THE IMPLICATIONS OF THE NEW ASTM PHASE 1 STANDARD FOR PROPERTY OWNERS AND LENDERS

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In mid-November, ASTM International (ASTM) published the updated version of its "Standard Practice for Environmental Assessments: Phase I Environmental Site Assessment Process" (E1527-21). The new standard replaces the 2013 version (E1527-13), which ASTM now considers a "historical standard." However, E1527-13 may continue to be used until EPA formally recognizes the latest version.[1]

E1527-21 revises some key existing definitions, and adds new definitions, explanatory text, and appendices that will assist consultants and parties who rely on Phase 1 reports to classify environmental conditions. The updated standard also clarifies what and how historical sources are to be reviewed for the property being investigated (target property) along with adjoining properties. For the first time, E1527 now specifically discusses how and when "emerging contaminants" such as per- and polyfluoroalkyl substances (PFAS) may be covered in Phase I reports.

Before detailing the changes to ASTM E1527, it is important for readers to understand how the ASTM E1527 has been developed and what it represents. The standard was developed and is periodically reviewed by the ASTM E1527 Task Group which is comprised of environmental consultants (known in ASTM parlance as "producers"), the parties who tend to order or rely on the reports, such as representatives of property owners and lenders ("users"), and lawyers. The Task Group surveyed its membership to determine if there have been problems with the implementation of the standard with the goal of improving both the quality and consistency of Phase I reports. The Task Group held over 75 virtual meetings over a two-year period as well as hundreds of smaller focus group conference calls that studied particular issues and made recommendations to the larger E1527 Task Group. The revised standard then went through several rounds of ballots before a final vote by the larger ASTM E50.02

Committee on Environmental Real Estate Assessment and Management.

Contrary to mischaracterizations in some trade press and legal advisories about the standard and its implications, the ASTM Task Group did not "tighten" or create more "stringent" due diligence standards. The revised standard simply represents an industry consensus on what is currently "good commercial and customary practice"—the statutory standard for establishing landowner liability protections (LLPs) under the federal superfund law formally known as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2]

What constitutes "good commercial and customary practice" evolves over time. E1527-21 represents the consensus of the relevant industry participants on what this phrase currently means. Said another way, if the EPA All Appropriate Inquiries (AAI) Rule[3] can be said to establish *what* type of inquiries must be done to satisfy one of the CERCLA liability protections, ASTM represents *how* these inquiries are to be performed.

BACKGROUND

CERCLA imposes strict liability on four categories of responsible parties, including current owners or operators of a property, for the cleanup of releases of hazardous substances, even if the contamination occurred prior to the time the owner acquired title or the operator came into possession of the property.[4] Past owners or operators may also be liable if they owned or occupied the property at the time of disposal of the hazardous substances.[5]

CERCLA does have a number of affirmative defenses for property owners or operators including:

- The third-party defense;[6]
- The innocent landowner (ILO) defense;[7]
- The bona fide prospective purchaser (BFPP) defense;[8]and
- The contiguous property owner (CPO) defense.[9]

To satisfy the third-party defense, an owner or operator has to demonstrate by a preponderance of the evidence that: (i) the release was solely caused by a third party; (ii) with whom the defendant did not have a direct or indirect contractual relationship; (iii) the defendant exercised due care with respect to the contamination; and (iv) took steps against foreseeable acts or omissions of third parties.

Most courts broadly construe a direct or indirect "contractual relationship" to encompass most forms of real estate conveyances so that purchasers or tenants would be barred from asserting the defense even if they acquired title or possession of the property after the contamination occurred.

To minimize this harsh result, Congress added the innocent purchaser defense in 1986 which provided that a landowner would not be considered to be in a "contractual relationship" with the person responsible for the contamination if the landowner performed an appropriate inquiry into the past use and ownership of the property. If, as a result of this appropriate inquiry, the landowner did not know or have reason to know of contamination, it would be deemed not to have a contractual relationship but would still have to demonstrate compliance with the due care and precautionary elements of the defense.

The 1986 amendments contained five criteria that courts could use in determining if a landowner had implemented an appropriate inquiry. Courts did not uniformly apply these criteria and often found that if a property owner did not identify contamination during a pre-acquisition investigation, it probably did not perform an appropriate inquiry and therefore could not assert the defense.

