

ON THE HORIZON: A REVISED ASTM STANDARD FOR CONDUCTING PHASE I ENVIRONMENTAL SITE ASSESSMENTS

Hodgson Russ Environmental Alert
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On November 1, 2021, the American Society for Testing and Material's ("ASTM") environmental assessment, risk management, and corrective action committee ("E50") released E1527-21, a revised standard for conducting Phase I Environmental Site Assessments ("ESA"). The standard establishes new requirements for complying with the "All Appropriate Inquiry" rule ("AAI" or "AAI Rule") codified in 40 CFR Part 312, which is a necessary component of the environmental due diligence process to protect a prospective buyer, property owner, or lender from liability for environmental contamination. Environmental professionals are not required to use the revised standard for AAI purposes until it is adopted by the United States Environmental Protection Agency ("EPA") through a formal rulemaking process. Until then, environmental professionals and users should become familiar with the new standard and begin implementing it in their Phase I ESAs.

AAI

The AAI Rule establishes requirements for evaluating a commercial property and its environmental conditions, as well as assessing the likelihood of the presence of any contamination. The premise of the rule is that once a prospective buyer undertakes a review in accordance with the AAI rule, it can potentially avail itself of certain Federal and State (if applicable) affirmative defenses under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA," and also known as "Superfund") and any relevant State analog. Pursuant to the AAI Rule, inquiries are to be made "consistent with good commercial and customary practice."

There are certain affirmative defenses available to protect from Superfund liability that are directly attributable to the AAI process. To qualify for one or more of these defenses, a party must rigorously follow the AAI Rule, which includes having conducted a Phase I ESA consistent with the then-applicable ASTM standard, as promulgated through rulemaking. The Phase I ESA identifies potential environmental impairment conditions on the property, which it will refer to as a Recognized Environmental Condition ("RECs"), Controlled REC, or a Historical RECs ("HRECs"). In addition, Phase I ESAs can consider other risk considerations, such as non-scope issues (*i.e.* the presence of asbestos or lead-based paint; radon; potential or mapped wetlands being on-site), Business Environmental Risks

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("BERs"), and *de minimis* conditions. Note that if the Phase I ESA indicates that further inquiry is necessary based on the findings, and the party fails to perform a Phase II ESA, there is a myriad of case law examples by which a party may lose the ability to assert the affirmative defense. There is also the potential for data gaps to create problematic issues associated with reliance.

Given the potential that simply following the process may not be enough to qualify under the AAI Rule, and the reality associated with being in the position of needing to assert an affirmative defense in the first place, a secondary reason for conducting a Phase I ESA is practical in nature. In general terms, it is for purposes of "knowing" what you're buying, and the ability to quantify and consider various risk considerations.

Phase I ESA ASTM Standard

The current ASTM standard, E1527-13, was released in 2013, and subsequently adopted by EPA for purposes of the AAI rule. In general, the current standard requires: (1) the review of information, including historical documents concerning the property and government and regulatory records; (2) interviews with present and prior owners and operators; (3) a visual inspection of the subject property and adjacent properties; and, (4) the preparation of a Phase I ESA report, which is to identify specific conditions or business environmental risks, as defined under the standards.

Among the changes included in the revised E1527-21 standard are the following:

- The definitions of REC, HREC, and CREC were strengthened to reduce misclassifications of known or likely hazardous substances and petroleum product releases affecting subject properties.
- The terms "Property Use Limitation" and "Significant data gap" are formally defined.
- The historical records review section is restructured and updated to clarify subject and adjoining property identification, use, and research objectives. In addition, new parameters are established for the use of standard historical sources.
- The site reconnaissance requirements include additional details to reinforce existing good commercial and customary practices.
- There are new requirements for the written report, including the identification of RECs, CRECs, and significant data gaps in the Conclusion section; adding photos of site reconnaissance items; requiring the consistent use of the term "subject property"; and requiring the inclusion of a site map.
- The appendices are updated to include a revised legal appendix, including a new appendix providing guidance on the REC/HERC/CERC decision process, a flow chart, and representative examples of each; a revised report outline; and consideration and relevant discussion of business environmental risks, including emerging contaminants.

Hodgson Russ Takeaways

For the time being, nothing is required for purposes of relying on the current ASTM review process. Once EPA adopts the revised standard for AAI purposes, parties will want to proceed with ensuring any engaged consultant is adhering to the new standard of review for consistency with the AAI Rule, as the use of the prior standard will not be barred.

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A traditional purchaser or financing user of these reports may not notice much of a change for purposes of their review of the main report, but there will be more substantive engagement and consideration required of the environmental professional preparing the reports. For some professionals, we expect that not much will change in their deliberative process. However, E50 is hopeful that the revisions will help provide for more consistency in findings from the Phase I ESA process. It also may have the unintended consequence in causing some professional firms to raise their cost of preparation of Phase I ESAs, depending on the nature of the changes to their current process. In preparation of the switch in the AAI Rule, environmental professionals and consultants should begin familiarizing themselves with and implementing the revised standard.

The revised standard does not remove the need for users to appropriately consider findings from the Phase I ESA process with experienced advisors, including counsel. Potential transactional and impairment risks may not be properly flagged or caught if not assessed in the right context. A Phase I ESA may also just be one piece of a diligence puzzle, meaning there is also a need to consider it within the broader terms of the transaction, including as it may pertain to risk mitigation, shifting, or avoidance. Finally, the language and findings in Phase I ESAs, if improperly characterized in the report, can result in long-term issues that the user may need to address when it goes to divest and/or finance the real property. All of these issues require thoughtful consideration by experienced parties.

If you have questions related to the revised standard or navigating any other environmental-related issue, please contact [Michael Hecker](#) (716.848.1599) or anyone else on the [Hodgson Russ Environmental team](#), and we would be happy to help.