

# ABCs OF SUPERFUND LIABILITY PROTECTION – AAIs, BFPPs, AND CURRENT PHASE I STANDARDS

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## I. Introduction

This article provides a general overview of the bona fide prospective purchaser (BFPP) liability exemption, first added by the 2002 Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Amendments) to the 1980 Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA or Superfund). It then focuses on the professional standards and processes for a Phase I environmental site assessment (Phase I) that must be performed for a purchaser to demonstrate compliance with CERCLA’s “all appropriate inquiries” (AAI) requirement. AAI is a threshold criterion that purchasers must meet to qualify for statutory liability protections available to BFPPs under CERCLA.

This article reviews and summarizes the U.S. Environmental Protection Agency’s (EPA) final rule published on December 15, 2022 (effective February 13, 2023), that amended the standards and practices for AAIs set forth in 40 C.F.R. Part 312 (AAI Final Rule). As amended, the AAI Final Rule now references and recognizes ASTM International’s most current E1527-21 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” and allows for this standard’s use to satisfy the requirements for conducting AAIs under CERCLA. The AAI Final Rule, as amended, also continues to recognize and allow for the use of ASTM International’s E1527-13 (the previous version of this same standard) for a one year “sunset” or “phasing out” period that expires as of February 13, 2024. Additionally, the AAI Final Rule continues to recognize the use, where appropriate, of ASTM International’s separate E2247-16 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property” as further reviewed below.

## II. Overview of BFPP Exemption and Its AAI Requirement

As part of the Brownfields Amendments, Congress amended CERCLA to create a new exemption for BFPPs whose potential liability for a release of hazardous substances is based solely on status as an owner or operator of a contaminated property, provided that the party does not impede the performance of a response action or natural resource restoration.<sup>2</sup> Through the Brownfields Amendments, Congress sought to encourage the voluntary acquisition of contaminated properties and eliminate prior statutory impediments to their redevelopment. CERCLA’s BFPP protections are available to qualifying private parties, as well as state and local government entities.<sup>3</sup>

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<sup>2</sup> CERCLA § 107(r)(1) provides that, “[n]otwithstanding subsection (a)(1), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the bona fide prospective purchaser being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.”

<sup>3</sup> See EPA’s comprehensive website for “State and Local Government Activities and Liability Protections” and specifically the section on “Other Superfund Liability Protections,” available at <https://www.epa.gov/enforcement/state-and-local-government-activities-and-liability-protections>.

To qualify as a BFPP, a property owner must have acquired ownership of a contaminated property after January 11, 2002, and meet all eight criteria in CERCLA § 101(40)(B), which includes establishing (by a preponderance of the evidence):

- All hazardous substance disposal occurred before the purchaser acquired (by fee or lease) the contaminated property (defined under CERCLA as a “facility”);
- The purchaser conducted statutorily required due diligence or “all appropriate inquiries” (as further described below) into the previous ownership and uses of the facility;
- The purchaser has “no affiliation” with any potentially responsible party (PRP); and
- The purchaser complies with all continuing obligations after acquiring the property, including taking reasonable steps to prevent a continued release or the threat of future release and to limit human and environmental exposures.

To date, the courts and EPA have focused on the AAI requirement of the BFPP exemption and related liability defense. Absent compliance with AAI, certain categories of persons may be held strictly liable under CERCLA. Conducting AAI is one of the “common elements” that EPA considers when determining the availability of the landowner liability protections statutorily available under CERCLA for BFPPs, contiguous property owners, and innocent landowners.<sup>4</sup> EPA’s AAI Final Rule (40 C.F.R. Part 312, first promulgated in 2005<sup>5</sup>) provides a performance-based standard for inquiries into past uses and ownerships of a property, which among other things requires visually inspecting the property to identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or adjacent to the subject property. Put simply, it is an evaluation of a property to identify potential environmental contamination and assess potential liability for any contamination present.<sup>6</sup> It may be viewed, from a due diligence perspective, as an important tool in assessing the business risk of a decision to acquire real property.

