

## New ASTM Standard for Phase I Environmental Site Assessments Takes Legal Effect: What This Means for Scoping Due Diligence

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Today, February 13, the American Society for Testing and Materials (ASTM) International E1527-21 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” becomes the modern legal standard for performing Phase I environmental assessments. After considering significant public comment over many months, on December 15, 2022, the United States Environmental Protection Agency (EPA) published in the *Federal Register* its final action to approve the standard.

A Phase I environmental site assessment (ESA) serves two primary purposes:

- Due diligence – by identifying contamination issues relative to the acquisition, leasing and financing of real property in real estate, corporate and lending transactions; and
- Liability relief – by allowing purchasers and tenants of real property to qualify as a bona fide prospective purchasers (BFPPs), who will not be liable under federal and state Superfund-type laws for pre-existing contamination.

To qualify as a BFPP, purchasers and tenants must comply with the All Appropriate Inquiry (AAI) regulatory standards adopted by the EPA. The easiest way to demonstrate compliance is to obtain a Phase I ESA from a consulting firm that certifies the ESA complies with the current EPA-approved Phase I ASTM Standard.

### What Is Different in ASTM E1527-21

The new ASTM E1527-21 standard contains multiple changes from the current standard. A few of the more important changes include:

- clearer definitions, including Recognized Environmental Condition (REC), Controlled Environmental Condition (CREC) and Historic Environmental Condition (HREC);
- additional review of source material for Phase I ESAs of retail properties;
- clarification of what is a significant data gap;
- clarification of when a Phase I ESA report expires;
- emphasis of the need to evaluate the potential for vapor intrusion, including the potential for impacts caused by historical uses of adjacent and nearby properties; and
- addition of new non-scope considerations.

Note that in addition to approving the new E1527-21 standard, EPA is allowing anyone attempting to qualify as a BFPP to use the E1527-13 standard until December 15, 2023. However, whether third parties, such as lenders and insurers, will accept the now-outdated standard remains to be seen.

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The proposed new E1527-21 standard requires the consultant, referred to as the environmental professional (EP), to perform a more thorough review of information sources than the prior E1527-13 standard. For example:

- the E1527-13 standard requires the EP to review additional sources such as property tax records or building department records if the Subject Property is used for industrial or manufacturing purposes, provided that these records are readily available and relevant to the assessment; **but**
- the new E1527-21 standard extends these requirements to retail properties. This means that EPs are required to take a closer look at the history of retail properties and, thus, potentially identify more issues.

## Emerging Contaminants

Arguably, the most significant clarification in the E1527-21 standard is that until a contaminant is listed as a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or “Superfund”), it is not within the scope of the standard and, as such, is not required to be discussed in a Phase I ESA. This excludes emerging contaminants such as per- and polyfluoroalkyl substances (PFAS) from the standard, which is important because they are increasingly the subject of litigation under various toxic tort and environmental theories.

The exclusion of PFAS and other non-scope considerations, including asbestos, lead, radon and wetlands, are just one reason not to simply “order the Phase I” when buying, leasing or financing a property or business with potential environmental concerns, including the safety of the workplace environment.

Whether to add non-scope considerations to the Phase I ESA will continue to be a business decision on a case-by-case basis. Addressing emerging contaminants such as PFAS will depend on business goals, lender requirements and whether the property is located in a state that already regulates PFAS as hazardous substances.

## Key Takeaway

It is critical for attorneys and their clients to evaluate whether a standard Phase I ESA provides a sufficient, or even appropriate, scope of environmental diligence. In some situations, it will be prudent to add certain non-scope items, including but not limited to PFAS and a usually separate, limited review of environmental and worker safety compliance matters. At some properties, environmental and worker safety compliance assessments may be more likely to identify issues of concern than the Phase I ESA. In other circumstances — for example, such as an acquisition of a business that does not generate wastes of potential concern and which is located at a leased property at which vapor intrusion risks are unlikely — buyers, tenants, lenders and insurers may be satisfied with a more limited “desktop review” of information derived from public and proprietary databases in lieu of a Phase I ESA.

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