

EPA Issues Direct Final Rule to Adopt the New ASTM E1527-21 Phase I ESA Standard

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As previously discussed in this Legal Update, the American Society for Testing & Materials (ASTM) approved a new standard for conducting Phase I Environmental Site Assessments (ESAs). The new Phase I ESA standard, known as “E1527-21 – Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,” made significant modifications to the previous ASTM Phase I Standard Practice (E1527-13) that had been in use by environmental professionals (EPs) for the previous eight years. The goal of an ASTM E1527 Phase I ESA is to identify the confirmed presence, likely presence or a material threat of the presence of hazardous substances or petroleum products at a real property, also known as a “Recognized Environmental Condition” (REC). The ASTM E1527 Standard defines what constitutes “good commercial and customary practice for conducting an environmental site assessment of a parcel of commercial real estate in the United States of America with respect to the range of contaminants within the scope of the Comprehensive Environmental Response, Compensation & Liability (CERCLA) Act (42 U.S.C. 9601) and petroleum products.” The previous ASTM E1527-13 Standard was incorporated as the “All Appropriate Inquiry” (AAI) rule promulgated by the federal Environmental Protection Agency (EPA) to identify what specifically is required to obtain protection from liability for contamination under CERCLA.

In March 2022, the EPA issued a request for comments regarding its proposed intention to adopt the new ASTM E1527-21 Standard into its AAI rules and also issued a “Direct Final Rule.” It is expected that EPA will not likely receive adverse comments and the E1527-21 Standard will be effective on May 13, 2022.

It is noteworthy that the EPA’s Direct Final Rule to adopt the ASTM E1527-21 Phase I ESA Standard does not automatically extinguish the use of the previous E1527-13 Phase I ESA Standard if use of that Standard is preferred. In the future, it is expected that EPA will rescind the E1527-13 Standard after an adequate time period has occurred for environmental consultants to integrate their Phase I ESA practices to the new E1527-21 Standard. However, prospective purchasers of real estate, lenders or other entities that are commissioning environmental consultants to conduct Phase I ESAs should seriously consider requesting use of the E1527-21 Standard as it clearly has heightened levels of environmental due diligence that will be beneficial in identifying environmental issues associated with a property.

Some of the most significant differences between the new ASTM E1527-21 Phase I Standard and the previous E1527-13 Standard include the following.

New Definition of “Recognized Environmental Condition” (REC) – Under the previous E1527-13 Standard, a REC was defined as “the presence or likely presence of any hazardous substances or petroleum products in, on or at a property: (1) due to a release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment.” The E1527-21 Standard contains a new definition of REC as set forth below which uses the word “likely” only within the context of the second phrase identified in the definition of a REC. An REC is now defined as:

“(1) the presence of hazardous substances or petroleum products in, on or at the subject property due to a release to the environment; (2) the likely presence of hazardous substances or petroleum products in, on or at the subject property due to a release or likely release to the environment; or (3) the presence of hazardous substances or petroleum products in, on or at the subject property under conditions that pose a material threat of a future release to the environment.”

Shelf Life of an E1527-21 Phase I Report – The new E1527-21 Standard indicates that the Phase I Report will remain viable if it was completed no more than 180 days prior to the date of acquisition, or up to one year, if five specific components of the Report have been updated (the five components include: interviews, searches for recorded environmental cleanup liens, review of government records, site reconnaissance of the subject property and the Environmental Professional [EP] Declaration). The E1527-21 Standard requires that the dates in which each of the components were completed be identified in the Phase I Report, and that the 180 day or 1-year time period begins with the date upon which the first of these components was completed.

Requirement to Use Standard Historical Sources – the previous E1527-13 Standard required that the EP review as many Standard Historical Sources (e.g., historical aerial photographs, historical city directories, historical topographic maps, historical fire insurance [Sanborn] maps, building department records, property tax records, zoning records) as the EP believed were necessary to meet the objectives of an ASTM Phase I ESA. The E1527-21 Standard prescribes that, at a minimum, the following four sources shall be reviewed in association with the subject property and adjoining properties as part of the Phase I ESA process:

- Historical Aerial Photographs,
- Historical City Directories,
- Historical Topographic Maps, and
- Historical Fire Insurance [Sanborn] Maps.

Guidance Regarding RECs – In addition to RECs, other types of RECs, can include Historical Environmental Conditions (HRECs) or “Controlled Recognized Environmental Conditions” (CRECs). Because the ASTM Committee recognized that there have often been major differences of opinion between consultants whether a property condition constitutes a REC, HREC or CREC, the new Standard includes an Appendix that contains a flow chart (Appendix X 4) for making determinations regarding the type of RECs associated with a property.

Emerging Contaminants (e.g., PFAS) – new contaminants of concern, such as per- and polyfluoroalkyl substances (PFAS), have been under scrutiny for possible regulation as hazardous substances by the federal EPA and some state agencies for the past several years. While some states have adopted regulatory standards for PFAS, the EPA has not yet listed PFAS as a federally regulated hazardous substance under CERCLA. Because PFAS are not currently regulated under CERCLA, environmental consultants have not been required to include identification of PFAS as a scope item in performing ASTM Phase I ESAs. The new E1527-21 Standard provides guidance regarding whether environmental consultants are to include emerging contaminants, such as PFAS, in their scope of work when conducting Phase I ESAs until an emerging contaminant is regulated as a federal CERCLA hazardous substance. However, the Standard also indicates that inclusion of such substances can be added to the Phase I ESA as a “Non-Scope Consideration”.

Significant Data Gap – The E1527-21 Standard now includes a definition of what constitutes a “significant data gap” defining it as, “a data gap that affects the ability of the environmental professional to identify a recognized environmental condition.” An example could include a building that is located on a subject property which is inaccessible during the site reconnaissance, and based upon the EP’s experience, such a building is one that involves activities that can lead to RECs. The Standard requires a discussion of how significant data gaps affected the EP’s ability to make conclusions regarding RECs.

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