



EPA to Withdraw Rule Regarding New Phase I ESA Standard E1527-13 as Satisfying All Appropriate Inquiries

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When EPA issued its **Direct Final Rule on August 15, 2013 (78 Fed. Reg. 49690)**, approving the use of the **new proposed 2013 Phase I Environmental Site Assessment (ESA) standard (ASTM E1527-13)** to satisfy the All Appropriate Inquiries Rule, **40 CFR Part 312**, the agency specified it would withdraw the Final Rule and it would not take effect if EPA received an adverse comment during the comment period. That has now happened as an adverse comment was received on August 28. Consequently, EPA will withdraw the final rule (if it does what it said it would do) and rely upon the companion **Proposed Rule issued simultaneously on the same day, 78 Fed. Reg. 49714**, and respond to comments in order to proceed with a final rule.

At issue is whether ASTM's new Phase I ESA Standard E1527-13 supersedes or replaces the current **2005 version E1527-05**. EPA's Final Rule specified that entities are not required to use the 2013 Phase I ESA standard to satisfy AAI. Rather, the 2013 Phase I ESA is just one mechanism for satisfying AAI according to the agency. In particular, EPA made clear that the 2005 version, E1527-05, would also satisfy the AAI Standard. "The Agency notes that there are no legally significant differences between the regulatory requirements and the two ASTM E1527 standards." 78 Fed. Reg. at 49692.

AAI, of course, is the common element that allows parties to claim defenses and protection from CERCLA liability under one of three landowner liability protections:

- Bona fide prospective purchaser;
- Contiguous property owner; and
- Innocent landowner.

The **adverse comment** received in the regulatory docket challenges the agency for endorsing two standards for satisfying AAI, a comment which appears to be a common theme amongst environmental consultants and practitioners based on similar comments on social media outlets.

The 2005 version and the 2013 version of the Phase I ESA provide different requirements. Indeed, despite EPA's statement concerning the absence of legally significant differences between the two standards, the agency issued a guidance document highlighting some of the differences, entitled "**Summary of Updates and Revisions to ASTM E1527 Standard Practice for Environmental Site Assessments: Phase**

I Environmental Site Assessment Process: How E1527-13 Differs from E1527-05”
identifying changes including:

- Updated definitions of Recognized Environmental Condition (“REC”), Historical Recognized Environmental Conditions (“HREC”), and a new Controlled Recognized Environmental Conditions (“CREC”);
- “Prospective property owners will have the added assurance that releases that migrate onto a subject property via a vapor pathway will be identified as [RECs].”; and
- Regulatory file reviews.

While uncertainty abounds at the moment, one point is clear: parties interested in submitting comments on the Proposed Rule -- and expressing an opinion about the interplay of the 2005 and 2013 Phase I ESA standards in relation to satisfying AAI -- must do so within the next week. As noted in the Direct Final Rule “[EPA] will not institute a second comment period on this action. Any parties interested in commenting must do so at this time and before September 16, 2013.” 78 Fed. Reg. at 49692.