

## REGULATORY UPDATE

### New Phase I Environmental Site Assessment Standard E1527-13 Endorsed by U.S. Environmental Protection Agency

The ASTM standard for Phase I Environmental Site Assessments was recently revised by ASTM International and was endorsed by the U.S. Environmental Protection Agency (EPA) on August 15, 2013. In its final rulemaking, EPA stated that if no adverse comments are received, the Final Rule will go into effect without further notice after 90 days, or approximately November 13, 2013. The comment period for the Final Rule closes on September 16, 2013. To view the rule making, the full revised standard or to post comments click on the following link: <http://www.regulations.gov/#!docketDetail;D=EPA-HQ-SFUND-2013-0513>.

### What Does This Mean for Current ASTM Standard E1527-05?

The revision does not include major changes to the current standard, but the revised standard offers several important new requirements that could make it more likely that a Recognized Environmental Condition (REC) is identified, and possibly add some time and cost to the assessment. Also, in order to be eligible for the full liability protection offered by the Phase I, users may need to ensure that the Phase I complies with the new Standard when it becomes effective.

### Background

A Phase I Environmental Site Assessment (also “Phase I” or “Phase I ESA”) is a report usually requested as part of due diligence for a real estate transaction, that examines environmental conditions for real property by studying historic uses and current environmental conditions at the property and in the vicinity. A Phase I report serves several important purposes:

- It educates the buyer and seller and their agents about the environmental condition and historic uses of the subject property and vicinity;
- It helps the parties to evaluate risk and decide how or if to further investigate, negotiate a more favorable transaction, or walk away;
- It allows the purchaser to qualify for the “*innocent landowner defense*” provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 and “*all appropriate inquiry*” in preparation of due diligence investigations under the Superfund Amendments and Reauthorization Act (SARA) of 1986.

ASTM International, formerly known as the American Society for Testing and Materials (ASTM), is an international standards organization that develops a range of technical standards, including environmental site assessments. The current ASTM Phase I standard, E1527-05, was finalized in 2005 and has largely become the industry benchmark for such investigations. EPA further solidified the role of the ASTM Standard in environmental due diligence investigations when it released, also in 2005, “Standards and Practices for All Appropriate Inquiries.” Often referred to as “all appropriate inquiry”, or simply AAI, it established the specific regulatory requirements and standards for evaluating environmental conditions on a property, and formally recognized that Phase I ESAs conducted according to the ASTM Standard will be recognized as compliant with AAI.

## The New ASTM Standard

As reported by EPA, ASTM's "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," or ASTM E1527-13 (the "New ASTM Phase I Standard") follows along very closely with the major sections and requirements currently in place in E1527-05. Below are the key revisions, grouped according to how they might affect the way Phase I ESAs currently are being performed.

### MAJOR REVISIONS

1. **RECs, HRECs, & CRECs** – the definition of recognized environmental condition was simplified to be more in line with CERCLA.

New Simplified Definition of REC: "the presence or likely presence of any hazardous substances or petroleum products in, on or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions the pose a material threat of a future release to the environment. *De minimis* conditions are not recognized environmental conditions."

ASTM also clarified the definition of historical REC (HREC) to emphasize where the past REC has been addressed to the satisfaction of regulatory authorities and meets unrestricted residential use criteria. In other words, the property is not required to have use restrictions, activity and use limitations (AULs), institutional controls, or engineering controls.

To address situations where a REC exists under such controls, ASTM added "CREC" to the standard to define "a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority ..." such as through a no further action letter or some in-place controls or use limitations. This addresses sites where no further remediation is required but where residual contamination could exist that is not likely to interfere with property transfer or future use.

2. **Vapor Migration** – EPA does not differentiate among the form of contamination, such as solid, liquid or vapor. To remain consistent, ASTM now requires that vapor migration be considered in all Phase I ESAs. A definition for migration is provided, and vapor intrusion into a building, for example, will need to be considered on the same basis as for contaminants in soil or groundwater. A standard already exists, ASTM E2600, in case a more thorough examination of a vapor REC is needed as follow up to the Phase I.
3. **A Stronger Recommendation for Agency File Review** – ASTM added a new section to the standard, 8.2.2, to address review of regulatory records, which states that if the target property or any adjoining property is identified in a government records search, then pertinent regulatory files and/or records associated with the listing should be reviewed, or a justification provided as to why a review is not needed. Since agency file reviews have been considered to be an important part of Phase I ESAs for many users, a good, thorough Phase I should already consider this need. However, in areas where contaminated sites or redevelopments are likely, some more thorough, and therefore potentially more time-consuming or costly, searching is prudent to best identify the potential RECs, CRECs, or need for a Phase II.

## MINOR REVISIONS

1. User responsibilities have been expanded - Under the current ASTM standard, the client or user is required to provide any known environmental lien and AUL information on the property, unless the consultant specifically agrees to perform that work. Under the new standard the environmental professional may conduct a search of institutional and engineering control recordings as part of the normal government records search. ASTM E1527-13 requires the user to provide or disclose information that is “commonly known and reasonably ascertainable” and which could be pertinent to the REC determination. If the user does not provide the required information under this Phase I section, the environmental professional should consider this as a data gap.
2. Industrial/Manufacturing properties – ASTM E1527-13 adds that if a property has been used for industrial or manufacturing purposes, then additional historical data must be reviewed, from such standard sources as aerial photographs, topographic maps, historic fire insurance maps, property tax files, street directories, land use or land title records, or “other historical sources” that are reasonably ascertainable.
3. Appendices to the Standard – these have been re-written to provide more relevant legal background, some revisions to the user Questionnaire, and a simplified recommended Table of Contents and Appendix format. ASTM states that the appendices are non-binding and are provided only for background information.

## GOING FORWARD

Based on the limited and focused revisions, the new ASTM Phase I Standard is not likely to create significant changes to environmental due diligence practice. Requiring that vapor intrusion now be considered on par with soil, groundwater and surface water contamination may need some additional attention. However, some cost savings can be derived by being able to formally designate “controlled” RECs (“CRECs”), especially if a user or lender can rely more heavily on risk-based site closures and thereby assign a lower risk to properties where residual contamination has been adequately shown to be controlled. This approach can reduce the need for Phase II sampling, as long as the scope and time for due diligence is sufficient. Also, sufficient time and scope should be allowed where property conditions warrant the need for more thorough agency file review. Future real estate purchasers should ensure that Phase I reports prepared after the effective date of EPA's approval (now estimated at November 13, 2013 unless significant adverse comments are received by September 16) are in compliance with the new ASTM standard.

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