### III. Overview of Phase I Assessments

For a purchaser’s compliance with CERCLA’s AAI requirement (to qualify as a BFPP and for the benefit of related statutory liability protections), EPA’s AAI Final Rule (as amended) approves the use of specific professional standards and practices for conducting Phase I environmental site assessments. Under the AAI Final Rule, a purchaser seeking to show that it has made “all appropriate inquiries” may demonstrate presumptive compliance by following ASTM International’s (formerly American Society for Testing and Materials) standards for conducting environmental site assessments. The recently updated AAI Final Rule approves ASTM E1527-21 for assessing commercial and industrial properties. Additionally, for a limited “sunset” period (February 13, 2024), the AAI Final Rule recognizes the continued use of ASTM E1527-13.<sup>7</sup>

ASTM published its revised ASTM E1527-21 standard in November 2021 and submitted a request to EPA to reference this updated 2021 standard as compliant with AAI and to amend the AAI Final Rule to recognize the same. In March 2022, EPA published a Direct Final Rule that

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<sup>4</sup> CERCLA § 101(40)(B)(ii)(I) requires that a BFPP make “all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices . . . .”

<sup>5</sup> See 70 Fed. Reg. 66,070 (Nov. 1, 2005).

<sup>6</sup> See 40 C.F.R. 312 (AAI Standard and Practices for BFPP & Innocent Landowners) and EPA Guidelines for AAI, available at <https://www.epa.gov/brownfields/general-brownfields-guidelines-all-appropriate-inquiries>.

<sup>7</sup> EPA’s AAI Final Rule (codified at 40 C.F.R. Part 312) was previously amended in December 2013 to recognize the then current ASTM E1527-13 standard (for Phase I Site Assessments). See 78 Fed. Reg. 79,319 (Dec. 30, 2013).

confirmed the ASTM E1527-21 standard could be used to satisfy the AAI requirements. However, in May 2022, due to adverse comments, EPA withdrew its March 2022 Direct Final Rule and indicated that it would address comments it received in a subsequent final action. Negative comments included those centering on EPA’s initial plan to allow both ASTM’s 2021 and 2013 E1527 standards to satisfy the AAI requirements. Commenters argued that the 2021 standard should replace the 2013 standard, since the updated 2021 standard represented what the real estate and environmental community had determined to be current good commercial and customary practice, including a more rigorous approach to the relevant environmental due diligence work required to prepare a Phase I assessment. Other commenters expressed concern that having two recognized versions of the ASTM E1527 standard would generally create confusion and uncertainty in the marketplace.

In December 2022, EPA published a revised Direct Final Rule, which recognizes the use of ASTM E1527-21 for satisfy the AAI requirements, but still allows for limited recognition and continued use of E1527-13 until February 13, 2024.<sup>8</sup> In its response to comments, EPA’s explained that it permitted the continued use of E1527-13 during this limited “sunset” or “phasing out” period to “provide parties with an adequate opportunity to complete AAI investigations that may be ongoing and to allow all parties sufficient notice to become familiar with the updated industry standard (ASTM E1527-21) . . . .”<sup>9</sup>

To facilitate an understanding of the slight differences between the AAI Rule and the revised ASTM E1527-21 standard, and the applicability of the E1527-21 standard, EPA published a useful *Comparison of [AAI] Regulation* in early 2022 that includes a comparison of 2013 and 2021 versions of the ASTM E1527 standard.<sup>10</sup> Significant revisions made in ASTM E1527-21 are also well summarized in a helpful 2022 legal article published in *The Practical Lawyer*.<sup>11</sup>

In summary, key updates made in the 2021 version of ASTM’s E1527 standard include:

- revisions to key definitions, including “recognized environmental conditions” (RECs), “controlled RECs,” and “historic RECs”;
- new definitions, additional instructions and clarifications for other key terms and concepts, including “likely,” “level of inquiry,” “property use limitations,” and “significant data gaps”;
- clarifications for the use of environmental lien and title searches, as well as the scope of historical research requirements;
- additional details required in the Phase I report for subject property, as well as for current and historical uses of adjoining properties; and
- considerations for assessing “emerging contaminants” (such as per- and polyfluoroalkyl substances or “PFAS”).

