

UPDATED ALERT ON REVISED ASTM STANDARD

Hodgson Russ Environmental Alert
March 22, 2022

Background:

In November 2021, the American Society of Testing and Material's ("ASTM") environmental assessment, risk management, and corrective action committee ("E50") released E1527-21, a revised standard for conducting Phase I environmental assessments ("ESA"). As more fully discussed in our November 5, 2021 alert,[1] E1527-21 creates new standards for compliance with the "All Appropriate Inquiry" rule ("AAI"), codified in 40 CFR Part 312. AAI is a necessary component of the environmental due diligence and risk management process for prospective property owners. E1527-21 remains an advisory standard until adopted by the United States Environmental Protection Agency ("USEPA") through the formal rulemaking process.

Update:

On March 14, 2022, USEPA issued a final direct rule (87 FR 14174) proposing to amend the AAI rule to reference E1527-21 and allow for its use to satisfy the requirements for conducting all appropriate inquiries under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[2] The rule will become effective on April 13, 2022, without further notice, unless USEPA receives adverse comments that it seeks to address. If USEPA does receive adverse comments, the agency will publish a timely withdrawal of its proposal in the Federal Register and the final direct rule will not take effect.

If the final direct rule does become effective, USEPA has stated its formal adoption of E1527-21 will not displace or disallow the use of the previously recognized ASTM standards (E1527-13 or E2247-16) for purposes of assessing AAI compliance. Nor will that adoption alter the regulatory requirements of the AAI rule set forth in 40 CFR Part 312.

Hodgson Russ Takeaways

By amending the AAI rule to incorporate E1527-21 without replacing the previously adopted ASTM standards (E1527-13 and E2247-16), parties may take the position that USEPA is seeking to broaden the paths a party has to satisfy the AAI rule and take advantage of related affirmative defenses under CERCLA. However, the distinctions between the prior standards creates the potential for confusion as to what standard should be applied (or required) in a transaction. We expect a number

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of comments to be lodged regarding this issue, so it'll be interesting to see how USEPA responds.

By declaring that the older ASTM standards remain acceptable for purposes of the AAI rule, USEPA's adoption of E1527-21 could create certain tensions in the environmental due diligence process. As noted in our prior discussion of E1527-21, the new ASTM standard contains numerous updates, changes, and clarifications intended to ensure a more complete and robust Phase I ESA. For prospective purchasers, more due diligence typically equates to greater transparency and less risk from an environmental contamination standpoint. It also means a stronger likelihood that a court would uphold that AAI was met in a circumstance where one of the associated affirmative defenses under CERCLA were to be utilized.

While certain parties may be willing to consider a prior standard as a means of "checking the box" on environmental diligence for a potential less robust and less expensive alternative, we would reiterate an old Latin saying – caveat emptor (buyer beware).

When E1527-21 is formally adopted, regardless of the applicability of prior standards, we'd recommend prospective purchasers or financing users of Phase I ESAs to be mindful of what AAI standard is actually being applied during the due diligence process. Being familiar with the differences in each standard, and having experienced counsel and advisors knowledgeable of how those differences can affect the level of review a Phase I ESA entails, will help ensure the proper identification and characterization of business environmental risks inherent in a property transaction.

If you have questions related to the revised standard or navigating any other environmental-related issue, please contact [Michael Hecker](mailto:mhecker@hodgsonruss.com) (716.848.1599) or anyone else in the [Hodgson Russ Environmental Practice](#), and we would be happy to help.

[1] "On the Horizon: A revised ASTM Standard for Conducting Phase I Environmental Assessments" (Nov. 5, 2021), available at <https://www.hodgsonruss.com/newsroom-publications-13569.html>.

[2] A copy of the USEPA's direct final rule is available here: <https://www.federalregister.gov/documents/2022/03/14/2022-05259/standards-and-practices-for-all-appropriate-inquiries>.