



# EPA Amends Rule for Conducting Phase I Environmental Site Assessments

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## What Happened

The United States Environmental Protection Agency (“EPA”) revised the standards and procedures that a party seeking protection from CERCLA liability may use when conducting a Phase I environmental site assessment before acquiring property. On December 30, 2013, EPA published an **amendment** to its All Appropriate Inquiries (“AAI”) Rule that allows a party to comply with the requirements for an environmental site assessment under the Rule by following ASTM International Standard E1527-13 (“ASTM E1527-13”). The amended AAI Rule became effective on the day it was published. A party may still comply with the AAI Rule’s provisions on environmental site assessments by having an environmental professional follow ASTM International Standard E1527-05 (“ASTM E1527-05”), but EPA announced that it intends to publish a proposed amendment “in the near future” that will remove the reference to ASTM E1527-05 and make ASTM E1527-13 the controlling standard for environmental site assessments for parties seeking liability protection.

## Background

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”) is a federal law that makes property owners liable for the cost of removing or remediating releases of hazardous substances on their properties regardless of whether they caused or contributed to the contamination<sup>i</sup>. Congress amended CERCLA in 2002 to exempt certain property owners who knowingly or unknowingly acquire contaminated properties from liability for environmental response costs. The innocent landowner, bona fide prospective purchaser, and contiguous property owner defenses provide liability protection to parties who conduct “all appropriate inquiries” before acquiring a contaminated property and meet the other requirements for those defenses.<sup>ii</sup>

EPA has issued regulations that define the procedures a party must follow to satisfy the CERCLA all appropriate inquiries requirement. The agency’s AAI Rule<sup>iii</sup> establishes standards and procedures for conducting a Phase I environmental site assessment for parties seeking protection from CERCLA liability. The AAI Rule contains specific criteria that an environmental professional must follow when performing an environmental site assessment and provides that a party may satisfy the site assessment requirements of the AAI Rule by having an environmental professional perform a Phase I in accordance with



ASTM E1527-05. In addition to providing potential protection from CERCLA liability, a Phase I that complies with the AAI Rule will also help a prospective purchaser to evaluate the environmental risks and liabilities associated with a property by evaluating current and historic uses of the site and nearby properties and by looking for other evidence of environmental impacts at the site.

In 2013, ASTM International released a new version of its ASTM E1527 standard. Although the new version retains most of the requirements from the earlier one, it also clarifies and expands upon the procedures that an environmental professional should follow when performing a Phase I. Among the significant changes that EPA identified are the following:

- ASTM E1527-13 specifically requires an environmental professional to consider impacts from vapor migration when determining whether there is a Recognized Environmental Condition on a property.
- ASTM E1527-13 distinguishes between a Historical Recognized Environmental Condition, a past release that has been addressed to a degree that allows for unrestricted use of the property, and a Controlled Recognized Environmental Condition, a past release that has been addressed but remains on the property and is subject to required controls.
- ASTM E1527-13 directs an environmental professional to perform a file review to verify information found in state and federal environmental databases or to provide a justification for why a file review is not necessary.

A party that intends to rely on the new ASTM standard should ensure that the environmental professional performing the site assessment has thoroughly reviewed and plans to follow ASTM E1527-13, which is available for purchase at [www.astm.org](http://www.astm.org).

After ASTM E1527-13 was released, EPA decided to amend its AAI Rule to keep pace with the emerging new standard for Phase I environmental site assessments. EPA published a proposed amendment to the AAI Rule on August 15, 2013 that would have added a reference to ASTM E1527-13, but withdrew the proposed rule on October 29, 2013 after receiving adverse comments. In the notice published with the December 30, 2013 amendment, EPA stated that it was responding to those comments and amending the Rule “to promote the use of the current industry standard and reduce confusion associated with the regulatory reference to a standard no longer recognized as current by ASTM International.”

### **What This Means**

A prospective purchaser who plans to rely on the ASTM standard to obtain liability protection should ensure that the environmental professional it selects to conduct or update a Phase I environmental site assessment follows the procedures in ASTM E1527-13. While a site assessment conducted in accordance with ASTM E1527-05 currently meets the site assessment requirements of the AAI Rule, EPA stated its intent to remove the reference to ASTM E1527-05 from the regulation. EPA now recommends that environmental professionals and prospective purchasers use ASTM E1527-13. Although there are only a few significant



differences between ASTM E 1527-05 and ASTM E1527-13, a party risks losing the ability to rely on the innocent landowner, bona fide prospective purchaser or contiguous property owner defenses to CERCLA liability if it fails to follow all of the procedures of ASTM E1527-13.

i 42 U.S.C. § 9601 *et seq.*

ii 42 U.S.C. §§ 9601(35), (40), 9607(q)

iii 40 C.F.R. Part 312