

Alerts

UPDATE: Revised All Appropriate Inquiries Final Rule Published

January 15, 2014

Hinshaw Alert

On December 30, 2013, the United States Environmental Protection Agency (USEPA) published a final rule, codified in 40 CFR Part 312, which amends the standards and practices for conducting AAI under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The final rule references ASTM E 1527-13 as an industry standard that can be utilized to comply with the AAI requirement. [This final rule became effective on December 30, 2013, the date of publication.](#)

Review of the Requirements of ASTM E 1527-13 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process”

In November 2013, ASTM International published ASTM E 1527-13. [As previously discussed, the ASTM E 1527-13 Standard proposes several changes from version published in 2005.](#) The changes made in the 2013 version should not significantly change the manner in which a Phase I Environmental Site Assessment is performed, nor should they significantly change the information that is provided in a Phase I ESA Report. The changes do, however, have the potential to impact all parties to commercial and industrial real estate transactions. As previously discussed, the changes include:

- Clarification and revision of the definitions of a recognized environmental condition (REC) and an historical recognized environmental condition (HREC);
- Addition of a definition for a controlled recognized environmental condition (CREC);
- Revision of the definition of migrate/migration to explicitly include vapor intrusion as a potential risk to be evaluated; and
- Revisions to the standards for regulatory file review.

These changes have the potential to increase both the cost of a Phase I ESA as well as the amount of time necessary to properly complete the analysis.

ASTM E 1527-13 Has Not Replaced ASTM E 1527-05 ... Yet

Unfortunately, the finalized rule does not eliminate the key ambiguity which was present in the proposed rule published on August 15, 2013, that is, which ASTM standard should be utilized when performing a Phase I ESA. The USEPA

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did not add any clarifications to the final AAI rule stating that all future Phase I ESAs must comply with the most current standard. Rather, the USEPA is allowing individual parties to choose the standard upon which it would like to rely — for now. Although the preamble to the rule contains language in which the USEPA makes clear its preference for the updated standard, the rule itself does not contain analogous requirements. As such, ASTM E 1527-13 has not formerly replaced ASTM E 1527-05 as the AAI standard; it is simply an option available as the pre-purchase inquiry analysis for landowners potentially seeking to minimize exposure to environmental liabilities. As of now, ASTM E 1527-05 has not been removed from the AAI Rule and remains a viable option for industry standards. Compliance with either ASTM E 1527-05 or ASTM E 1527-13 will satisfy the AAI standard.

In its publication, however, the USEPA announced its intent to publish, in the near future, a proposed rulemaking that will remove the reference to ASTM E 1527-05 as an approved industry standard. In this manner, the USEPA has indicated its preference for use of the more current and more stringent standard for performing AAI. While, technically, ASTM E 1527-05 may still be a viable option for seeking protection under AAI, the better practice for businesses and individuals to minimize potential future complications would be to perform Phase I ESAs in compliance with ASTM E 1527-13.

For more information, please contact your regular Hinshaw attorney.

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