

# Recent Rulings Affirm Need For Up-To-Date Phase I ESAs

By **Van Hilderbrand, Marian Hwang and Russell Randle** (April 25, 2022)

It is standard practice today for real property purchasers to conduct a Phase I environmental site assessment, or otherwise satisfy the all appropriate inquiries, or AAI, requirement, in accordance with generally accepted good commercial and customary standards and practices, prior to completing a property transaction.

Fulfilling the AAI requirement helps real property purchasers qualify for certain defenses to liability for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA — otherwise known as the Superfund law — as a contiguous, bona fide prospective purchaser or innocent landowner.

The American Society for Testing and Materials' Committee on Environmental Assessment, Risk Management and Corrective Action establishes the environmental professional industry standard governing the practice and process for conducting Phase I ESAs. This standard is then approved by the U.S. Environmental Protection Agency as compliant with the AAI requirement.

Although completing a Phase I ESA isn't the only way to meet the AAI requirement, it is the most straightforward — and it is specifically endorsed by the EPA. Conducting a Phase I ESA is now routine, but it should not be taken lightly.

Working with a qualified environmental professional is crucial to compliance with the ASTM standards and the AAI requirement. If a Phase I ESA is noncompliant, a purchaser's liability defenses are jeopardized.

The ASTM released a revised standard late last year, and the EPA recently adopted it and published it for public comment. In this article, will discuss two important aspects of the ASTM standard and the AAI requirement.

First, we will review why meeting the AAI requirement and conducting a Phase I ESA prior to purchase is so important, by discussing several recent cases in which a noncompliant Phase I ESA put a purchaser's status in jeopardy. Second, we will recap the significant changes in the revised standards, and examine how the compliance landscape has changed.

## Courts Requiring Strict Compliance With AAI Requirement

### ***Von Duprin LLC v. Major Holdings LLC***

The importance of complying with the AAI requirement can be seen in some recent cases. The first case of note is *Von Duprin v. Major Holdings*, decided last year by the U.S. Court of Appeals for the Seventh Circuit.

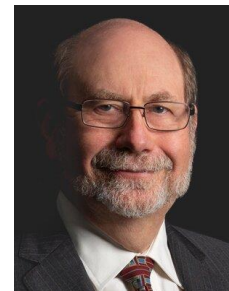
Among several other CERCLA-related issues, one issue in the case was the status of Von Duprin's bona fide prospective purchaser, or BFPP, defense. Von Duprin conducted Phase I ESAs for four properties that later required varying degrees of remediation.



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Von Duprin claimed that the company was exempt from CERCLA liability, and brought claims against current and former owners and operators of the properties. The U.S. District Court for the Southern District of Indiana looked to the process and procedure outlined in the ASTM International Standard for conducting Phase I ESAs — at that time, the standard was ASTM E1527-05 — to determine that Von Duprin had not satisfied the AAI requirement at two of the properties.

At the first property, the ASTM requires certain attestations about the environmental qualifications of the environmental professionals conducting the Phase I ESA on behalf of the prospective purchaser to be included in the report. Because these attestations were not included in the Phase I ESA, Von Duprin was not entitled to the defense.

At the second property, Von Duprin leased the property for a few years before purchasing. Von Duprin didn't conduct the Phase I ESA until the purchase. The district court held that because Von Duprin didn't satisfy the AAI when it became an operator at the site, it was not entitled to the defense.

In other words, the Phase I ESA, which was conducted many years later, was not completed within 180 days of the lease commencement, as required in the ASTM. The Seventh Circuit agreed with the district court on both issues. This decision demonstrates that strict compliance with the AAI requirement, per the EPA's regulations, is required to succeed in establishing the BFPP defense.

### ***TC Rich LLC v. Shaikh***

The second case is TC Rich v. Shaikh, decided in 2021 by the U.S. District Court for the Central District of California. The court found that the property owner, TC Rich, had reasonably relied on an environmental site assessment, despite the environmental professional's failure to review land records to identify prior uses of hazardous substances.

Because TC Rich reasonably relied on the findings, the owner had satisfied the AAI requirement. This was sufficient to defeat summary judgment on liability, based on the innocent landowner defense.

### ***U.S. v. Godley***

The third case is U.S. v. Godley, decided in 2021 by the U.S. District Court for the Western District of North Carolina. In this case, the town of Pineville, North Carolina, asserted the innocent landowner defense to CERCLA liability.

The court rejected the argument, because Pineville knew about the hazardous substances on the site at the time of purchase. According to the court, the innocent landowner defense only applies to those landowners who "did not know and had no reason to know of the presence of hazardous substances when it acquired a facility."

There is no mention in the opinion of whether Pineville attempted to satisfy the AAI requirement through a Phase I ESA or otherwise. Had it satisfied the AAI requirement, maybe the town could have asserted a BFPP defense.

