

EPA Approves New Standard for Phase I Environmental Site Assessments

By Gary Pasheilich

On December 14, U.S. EPA issued a final rule adopting ASTM Standard E1527-21 for conducting Phase I environmental site assessments.

Real estate developers, lenders and investors, and all purchasers of commercial property should take note of the new ASTM standard E1527-21 (the “Standard”), which sets forth the procedures and requirements for environmental professionals preparing Phase I environmental site assessments. Phase I assessments are commonly prepared to assist purchasers of commercial property with the investigation of a property’s history and to identify conditions indicative of releases or threatened releases of hazardous substances or petroleum products.

Phase I assessments prepared in accordance with the Standard satisfy key requirements of conducting “All Appropriate Inquiries” or “AAI” in connection with commercial real estate transactions. In turn, parties conducting AAI can establish standing to assert certain statutory defenses to liability under the federal Superfund law (aka “CERCLA”), such as the “Bona Fide Prospective Purchaser” defense. These defenses, if established, can afford protection from strict liability under CERCLA for the costs of investigation and remediation of hazardous substances.

Although the new Standard was issued by ASTM International in November of 2021 to replace its 2013 version, EPA withdrew its rule approving the new Standard in May 2022 due to adverse comment. The December 14 rule addresses the adverse comments received by EPA and provides that the new Standard is effective as of February 13, 2023. Notably, the final rule also provides that the 2013 version of the Standard may continue to be utilized through February 13, 2024, but shall be discontinued after that date.

Several New Changes from the 2013 Version

The new ASTM Standard contains several key changes from the 2013 version, including:

- **6-Month Shelf-Life:** A Phase I report remains valid for six months without updating of certain components (or one year if the components are updated). The new Standard requires that the “earliest” of the individual components (e.g. interviews, searches for recorded environmental cleanup liens and government records, site reconnaissance, and the professional’s “Declaration”) be conducted within six months of the property acquisition.
- **Historical Sources:** The new version requires that environmental professionals consult historical aerial photographs, fire insurance maps, local street directories, and topographic maps for the subject property and any adjacent properties.

- **Title Searches:** The new Standard requires that title records must be searched back to 1980 to identify any land use or activity restrictions or environmental liens on the subject property.
- **Emerging Contaminants:** The new Standard addresses “emerging contaminants,” specifically referencing per- and polyfluoroalkyl substances (PFAS). Although these substances are not currently regulated as hazardous substances, the new Standard allows for consideration of these compounds as “non-scope considerations.”

As Phase I reports are a critical tool for assessing the environmental risks and liabilities associated with a property, a thorough understanding of the legal and technical aspects of the new ASTM Standard is essential for effective planning for commercial property acquisition, M&A deals, and other commercial transactions.

For more information regarding the new ASTM Standard, please feel free to contact any of Roetzel's EHS professionals.

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