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<sup>8</sup> 87 Fed. Reg. 76,578 (Dec. 15, 2022). Some reviewers have noted potential ambiguity in this date, due to the reference in the December 15, 2022, *Federal Register* and EPA’s “Summary of Comments” that E1527-13’s sunset period is “one year from publication of this final rule,” *id.* at 76,580; Section I then differently provides E1527-13 can be used “for up to one year after this rule becomes effective [(February 13, 2023)].” *Id.* at 76,579. However, the amended text of 40 C.F.R. Part 312 itself, included at the end of Direct Final Rule, clearly states that E1527-13 can be used “until February 13, 2024.” *Id.* at 76,581.

<sup>9</sup> *Id.* at 76,580.

<sup>10</sup> See EPA, *Comparison of All Appropriate Inquiries Regulation, the ASTM E1527–13 Phase I Environmental Site Assessment Process, and ASTM E1527-21 Phase I Environmental Site Assessment Process* (Mar. 2022), available at <https://www.regulations.gov/document/EPA-HQ-OLEM-2021-0946-0002>.

<sup>11</sup> See Lawrence Schnapf, *Implications of the New ASTM Phase I Standard for Property Owners and Lenders*, THE PRACTICAL LAWYER (Apr. 2022).

The primary goal of the processes established by the ASTM E1527 standard is to identify RECs, as defined in the standards currently approved by EPA. Under E1527, “controlled RECs” and “historical controlled RECs” are also cataloged as part of a Phase I. Finally, the Phase I report must discuss and list any “significant data gaps” that may impact the ability of the required “environmental professional” (EP) to identify RECs.

The scope and sources of facts and information that must be evaluated by the EP preparing a Phase I in accordance with the ASTM E1527 standard include:

- site inspection (including to catalog the presence of hazardous materials);
- historical research (including aerials and topographical maps);
- review of land title records; geologic and hydrogeologic assessment (including soil type, geological setting, and groundwater depth);
- regulatory research (including records from state and environmental agencies);
- interviews (including with property owners, and state and local regulators); and
- review of any other reasonably available documents and reports.

The “shelf life” of a Phase I is 180 days, and it can be updated between 6 and 12 months. Older Phase I’s can provide relevant information or may otherwise be referenced, but they do not provide the CERCLA protection to transferees. ASTM E1527-21 clarifies that the 180-day shelf life of a Phase I begins to run from the earliest date of the following five inquiries is commenced (*not* the date of issuance of the Phase I report): (1) interviews with knowledgeable persons; (2) review of government records; (3) review of environmental liens; (4) visual inspection of the property; or (5) declaration by the EP. For Phase I’s that are 6 to 12 months old, the preceding five listed inquiries must be repeated and dated no more than 180 days prior to the subject property’s acquisition/closing date.

Separately, EPA’s AAI Final Rule regarding ASTM’s Standard Practice for Environmental Site Assessments: Phase I Environmental Process for Forestland or Rural Property (E2247-16) was amended by EPA in September 2017.<sup>12</sup> Due to the unique nature of assessing environmental issues on rural and larger tracts of land, the E2247-16 standard allows for less-rigorous site reconnaissance than the site visit required by the ASTM E1527 standard for assessing developed commercial and industrial properties. Under E2247-16, “rural property” is defined as “property that has a low human population density and is undeveloped or has limited areas of development.” “Forestland” is defined as “property that is either unmanaged land or managed land where forest management principles are applied . . . to meet specific goals. Both managed and unmanaged forestland may have roads and limited areas of development.”

