
EPA's Direct Final Rule Signals End of ASTM E1527 Revision Process

By Joseph R. Brendel / Sep 16, 2013

The U.S. Environmental Protection Agency ("EPA") recently issued a Direct Final Rule (78 Fed. Reg. 49690; August 15, 2013) amending the EPA's All Appropriate Inquiries Rule (40 C.F.R. Part 312) to reference the pending ASTM Standard Practice E1527-13 for Phase I environmental site assessments as satisfying the requirements for conducting all appropriate inquiries under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Although the EPA states that it does not anticipate receiving any negative comments in response to the Direct Final Rule, the agency simultaneously issued a Proposed Rule (78 Fed. Reg. 49714; August 15, 2013) and the EPA will proceed through the conventional rulemaking process if it is necessary to respond to negative comments.

By way of background, the All Appropriate Inquiries Rule ("AAI Rule") sets forth the steps that a prospective purchaser must take prior to purchasing potentially contaminated property in order to qualify for CERCLA liability protection, such as the "innocent landowner" defense and the "bona fide prospective purchaser" defense. When the EPA issued the AAI Rule in 2005, it specifically referenced the ASTM E1527-05 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" as being compliant with the AAI Rule requirements.

Since 2005, most prospective purchasers wishing to qualify for one of the CERCLA liability protections and/or to satisfy a lender requirement have retained an environmental professional ("EP") to perform a Phase I ESA in accordance with ASTM E1527-05. However, ASTM standards have a sunset provision and must be reviewed and reissued every eight years in order to ensure that the standard still reflects good commercial and customary practices of the industry. During its review of E1527-05, the ASTM E1527 Task Group decided that revisions to the standard were appropriate in order both to improve industry practices and to resolve perceived confusion regarding application of the standard. The Task Group's multi-year effort resulted in E1527-13, which ASTM expects to issue in final form before the end of 2013. The most significant changes in E1527-13 are as follows:

- The definition of "Recognized Environmental Condition" ("REC") has been simplified to focus on the concepts of release or threatened release of a hazardous substance or petroleum products. Likewise, the definitions of "release" and "environment" in the Standard incorporate by reference the CERCLA definition.
- The definition of "Historical Recognized Environmental Condition" ("HREC") has been revised to clarify that it applies only to past release sites addressed to agency satisfaction without the necessity for activity and use limitations ("AULs") such as institutional controls or engineering controls. Unless the EP finds that a "no further action" determination from the agency was based upon incomplete data (i.e., the release is still present above action levels), an HREC is not considered to be a REC. Although an HREC is required to be identified in the findings section of the Phase I report, where the EP must opine on its current impact to the property, an HREC is not required to be identified in the conclusions section of the report.
- The revised standard includes a new definition for a "Controlled Recognized Environmental Condition" ("CREC") for situations where AULs (e.g., a deed restriction or an engineered cap) are required to maintain a cleanup. An historical release identified as a CREC must be included in both the findings and conclusions sections of the Phase I report.
- The standard was revised to make clear that vapor intrusion into structures should be considered during the Phase I process. There was some confusion under the existing E1527-05 standard because "indoor air quality" was considered a non-scope item. However, the new standard will specifically provide that non-scope indoor air quality issues are "unrelated to releases of hazardous substances or petroleum products into the environment." Furthermore, the new definition of "migrate/migration" specifically includes the movement of vapor in the subsurface.
- ASTM revised Section 8.2.2 on "Regulatory Agency File and Records Review" to provide that if the target property or any adjoining property is identified in the standard environmental record sources (e.g., CERCLIS list or RCRA generators list), "pertinent regulatory agency files and/or records associated with the listing should be reviewed." If, in the EP's opinion, such a review is not warranted, the EP must explain within the report the justification for not conducting the regulatory file review. As an alternative to an agency file review, the EP also may review files/records from an alternative source(s) (e.g., on-site records, user provided records, interviews with knowledgeable regulatory officials). The EP must include a summary of the information obtained from the file/record review in the report as well as his/her opinion on the sufficiency of the information obtained from the files/records review to evaluate the existence of a REC, HREC, CREC, or a de minimis condition.
- ASTM revised the scope of the "User Responsibilities" to clarify which aspects of the site assessment process may be the responsibility of the prospective property owner (i.e., the "User") and not necessarily the responsibility of the EP.

The EPA's Direct Final Rule simply adds a reference to the AAI Rule that the procedures in E1527-13 are compliant with all appropriate inquiries. However, the rule as drafted would retain the reference to E1527-05 as also being compliant with all appropriate inquiries. Therefore, theoretically, an EP could choose to conduct a Phase I under E1527-05 and the EPA would find that it satisfies all appropriate inquiries. The ASTM Task Group's position is that when E1527-13 is issued by ASTM, it effectively will supersede E1527-05 and E1527-05 will be considered "retired."

Regardless of whether the rule ultimately provides that E1527-05 remains compliant with AAI, it is anticipated that the marketplace generally will insist upon the use of the updated E1527-13 standard because it represents an improvement over E1527-05. In that regard, the ASTM Task Group may submit comments on the EPA's rulemaking to explain ASTM's process for replacing an existing standard (i.e., that E1527-05 will be considered to be superseded and retired). Once ASTM issues E1527-13, prospective purchasers and other Users of Phase I assessments should carefully review Phase I proposals from EPs in order to confirm that the EP will be performing the Phase I assessment pursuant to the updated and improved E1527-13 standard.

For more information regarding ASTM Standard Practice E1527 or the All Appropriate Inquiries requirements, please contact Joseph R. Brendel at 412.394.2373 or jbrendel@clarkhillthorpeed.com . Mr. Brendel participated on the ASTM Task Group that drafted the currently proposed E1527-13.