

Alerts

Revised All Appropriate Inquiries Final Rule

November 20, 2013

Hinshaw Alert

"All Appropriate Inquiries," or AAI, is the process of evaluating a property's environmental conditions and assessing the likelihood of contamination at that property. The current AAI Final Rule provides that the ASTM E1527-05 standard is consistent with the requirements of the final rule and may be used to comply with the provisions of the rule. On August 15, 2013, the United States Environmental Protection Agency (EPA) published a direct final rule (78 FR 49690) that would have amended the current AAI rule to allow the use of the revised ASTM E1527-13 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" in addition to use of the ASTM E1527-05 Standard to satisfy the requirements for conducting AAI.

Comments on Direct Final Rule Amending All Appropriate Inquiries Standard

This direct final rule did not become law on November 13, 2013 as initially anticipated. In the direct final rule, the EPA stated that if it received adverse comment by September 16, 2013, the direct final rule would not take effect. Rather, the EPA would publish a timely withdrawal. After publication of the direct final rule, the EPA received adverse comments. On October 29, 2013, the EPA withdrew the direct final rule. EPA has not yet indicated when the rule will be reissued, but it has stated that any subsequent final action will address the comments received and that a second comment period on the parallel proposed rule will not be instituted.

Comments were generally in favor of the proposed rule; however, many argued that permitting both the 2005 and the 2013 standards for conducting Phase I ESAs allowed two different levels of due diligence to be equally acceptable, and would therefore lead to confusion in the marketplace and a two-tiered due diligence evaluation system. Additional criticisms of the proposed rule included the fact that the definition of Environmental Professional has not been revised, and the fact that there has been no clarification as to what it means to be "under the supervision" of an Environmental Professional.

ASTM E1527-13 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process"

While not yet formally adopted, the ASTM E1527-13 Standard proposes several changes as outlined below. Although these changes will not significantly change the manner in which a Phase I Environmental Site Assessment (Phase I ESA)

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is performed, nor will they significantly change the information which is provided in a Phase I ESA Report, they certainly have the potential to impact all parties to commercial and industrial real estate transactions.

Clarification and Revision of Definitions of a Recognized Environmental Condition (REC) and an Historical Recognized Environmental Condition (HREC)

The purpose of these clarifications and revisions is to help those utilizing the Phase I ESA to distinguish between, for example, a site impacted by the release or threatened release of a hazardous substance, a site which was previously contaminated and has since been cleaned up, and a site that has obtained regulatory closure subject to institutional or engineering controls due to the continued presence of on-site contamination.

The proposed standard redefines and simplifies the definition of a REC by removing ambiguity, thus creating better alignment with the objectives of the All Appropriate Inquiries Rule:

[T]he presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: (1) due to the release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment.

In addition, under the existing rule, an HREC applies to both releases which have been completely cleaned up as well as releases which have received regulatory closure. This dual application has caused confusion, particularly in cases where some contamination remains on site, because the site could then qualify as both a REC and an HREC, depending upon the interpretation of the Environmental Professional. The revised definition of HREC clarifies that it applies only to sites where contamination has been remediated to unrestricted residential use:

[A] past release of any hazardous substances or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted use criteria established by a regulatory authority, without subjecting the property to any required controls (e.g., property use restrictions, AULS, institutional controls, or engineering controls)...

Addition of a Definition for a Controlled Recognized Environmental Condition (CREC)

In addition to clarifying the definition of an HREC, the proposed standard adds a new definition, CREC, which applies to sites where remediation has occurred, however, residual contamination left on site may present future obligations for a landowner:

[A] REC resulting from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority (e.g., as evidenced by the issuance of a NFA letter or equivalent, or meeting risk-based criteria established by regulatory authority), with hazardous substances or petroleum products allowed to remain in place subject to the implementation of required controls (e.g., property use restrictions, AULS, institutional controls, or engineering controls)...

Revision of the Definition of Migrate/Migration to Explicitly Include Vapor Intrusion as a Potential Risk to be Evaluated

The current ASTM standard has no explicit provisions as to whether a Phase I ESA should assess the risk of vapor intrusion. However, the revised standard includes several changes which explicitly address the assessment of vapor intrusion risk. The proposed standard revises the definition of migrate/migration to specifically include the movement of vapor in the subsurface:

[T]he movement of hazardous substances or petroleum products in any form, including, for example, solid and liquid at the surface or subsurface, and vapor in the subsurface.

In this manner, the proposed standard differentiates vapor migration/intrusion which can be attributed to hazardous waste releases from indoor air quality issues, such as asbestos and radon, which are both outside the scope of a Phase I ESA. However, it is important to note that while referenced in the proposed ASTM standard, neither the proposed AAI Rule nor the proposed ASTM standard will require implementation of ASTM E2600-10 "Standard Guide for Vapor Encroachment



Screening on Property Involved in Real Estate Transactions.”

Revision to the Standards for Regulatory File Review

The revisions to the standards for regulatory file review emphasize the importance of reviewing regulatory files for adjacent properties. If either the property of interest or an adjacent property is identified in government records, then regulatory files and records associated with that property should be reviewed, at the discretion of the Environmental Professional. The revisions will require that additional information sources, such as fire insurance maps and tax files, be reviewed for properties with historical industrial and manufacturing uses, to verify information found from database searches.

In the event that an Environmental Professional determines that this regulatory review is not necessary, proper justification of that decision must be contained in the Phase I ESA. It is important to note, however, that the proposed standard still does not address state and local questions, such as whether certain types of records are considered readily ascertainable, and thus part of the Phase I ESA.

In general, neither land nor judicial records are required to be reviewed by the Environmental Professional, as this is a responsibility of the User. However, if a state keeps a special environmental registry for the recording of environmental liens and activity and use limitations, that registry must be included by the Environmental Professional in the standard governmental database review.

Uncertainties Remain

Uncertainties regarding the implementation of Phase I Environmental Site Assessments remain. ASTM has yet to release the final Phase I ESA Standard. EPA has yet to adopt that standard as meeting the requirements of the All Appropriate Inquiries Rule. As such, for the time being, the applicable standard remains the ASTM E1527-05 Standard; however, it is still unclear for how long this standard will apply.

In reference to the withdrawn rule, the EPA had indicated that there were no legally significant differences between ASTM E1527-05 and ASTM E1527-13, and, as such, either standard could continue to be utilized to satisfy the All Appropriate Inquiries Rule. It is unclear whether this guidance will stand once the updated ASTM Standard and Rule are formally adopted.

If it does stand, it may not end the uncertainty surrounding the use of each standard. It is predicted that since the ASTM E1527-13 Standard is more in depth, it will equate to higher costs to perform and will lead to more recognized environmental conditions. If that is the case, it is possible that an Environmental Professional would feel forced to rely upon the older version of the Standard in order to stay financially viable in a highly competitive field. Conversely, it is also possible that Environmental Professionals urge use of the ASTM E1527-13 Standard, although it will likely cost more, in order to avoid potential professional liability claims arising out of any transactional issues.

Lastly, there is also a possibility that the courts will determine there are legally significant differences between the two standards, in which case continuing to utilize the ASTM E1527-05 Standard would jeopardize the applicability of CERCLA defenses such as Bona Fide Prospective Purchaser, Innocent Landowner, or Contiguous Property Owner. The EPA could solve these uncertainties by adding a clarification in the Final AAI Rule that all future Phase I ESAs should comply with the most current standard, rather than allowing individual parties to choose which standard upon which it would like to rely.

For more information, please contact your regular [Hinshaw attorney](#).

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