

Use of the ASTM E1527-21 Phase I Environmental Site Assessment Standard Practice is Now Required to Meet CERCLA Liability Protections

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As of February 13, 2024, the American Society for Testing and Materials (ASTM) E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" is now required when Phase I Environmental Site Assessments (ESAs) are conducted by environmental consultants to qualify for the innocent landowner defense, or the bona fide prospective purchaser or contiguous property owner liability protections, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (see: 42 U.S.C. 9601 et seq.).

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). It also 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 ASTM E1527-21 Standard was formally approved for use by environmental consultants by the U.S. Environmental Protection Agency (USEPA) on February 13, 2023. However, the USEPA allowed environmental consultants to use the previous Phase I ESA Standard, known as E1527-13, for a one-year time period until February 13, 2024, to allow the environmental consulting industry a time period to phase in the use of the E1527-21 Standard. As noted previously, after February 13, 2024, only the E1527-21 Standard Practice will be recognized as meeting the AAI Rule for protection from liability for contamination under CERCLA.

The E1527-21 Standard Practice made significant modifications to the E1527-13 Standard that had been in use by environmental professionals (EPs) for the previous eight years in performing Phase I ESAs of real property. The most significant modifications required by the E1527-21 Standard include the following:

1. New Definition of “Recognized Environmental Condition” (REC) – the goal of an E1527 Phase I ESA is to identify RECs associated with the real property that is the subject of the Phase I ESA. Under the previous Standard, an 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 ASTM Committee that proposed the new Standard believed that the use of the word “likely” within the context of all three of the phrases contained in the previous definition was confusing to environmental consultants. The Standard now contains a new definition of REC:

“(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.”

To assist environmental consultants in identifying RECs, the new Standard contains an Appendix (Appendix X4) that is intended to clarify what each of the three phrases means. Further, the Appendix contains examples of what constitutes a REC. Moreover, there is a note to the REC definition that provides that use of the word “likely” is a condition “which is neither certain nor proved, but can be expected or believed by a reasonable observer based on the logic and/or experience of the environmental professional, and/or available evidence, as stated in the report to support the opinions given.”

2. Consistent Use of the Term “Subject Property” – Many environmental consultants commonly use a variety of terms in their Phase I Reports to describe the property that is the subject of a Phase I ESA. Often, it is referred to interchangeably in the Phase I ESA Report as the “property,” “site,” and/or “subject property.” This can become confusing to the reader of the Phase I Report. In an effort to promote clarity and consistency, the new Standard encourages use only of the term “subject property” throughout the Phase I Report.

3. Shelf Life of an E1527-21 Phase I Report – The new 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 Declaration. In addition, the new 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.

4. Requirement to Use Standard Historical Sources – the previous Standard required that the EP review, within the EP’s discretion, as many Standard Historical Sources as the EP believed were necessary to meet the objectives of an ASTM Phase I ESA. The new 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. (Note: adjoining properties include not only those properties with abutting property boundaries, but also properties that are across a street or alley from the subject property.)

1. Historical Aerial Photographs
2. Historical City Directories,
3. Historical Topographic Maps
4. Historical Fire Insurance [Sanborn] Maps

If one or more of these sources cannot be reviewed, there must be a statement why the source could not be reviewed. Additional Standard Historical Sources shall be reviewed as needed to complete the objective of identifying RECs.

5. Use of Additional Standard Historical Sources – the new Standard emphasizes that providing as much specific information in the Phase I ESA Report about the use of the subject property is important. For example, the ASTM Committee learned from the EPA that many of the most highly contaminated properties in the U.S. are former dry-cleaning facility sites. Frequently, such sites were located in a retail use area, which is not typically considered to be a source of contamination like an industrial or manufacturing site would more likely be. Therefore, even if the general use of the subject property is classified as retail, the new Standard requires that additional ASTM Standard Historical Sources shall be reviewed if they are likely to identify a more specific use and are reasonably ascertainable.

6. Historical RECs (HREC) – an HREC is defined in the new Standard as “a previous release of hazardous substances or petroleum products affecting the subject property that has been addressed to the satisfaction of the applicable regulatory authority or authorities and meeting unrestricted use criteria established by the applicable regulatory authority or authorities, without subjecting the property to any controls (for example activity and use limitations, or other property use limitations).” An example of what may constitute an HREC could include a condition in which an underground storage tank (UST) was removed from a property, and residual contamination released from the UST was present. However, the residual contaminants that were released were excavated, and the regulatory authority issued a “No Further Action Required Letter” (often referred to as a “Closure Letter”) and did not require some type of activity use or institutional control limitation. The new Standard requires that the EP evaluate the past closure of a contaminated site and the environmental assessment data associated with the closure to confirm that the assessment meets current standards for unrestricted use.

7. Guidance Regarding REC vs HREC vs CREC – In addition to RECs and HRECs, another third type of REC, known as a “Controlled Recognized Environmental Condition” (CREC), can also be identified in association with a subject property. A CREC is defined in the new Standard as “a recognized environmental condition affecting the subject property that has been addressed to the satisfaction of the applicable regulatory authority or authorities with hazardous substances or petroleum products allowed to remain in place subject to implementation of controls (for example, activity and use limitations or other property use limitations).” Because the ASTM Committee recognized that there have often been major differences of opinion between consultants whether a property condition constitutes a REC, a HREC and/or a CREC, the new Standard includes an Appendix that contains a flow chart (Appendix X 4) for making this determination. While this will not remove all uncertainty in making decisions about RECs, it is hoped that this will create more consistency among consultants in making such determinations.

8. Interviews – The prior Standard divided the Phase I process into four separate components: 1) a review of environmental regulatory records (e.g., federal Superfund site lists/Solid Waste landfill site lists/leaking UST lists) and ASTM Standard Historical and Physical Setting Sources (e.g., historical aerial photographs/historical city directories/topographic maps); 2) a site reconnaissance; 3) interviews of the site owner, tenants, etc.; and 4) the Phase I ESA Report. Under the new Standard, the interviews are now classified and grouped into one of the ASTM Standard Historical Sources of information.

9. Significant Data Gap – The previous Standard required that significant informational or observational-related data gaps be identified. (Note: a “data gap” is defined in the E1527-21 Standard as “a lack or inability to obtain information required by this practice despite good faith efforts by the environmental professional to gather such information.”) However, there often has been confusion among environmental consultants as to what is considered a data gap that is significant enough to impact meeting the objectives of a Phase I ESA. The new 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, one that involves activities that can lead to RECs. In addition, the new Standard requires a discussion of how significant data gaps affected the EP’s ability to make conclusions regarding RECs.

10. Inclusion of Maps/Photographs – While it may appear to most that the inclusion of photographs of the subject property and of a map that illustrates the boundaries of the subject property be included as a routine part of a Phase I ESA Report, the prior Standard did not explicitly state that such items be included in the Report. Interestingly, the ASTM Committee that developed the new Standard noted that it was not unusual for Phase I ESA Reports to not include such items. The new Standard makes it clear that photographs and a map illustrating the boundaries of the subject property shall be included in all Phase I ESA Reports. The photographs should include major site features and locations on the subject property that are considered RECs, and also de minimis conditions. (Note: “de minimis conditions” are defined in the E1527-21 Standard as those conditions “related to a release that generally does not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.”)

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