For selecting the appropriate standard (ASTM E1527 vs. E2247), ASTM explains that E2247-16’s methodology is an effective and practical process for achieving the objectives of a Phase I review of forestland or rural property when some of E1527’s methodologies are impractical or unnecessary due to the size or nature of the property, and where the property is generally uniform in use. A primary consideration in applying the E2247 standard, instead of the E1527 standard, is the nature and extent of the property being assessed, as the typical environmental concerns, sources for interviews and records, and the methodology used to perform the site reconnaissance may differ significantly. Notably, the property to be assessed using this standard practice need not be contiguous and may contain isolated areas of non-forestland and non-rural property. Site reconnaissance of areas that include activities outside identified forestland or rural property (e.g., commercial or industrial uses) should be addressed using methodologies provided in E1527, which

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<sup>12</sup> See 82 Fed. Reg. 43,310 (Sept. 15, 2017).

may be conducted and reported in conjunction with the E2247-16 standard's practice.<sup>13</sup> An EP is a valuable professional resource for BFPPs in selecting the appropriate Phase I standard to be applied (ASTM E1527 vs. E2247) for assessing any such undeveloped areas.

#### **IV. EPA “Enforcement Tools” to Address Liability Concerns**

EPA's generally stated position is that the liability protections available to qualifying BFPPs under CERCLA provide sufficient protections to prospective purchasers of brownfield or contaminated properties. However, there are several additional “enforcement tools” available to such purchasers that provide additional assurances, subject to EPA's cooperation. These include agency-issued “comfort letters” and separate “prospective purchaser agreements” (PPAs) containing covenants not to sue and possibly contribution protection that may be entered between EPA and a prospective purchaser, in the agency's administrative discretion.<sup>14</sup> While not a guarantee against post-acquisition owner/operator liability, these tools can provide assurances to purchasers, and are often considered favorably by courts in any subsequent site-specific liability determinations.<sup>15</sup>

EPA has issued a model letter for regional offices and a revised model “Agreement and Covenant Not to Sue” for use in negotiations between EPA and prospective purchasers of contaminated property.<sup>16</sup> However, with the Brownfield Amendments in place and the specific limitation on liability statutorily provided to BFPPs under CERCLA § 107(r), EPA's usual position is that in most cases such agreements with prospective purchasers are unnecessary. However, EPA and the U.S. Department of Justice's (DOJ) joint April 2018 memorandum on “Agreements with Third Parties to Support Cleanup and Reuse at Sites on the Superfund National Priorities List” encourages EPA regional offices to “consider more frequent use” of PPAs at properties within a Superfund Site (including where the purchasing party may *not* necessarily qualify for BFPP status), to help address prospective purchasers' liability concerns, and to generally “foster cleanup and reuse.”<sup>17</sup> Particularly with regard to brownfields redevelopment, such agreements directly with EPA and/or state environmental agencies may provide additional confidence for purchasers and lenders.

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<sup>13</sup> See E2247-16 § 1.1.1 (Standard Practice Selection) and § 4.5.3 (Level of Inquiry Variable).

<sup>14</sup> See <https://www.epa.gov/enforcement/tools-address-liability-concerns-support-cleanup-and-reuse>.

<sup>15</sup> See *SPS Ltd. P'ship v. Sparrows Point, LLC*, 2017 WL 3917153, at \*1, \*3, \*12–13 (D. Md. Sept. 6, 2017) (upholding on summary judgment developer's BFPP status in subsequent litigation initiated by PRPs seeking cost recovery under CERCLA against the developer and a declaratory judgment holding defendants liable for their share of all response costs, in part based on the court's recognition of the PPA entered by developer with EPA prior to its 2014 acquisition).

<sup>16</sup> See EPA's guidance on BFPPs: <https://www.epa.gov/enforcement/bona-fide-prospective-purchasers>; *see also* <https://www.epa.gov/enforcement/third-party-agreements-support-cleanup-and-reuse-superfund-npl-sites>.

<sup>17</sup> EPA/DOJ 2018 memo at 3, *available at* [https://www.epa.gov/sites/production/files/2018-04/documents/sftf25-memo-ppa-bfpp-final-2018\\_2.pdf](https://www.epa.gov/sites/production/files/2018-04/documents/sftf25-memo-ppa-bfpp-final-2018_2.pdf).