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ASTM's 2021 Update to the Phase I Standard Now Satisfies All Appropriate Inquiry

EPA's Final Rule approving the ASTM E-1527-21 is effective as of Monday February 13, 2023, meaning that the updated standard may now be used to satisfy All Appropriate Inquiry (AAI). This is an important development for property purchasers seeking to qualify for the bona fide prospective purchaser (BFPP) safe-harbor defense to historic property liability under federal and (some) state Superfund laws. For an easy reference guide to similarities and differences between the old standard, the new one, and Superfund's AAI Rule itself, you need only look at a comparison and summary prepared by EPA in March 2022.

Process and Timing of New Standard's Effective Date

EPA's approval of the updated ASTM standard came via a notice of Final Rule published December 15, 2022, following an extended review process. The Final Rule amends EPA's AAI regulation[1] to recognize ASTM E1527-21, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," as meeting the AAI Rule's requirements and thereby allowing a new property owner "user" (a defined term under AAI) to claim the exemption from current owner liability afforded by Section 101(35) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[2].

The Final Rule became effective as of February 13, 2023. The prior standard, ASTM E1527-13, will continue to be valid and usable for one year after publication of the new rule (i.e., to December 15, 2023). This will allow Environmental Professionals (EPs) and prospective purchaser users of the reports to complete property acquisitions without unnecessary duplication of otherwise viable Environmental Site Assessments (ESAs). Beginning on December 16, 2023, only the updated 2021 standard will have

EPA's approval as meeting the requirements of the AAI Rule.

Terminology and Clarifications

The 2021-2022 update, which arose from ASTM's customary process of reviewing E1527 at least every eight years, revised definitions of three key terms: Recognized Environmental Condition (REC), Historical Recognized Environmental Condition (HREC), and Controlled Recognized Environmental Condition (CREC). In EPA's March 2022 comparison of the new standard to the 2013 version, EPA found that the changes to the definitions did not change the concepts or ramifications of the REC, HREC, and CREC definitions.

ASTM E1527-21 also adds new terminology, definitions, instructions and clarifications regarding numerous other key terms and concepts, including "review of land title records," "property use limitations," "likely," "significant data gaps," "presumed viability," and the "level of inquiry," which can be adjusted depending on the future intended uses of the target property. EPA's review found that these changes also stayed consistent with the AAI regulation.

Identification of an ESA Report's Duration and Expiration

The AAI Rule requires that four elements of an ESA be completed no more than 180 days prior to the date of property acquisition. These elements include interviews with the current and past owner/operator, a search for recorded environmental liens, the regulatory and historic records search, and the site reconnaissance visit. The EP's certification and signature also must be renewed after 180 days. The regulation provides than an ESA cannot be used more than a year after it is completed.

One seemingly minor change in the updated ASTM standard clarifies that the Phase I's "presumed viability" is dependent on the dates of completion for each of the ESA's investigative components, and emphasizes that the date of the Phase I report is not the report's viability start date. If the parties allow a protracted due diligence period or if closing is otherwise delayed, the EP can update the "stale" elements of the Phase I for another 180 days, but the Phase I still will expire after one year. If a user opts to perform its own search for environmental liens (for example, by ordering title insurance), that will carry the same 180-day lifespan and updating requirements, as well as the one-year expiration date.

This specificity about investigative components' duration should help reduce confusion among users, brokers, lenders, and others, not only to support a user's entitlement to claim the BFPP defense, but also whether a lender or other third party's request for reliance rights has any value.

Emerging Contaminants

The new standard's most controversial position involves the issue of emerging contaminants. Despite requests from participants during the ASTM updating process and from some of those who commented as part of EPA's review, the new version of the standard does not require consideration of substances that are currently a focus of regulatory attention but are not yet listed as "hazardous substances" under the federal Superfund law (for example, polyfluoroalkyl substances / PFAS). The ASTM standard writers recognized that these contaminants may be relevant to the parties involved in real estate transactions, because such compounds will fall within the standard's scope if or when they do become listed hazardous substances.

On August 26, 2022 (after ASTM published the updated E1527 standard), EPA proposed listing two PFAS compounds (PFOS and PFOA) as hazardous substances. Not surprisingly, that listing proposal was still pending when ASTM E1527-21 became effective. Moreover, EPA has not yet taken a position on potentially hundreds of other PFAS compounds.

At present, then, consideration of PFAS compounds and other emerging contaminants will be an "additional scope" item that can be added to an ESA process. And, absent additional listing proposals or decisions, other PFAS substances will remain additional scope items even after EPA finalizes the proposed listing of PFOA and PFOS. This means that the content and scope of Phase I ESAs will continue to have a significant level of variability as parties grapple with the issue of whether to look for indicia of emerging contaminants. At the same time, compliance with the ASTM standard will continue to create a "blind spot" in which emerging contaminants remain a potential issue for property use and risk assessment.

Findings and Opinions vs. Recommendations for Additional Investigation

The updated ASTM standard does advance the clarification needle in favor of consistency for multiple elements of the Phase I reporting process. In particular, the

update attempts to resolve a continuing discussion about the differences between findings, opinions, and recommendations, and whether an EP's recommendations also must specify the scope or extent of actual Phase II invasive sampling. Under the new standard, every Phase I report must continue to contain findings and opinions and can (but need not) contain recommendations. If a report does include recommendations, however, they can be general and need not identify any specific course of action, notwithstanding the identification of one or more RECs. Such recommendations concerning a follow-up Phase II have always been, and now expressly will continue to be, outside the scope of the Phase I process.

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1. (40 C.F.R. Part 312)

2. (42 U.S.C. Section 9601 et seq)