In 2002, Congress amended CERCLA to add the BFPP and CPO LLPs. To qualify for the BFPP, a property owner or operator must establish the following pre-acquisition requirements:

- All disposal of hazardous substances occurred before the purchaser acquired the facility; [10]

- The purchaser is not a potentially responsible party (PRP) or affiliated with any other PRP for the property through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that was a PRP; [11] and
- The purchaser conducted "all appropriate inquiries" into the past use and ownership of the site.[12]

After taking title, a purchaser must comply with a number of "continuing obligations" to maintain its BFPP status. The "continuing obligation" relevant to the BFPP cases is the requirement to exercise "appropriate care" by "taking reasonable steps" to:

- Stop any continuing release;
- Prevent any threatened future release; and
- Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.[13]

The CPO is available to owners of properties that have been impacted by contamination from a contiguous or adjacent property. A CPO will not generally be required to conduct groundwater investigations or groundwater remediation. A person seeking to qualify for the CPO must comply with the same pre- and post-acquisition obligations as a BFPP. However, while the BFPP can knowingly acquire contaminated property, a CPO must not know or have reason to know of the contamination after it has completed its pre-acquisition AAI investigation. On the other hand, EPA is authorized to issue assurance letters to CPOs that no enforcement action will be initiated under CERCLA and to provide protection against claims for contribution or cost recovery. If an owner cannot qualify for the CPO defense because, for example, it had knowledge of the contamination from an adjacent property, it may still be able to qualify for the BFPP defense. The contiguous property owner may also assert any other defense to liability that may be available.

The party seeking to assert one of the LLPs has the burden of establishing, by a preponderance of the evidence, that it meets all of the elements of the LLPs. Moreover, the LLPs are self-implementing, meaning a property owner can assert the liability protection without formal determination by EPA. As a result, a party that thinks it may have achieved one of the LLPs may later learn that a court holds otherwise.

ALL APPROPRIATE INQUIRIES AND ASTM E1527

ASTM initially published the E1527 standard in 1993 to define "good commercial and customary practice" for establishing the innocent landowner defense.[14] Since then, E1527 has become the accepted industry standard for how to satisfy the pre-acquisition AAI Rule.

As part of the 2002 amendments to CERCLA, Congress also instructed EPA to issue a rule defining what constituted all appropriate inquiries (AAI). Congress provided that until EPA issued its AAI rule, the ASTM E1527 standard would function as an interim standard for conducting AAI. When EPA promulgated its AAI rule in November 2005,[15] the agency determined that E1527-05 could be used to satisfy AAI. The agency subsequently amended AAI to remove ASTM E1527-05 and replace it with ASTM E1527-13.[16]

KEY REVISED OR NEW DEFINITIONS

Among the key changes to E1527-21 are new and revised definitions.

Revised definition: Recognized Environmental Condition (REC)

The goal of Phase I is to identify if a Recognized Environmental Condition (REC) exists at a property. This term does not appear in CERCLA but was developed by ASTM to help consultants distinguish minor spills from conditions that would be required to be investigated or remediated.

Unfortunately, the REC definition was not artfully drafted and has led to much confusion. As a result, it is not unusual for a property owner or its counsel to disagree with an environmental consultant if a certain condition rises to the level of a REC.[17] ASTM

has tweaked the REC definition as part of the 2000, 2005, and 2013 revisions to E1527 but it was determined by the recent Task Group that these iterations had not resolved the confusion.

The source of the dispute is usually centered on the term "likely" in the E1527-13 REC definition:

> 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 that pose a material threat of future release to the environment (emphasis added).

Based on their experience and studies showing that at least 75 to 80 percent of dry cleaners using perchloroethylene (PCE) have impacted the environment, many environmental professionals (EPs) have concluded it was likely that a former dry cleaner was a REC that warranted further investigation. An attorney representing the property owner in a financing or sales transaction, though, might argue that there was no evidence of any spills or leaks justifying the REC finding. [18]

To try to clarify the uncertainty, the E1527 Task Group made two significant revisions. First, the Task Group broke up the definition into its three components. Clause 1 requires an actual release (using the CERCLA definition of Release[19]), and clause 3 applies to the presence of hazardous substances or petroleum that present a "material threat" of a release (again, relying on the CERCLA definition of "Release"). The term "likely" now only applies to clause 2. In addition, the EP must now: (i) explain why it believes a release is likely in the "Opinions" section of the Phase I report; and (ii) discuss what observations and experience has led it to conclude a release may be likely.

