

On December 30, 2013, US EPA issued its **final rule** approving use of the new ASTM E 1527-13 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" to satisfy the All Appropriate Inquiry (AAI) requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Performing environmental due diligence in compliance with the AAI requirements provides a basis for property purchasers to assert certain defenses to environmental remediation liability under CERCLA as an innocent purchaser, bona fide prospective purchaser or contiguous landowner. The rule is effective immediately.

US EPA clarified that "today's rule does not require that any party use this standard" and prospective purchasers can continue to use ASTM E 1527-05. Nonetheless, US EPA also announced that "in the near future" it intends to propose removing the reference to ASTM E 1527-05 from the AAI rule. US EPA believes ASTM E 1527-13 provides greater clarity to prospective purchasers with regard to potential contamination and enhances the procedures in ASTM E 1527-05. As a result, "EPA recommends that environmental professionals and prospective purchasers use the ASTM E 1527-13 Standard."

Some of the more significant changes adopted in ASTM E 1527-13 that may add time and costs to the Phase I process are:

1. The new recommendation to review regulatory files if the target property or adjoining properties appear in a public database listing. This could require several extra days/weeks as well as additional consultant travel and review time as compared to ASTM E 1527-05, which does not contain this specific recommendation and often resulted in consultants relying only on public database search results to make environmental risk conclusions.
2. The new specific requirement to evaluate the potential for hazardous vapors to migrate onto the target property.
3. The revised definition of Historical Recognized Environmental Conditions (HREC) as a past release that has been addressed to the satisfaction of a regulatory authority or meets unrestricted use criteria. ASTM E 1527-05 allowed a consultant more discretion in determining whether a condition is an HREC. Consequently, conditions considered as an HREC under ASTM E1527-05 may be considered a REC under ASTM E1527-13, triggering additional investigation.

Practically speaking, a consultant preparing Phase I ESAs consistent with ASTM E 1527-05 should have been conducting file reviews and vapor assessments when circumstances warranted. The new standard now requires these actions, which takes some discretion away from the environmental consultant, but also results in a more thorough analysis of environmental conditions that should help ensure compliance with the AAI rules. Performing the additional due diligence actions up-front pursuant to ASTM E1527-13 may also actually save time since these actions were often only conducted under ASTM E 1527-05 based on client or attorney recommendations to address issues identified in, or shortcomings of, a Phase I report after it was finalized.

Phase I ESA users, including purchasers, developers, investors and lenders, would be well served to require Phase I environmental site assessments going forward to comply with ASTM E 1527-13. If you have any questions about the final rule, please contact one of the Squire Sanders lawyers listed in this publication.

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