the property probably involved PFAS may lead to additional inquiry.

Furthermore, many states are regulating PFAS. For that reason alone, assessment of PFAS as an emerging contaminant, though a nonscope issue, is recommended when considering the risk associated with a property sale.

Effective Date of the New ASTM Standard

ASTM International is expected to publish the revised standards by the end of 2021, and will request that the EPA recognize the updated E1527-21 standard as being compliant with the AAI rule.

Revising the federal regulation to reference the ASTM E1527-21 standard can take about six months. Typically, EPA regulations are effective 60 days after they are published.

Though the ASTM E1527-13 may still be considered by the EPA to be compliant with the AAI rule, lenders and other interested parties may insist that environmental due diligence follow the new standards as soon as they are released.

Lorene L. "Renie" Boudreau is of counsel at Ballard Spahr LLP.

Mitchell A. Wiest is principal hydrogeologist and Sara Redding is a senior hydrogeologist at Roux Associates.

Disclosure: Mitchell Wiest is a member of the task group that developed the revisions to the Phase I ESA standards now being reviewed by the EPA.

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[1] Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 66,070 (Nov. 1, 2005) (effective Nov. 1, 2006) (codified at 40 C.F.R. Part 112).