

Insights

WELCOMING THE NEW YEAR WITH EPA REVISIONS TO THE ALL APPROPRIATE INQUIRY REGULATIONS

Jan 30, 2023

On December 15, 2022, the United States Environmental Protection Agency (“EPA”) published a [final rule](#) amending the Standards and Practices for All Appropriate Inquiries (“AAI”) to incorporate and adopt the American Society for Testing and Materials (“ASTM”) International’s recent E1527-21 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.”

Significantly, these changes affect what constitutes a valid Phase I ESA for purposes of AAI. Entities with financial interests in real property, including prospective purchasers and tenants, lenders, private equity, investors, insurers, and other stakeholders should be familiar with the changes to ensure any Phase I ESA satisfies the updated requirements.

EPA has created a helpful [chart](#) comparing the new standard to the previous ASTM E1527-13. Below we highlight some of the significant changes between the old and new ASTM standards.

I. SIGNIFICANT CHANGES

While ASTM E1527-21 does not make any substantive changes to AAI itself, there are numerous differences between the two standards to consider. While not intended to be a complete list of changes, some of those differences include the following:

Recognized Environmental Condition (“REC”).

- The new standard updates the definition to clarify what constitutes a REC.
 - The prior ASTM E1527-13 standard used “likely” when describing three instances in which a REC is identified.
- Under the new standard, the term “likely” is no longer used to describe every instance in which a REC is found. Rather, it is used only when describing a single instance in which the *likely* presence of hazardous substance is sufficient to establish a REC.

- The new standard clarifies that the term “likely” means a condition “which is neither certain nor proved, but can be expected or believed by a reasonable observer...”
- Under the new standard, the Historical REC (“HREC”) and Controlled REC (“CREC”) categories are further developed to help simplify the REC logic and delineate among RECs, HRECs, and CRECs. The new standard includes a flow chart to illustrate these distinctions and promote uniformity.

Consultant’s Responsibility versus User’s Responsibility.

- The environmental consultant must now identify “significant data gaps,” which is defined as a “data gap that affects the ability of the environmental professional to identify a recognized environmental condition.”
- The environmental consultant is required to include a site map indicating the property boundaries in all Phase I reports and captioned photos depicting major site features and the location of RECs and/or *de minimis* conditions.
- The user must conduct environmental lien and activity use limitation searches, but the user can require the consultant to do this as an added scope item. The new rule provides some flexibility as to how this process is done so long as the search extends back to 1980.

Emerging Contaminants.

- Examples of **Emerging Contaminants** are certain chemicals, pharmaceuticals, food additives, and natural or synthetic hormones.
 - Current Emerging Contaminant chemicals include, but are not limited to, per- and polyfluoroalkyl substances or “PFAS,” 1,4-dioxane, and 2,4,6-Trinitrotoluene or “TNT.”
 - Asbestos was once classified as a former Emerging Contaminant.
- These substances may pose a risk to human health or the environment, but are not currently classified as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”).
- Emerging contaminants are not required to be considered under the new ASTM standard unless they are hazardous substances as defined in CERCLA.
 - Assessment of emerging contaminants may be included as a “non-scope consideration” in a Phase I ESA.
- Emerging Contaminants will become subject to review under Phase I ESAs if they are classified by EPA as hazardous substances under CERCLA. Certain types of emerging

contaminants are expected to be added to the definition of hazardous substance as soon as the summer of 2023.

II. WHAT IS NOT CHANGING?

Significantly, the list of critical component dates remains unchanged. The new standard does not affect the existing rule that the shelf life of a Phase I ESA is effectively 180 days. The new standard makes clear that the 180 days is calculated from the date of the first of the enumerated critical components and requires a list of those critical components.

We expect this process will make it easier for all parties to determine whether a Phase I ESA remains valid. The critical components include interviews with owners, operators, and occupants; searches for recorded environmental cleanup liens; reviews of government records; visual inspections of the subject property; and the environmental professional declaration.

III. TRANSITION TIMELINE

The following is a summary of important dates for transferring to the new ASTM standard under AAI:

- **December 15, 2022 – February 12, 2023.** The current standard (ASTM E1527-13) is the recognized standard.
- **February 13, 2023.** ASTM E1527-21 standard becomes effective.
- **February 13, 2024 – February 12, 2024.** Both standards (ASTM E1527-13 and E1527-21) can be used. In short, the user can elect which standard to comply with in the Phase I ESA.
- **February 13, 2024.** EPA will require ASTM to “[sunset](#),” or remove, the previous standard (ASTM E1527-13); ASTM E1527-21 will be the only standard to satisfy AAI.

IV. CONCLUSION

The revised ASTM 1527-21 standard represents the most current practices for conducting Phase I ESAs. As a result, users are encouraged to adhere to ASTM E1527-21 on or after February 13, 2023. Notably, EPA will allow users to adhere to the current standard (ASTM E1527-13) for AAI purposes until one year following the effective date of the final rule referencing ASTM E1527-21, which is February 13, 2023. Therefore, ASTM E1527-13 cannot be used after February 13, 2024 to establish AAI.

With respect to emerging contaminants, and specifically PFAS, we recommend that users discuss with counsel whether to add an assessment of emerging contaminants to the Phase I ESA scope. Numerous states have already enacted regulations implementing standards for certain PFAS

substances in drinking water, groundwater, surface water, and soil. Even though EPA has not designated PFOA or PFOS as hazardous substances pursuant to CERCLA yet, that time is expected to arrive shortly. Consequently, we encourage you be prepared now by considering a potential evaluation of PFAS substances in all Phase I ESAs, particularly if merited by state or local regulations.

For additional information, or if you have any questions regarding the ASTM standards or AAI requirements, please contact Bryan Keyt (312-602-5036, bryan.keyt@bclplaw.com), Erin Brooks (314-259-2393, erin.brooks@bclplaw.com), Brittainy Cavender (314-259-2774, brittainy.cavender@bclplaw.com), or John Kindschuh (314-259-2313, john.kindschuh@bclplaw.com).

RELATED CAPABILITIES

- PFAS
- Environment

MEET THE TEAM



Bryan E. Keyt

Chicago

bryan.keyt@bclplaw.com

[+1 312 602 5036](tel:+13126025036)



Erin L. Brooks

Chicago / St. Louis

erin.brooks@bclplaw.com

[+1 312 602 5093](tel:+13126025093)



Brittainy Anne Cavender

St. Louis

brittainy.cavender@bclplaw.com

[+1 314 259 2774](tel:+13142592774)



John R. Kindschuh

St. Louis

john.kindschuh@bclplaw.com

+1 314 259 2313

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.