

The New ASTM Phase I Standard

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On December 30, 2013, a new standard for Phase I Environmental Site Assessments (“Phase I”), known as *E1527-13 Phase 1 Standard for Environmental Site Assessments* (“2013 ASTM Standard”) was adopted by the Environmental Protection Agency (“EPA”). The 2013 ASTM Standard updates the 2005 ASTM Standard and impacts anyone who plans on buying, selling, or refinancing property.

The 2013 ASTM Standard is the guideline used to conduct pre-purchase Phase I’s so that a purchaser can satisfy the requirements of the All Appropriate Inquiry Rule (“AAI Rule”). Satisfying the requirements of the AAI Rule gives a purchaser of contaminated property a layer of protection from federal CERCLA liability for environmental cleanup of the newly-acquired contaminated property. Conducting an ASTM compliant Phase I is an absolute “must-do” prior to the acquisition of commercial or industrial property.

For now, Phase I’s conducted using both the 2005 and the 2013 ASTM Standards will be compliant with the AAI Rule. However, as discussed more fully below, EPA will phase out the 2005 ASTM Standard in the near future.

The top five things you need to know about the new Phase I standard are:

(1) Compliance with the 2013 ASTM Standard may increase the cost and time to get a Phase I.

The 2013 ASTM Standard adds new requirements and expands on others. For example, environmental consultants must review pertinent regulatory files or justify the reason why the file review was not conducted. Regulatory file reviews have been standard practice for many consultants but not for some lower-cost providers; this requirement may increase the cost and time to deliver a Phase I ESA. In addition, the 2013 ASTM Standard places a greater emphasis on assessing the impacts of vapor migration and intrusion (discussed further below).

(2) Be sure to discuss with your environmental consultant whether to proceed under the 2005 or the 2013 ASTM Standard. Even though both standards are now accepted as compliant with the AAI Rule under CERCLA, the U.S. Environmental Protection Agency (“EPA”) has expressed a strong preference for the 2013 ASTM Standard. In the near future, EPA will likely amend the regulations to allow only the 2013 ASTM Standard to be compliant with the AAI Rule.

(3) Understanding the impacts of vapor intrusion and vapor migration will be a more significant part of the Phase I process. The 2013 ASTM Standard places greater emphasis on assessing impacts from vapor migration and vapor intrusion. Under the new standard, vapor migration is included within the definition of “migration.” Vapor migration on, under, or at a property will now be considered a Recognized Environmental Condition (“REC”). Even though the EPA has stated that it considered vapor migration concerns to be covered under the 2005 ASTM Standard, as a practical matter, many environmental consultants did not address these concerns in their Phase

I's. The 2013 ASTM Standard clarifies that the impact of vapor intrusion must be a consideration when performing Phase I's. Further, environmental consultants who failed to identify vapor intrusion issues in previous Phase I's may be at risk for liability from malpractice lawsuits.

(4) Properties that formerly had no RECs may now require action to address vapor intrusion concerns. Because vapor migration and vapor intrusion are more thoroughly addressed in the new ASTM standard, properties where a "clean" Phase I had been provided may now require additional investigation if the property is part of a new transaction.

(5) Definitions have been added and revised for greater clarity. The 2013 ASTM Standard includes several new terms that give environmental consultants more guidance in describing and assessing RECs. For example, "Controlled Recognized Environmental Condition" or "CREC" can be used to describe a site that has been cleaned up to risk-based standards and is restricted to certain uses such as commercial/industrial. An "Historical Recognized Environmental Condition" or "HREC", by contrast, is a closed REC that has been cleaned up to unrestricted use criteria and is no longer a concern. The added clarity gives environmental consultants more flexibility in describing RECs and assessing whether the REC is an issue that needs to be dealt with immediately, is a controlled REC that is acceptable based on land use, or is an historical REC that no longer presents an issue.

The new 2013 ASTM Standard will lead to more comprehensive Phase I's and add clarity but also likely will raise new issues with respect to vapor intrusion issues.

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