### **ASTM Revised Standard Approved by EPA**

You may be aware that a new revision of the environmental professional industry standard

governing the practice and process for conducting Phase I ESAs has been approved by the ASTM Committee on Environmental Assessment, Risk Management and Corrective Action. The revised standard, ASTM E1527-21, replaces ASTM E1527-13.

The updates in the revised standard help clarify important aspects of the process, and should create more consistency in the practice of environmental professionals and the results of Phase I ESAs.

On March 14, the EPA adopted the revised standard as compliant with the AAI requirement, and published a direct final rule, as well as a proposed rule, in the Federal Register. The agency stated the following in the direct final rule:

EPA is publishing this direct final rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comment given that this action will provide flexibility for grant recipients and other entities that may benefit from the use of the ASTM E1527-21 standard.

According to the EPA, the direct final rule would become effective 60 days after publication without further notice — in other words, on May 13 — unless the agency received adverse comments.

The official comment period closed on April 13, with several stakeholders submitting adverse comments. In sum, the stakeholders objected because the proposed rule and direct final rule failed to remove the reference to the superseded ASTM E1527-13 standard, and allowed the continued use of E1527-13 to satisfy the agency's AAI requirement.

According to the filed comments, allowing the use of two standards would cause confusion, uncertainty and controversy in the marketplace on how to comply with the AAI requirement. Instead, the commenters proposed removing the ASTM E1527-13 standard as a method to satisfy the AAI requirement.

The EPA previously said that if adverse comments were received, the direct final rule would be withdrawn, and the proposed rule would be revised to address those comments and eventually finalized. When the EPA adopted the ASTM E1527-13 standard as compliant with the AAI requirement, the agency removed the reference to the superseded ASTM E1527-05 standard. Most likely, the agency will do the same here in the new rule.

Below is a quick recap of the changes in the revised standard.

### ***Updated Definitions***

The revised standard includes updated and revised definitions of the key terms "recognized environmental condition," "controlled recognized environmental condition" and "historical recognized environmental condition."

The revised standard will also contain an appendix that will include recognized environmental condition examples, and clarifications with regard to each definition. The updates, however, are meant to provide clarification between the classifications, and do not substantively change the definitions from the previous standard.

### ***Clarification on Dates***

The revised standard requires that the specific dates on which certain required tasks were

completed be listed in reports, so that report users can determine if a Phase I ESA requires updating to remain valid.

A Phase I ESA's shelf life is 180 days from the earliest of required tasks, but can be extended to one year if those tasks are updated, for example, through the review of governmental agency records, interviews, site reconnaissance, declaration by the environmental professional, and the search for environmental liens and activity use limitations, or AULs.

Without reference to the specific dates, the report could be unclear as to when required tasks were completed, and as to whether the report needed updating. The revised standard also clarifies that the 180-day or one-year clock begins to run as soon as the first of these tasks is completed.

### ***Prior Use of the Subject Property***

Unlike in the previous standard, the revised standard lists four standard historical resources that must be reviewed, at a minimum, to determine the subject property's prior uses. These include (1) aerial photographs; (2) fire insurance maps; (3) local street directories; and (4) historical topographic maps.

The environmental professional must also explain why any of these sources cannot be reviewed. The environmental professional must also research these historical resources for any adjoining properties.

### ***Environmental Liens and AULs***

The revised standard discusses and further clarifies that the report user is responsible for searching for environmental liens and AULs that affect the subject property in land and title records going back to 1980. The previous standard did not include a timeframe.

### ***Inclusion of Emerging Contaminants***

The revised standard lists per- and polyfluoroalkyl substances and other emerging contaminants as a nonscope consideration in Phase I ESAs. Nonscope considerations, such as lead and asbestos, may identify an environmental risk, but these considerations are not required to be considered under the AAI requirement.

However, the revised standard includes a footnote that a party may consider emerging contaminants in their due diligence, if states define them as hazardous substances and users want to obtain state liability defenses.

### ***Use of the Term "Subject Property"***

To avoid confusion and promote consistency, the revised standard encourages use only of the term "subject property" in the Phase I ESA, as opposed to "property" or "site."

### ***Definition of "Significant Data Gap"***

The standard always included a definition of "data gap," but to assist environmental professionals in determining if a data gap is significant enough to alter the findings of a Phase I ESA, the revised standard now includes a definition of "significant data gap."

## ***Subject Property Photographs***

The revised standard makes it clear that photographs and a map showing the boundaries of the subject property should be included in the Phase I ESA.

Until the proposed rule is revised and finalized, real property purchasers and environmental professionals have several options: (1) Continue using and citing the previous standard; (2) use and cite the revised standard; or (3) a hybrid approach — adapt the review to the revised standard, and use and cite to both standards.

## **Conclusion**

Real property purchasers should understand that the AAI compliance landscape is changing. With the adoption of the ASTM E1527-21 standard, it is imperative to work with a qualified environmental professional to conduct a fully compliant Phase I ESA. The risk of losing key protections from CERCLA liability is just too great.

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