ASTM E1527-21 now defines a REC as follows:

> (1) the presence of any hazardous substances or petroleum products in, on, or at the subject property due to any *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. De minimis conditions are not recognized environmental conditions (emphasis added).

To further assist the EP, users, and their attorneys in evaluating the existence of a REC, the revised definition describes a release or presence of hazardous substances or petroleum products can be considered to be likely when it:

> 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 therein."[20]

Revised definition: "release" [21]

This definition was revised to remind consultants that the CERCLA definition has statutory exclusions so that certain types of spills or leaks might not qualify as RECs under the statutory definition and therefore potentially impact the Findings, Opinions, and Conclusions of their report. EPs are urged to review the Legal Appendix discussing what constitutes a Release under CERCLA.

Other related definitional changes

To further promote uniformity in REC determinations, the E1527 Task Group clarified other important terms that are related to the REC definition or a REC determination.

Under the revised standard, a "Material Threat" is now an "*obvious* threat which is *likely* to lead to a release and that, in the opinion of the environmental professional, would likely result in impact to public health or the environment."[22] An example would

be an above-ground storage tank that is damaged. Under the revised definition, the damage would represent a "material threat" if it is deemed serious enough that it may cause or contribute to tank integrity failure with a resulting release of contents to the environment.[23]

In turn, "obvious" is now defined as a condition or fact that is plain or evident or that could not be ignored or overlooked by a reasonable observer. The revised definition no longer requires that the condition be "visually observable." This allows non-visual conditions, such as odors, to qualify as an "obvious" condition. To reinforce this concept, the phase "visually and/or physically observed" now means a condition that is visually, auditorily, or olfactorily detected during a site visit.[24]

Significant data gaps

A data gap occurs when the EP is unable to obtain information to complete one of the 10 mandated inquiries despite good faith efforts to gather the information (e.g., historical information back to 1940 is unavailable, the EP was unable to complete required interviews, etc.). Because many of the investigatory tasks are overlapping, the inability to complete one of the inquiries is usually not critical. For example, if the EP is not able to obtain insurance maps for the target property back to 1940, but aerial photos show that the property was not developed during that time period, or if the owner fails to prepare the environmental questionnaire, the consultant could identify the foregoing as a data gap.[25]

However, if the EP believes the data gap will likely interfere with the ability of the EP to adequately determine if a REC is present, then the data gap is considered a "significant data gap." E1527-21 now includes a definition of what constitutes a "significant data gap."[26] Phase I reports must also explain how the "significant data gap" affected the EP's ability to identify RECs. Furthermore, significant data gaps must be listed in the Conclusions section of the Phase I report.

Appendix X4

To promote more consistency in REC, Historical REC (HREC) or Controlled REC (CREC) determinations, ASTM E1527-21 now contains Appendix X4. The appendix breaks down the various definitions into their component parts; it includes a flow chart and 12 hypothetical scenarios.

Revised definition: Controlled Recognized Environmental Condition (CREC)

A Controlled Recognized Environmental Condition (CREC) is essentially a remediated release that leaves at least some contamination at the target property at concentrations that limit the use of the property in some way. The term applies to cleanups that do not meet the unrestricted cleanup standards but where residual contamination is allowed pursuant to risk-based cleanup criteria established by a state regulatory authority.[27] Because contamination remains at the property, a CREC is technically a type of REC. However, the contamination is allowed to remain in place because certain institutional or engineering controls prevent exposure to humans or the environment.

The term was added to E1527 in 2013, and the Task Group determined that there was considerable confusion among environmental professionals about what "controls" qualified as a CREC. A frequent problem was where the basis for a "no further action" (NFA) was implied (e.g., the property was used for commercial purposes) but the state closure letter did not expressly state the nature of the control. Another common problem was where an NFA letter expressly provided for a use restriction but the owner had failed to record the NFA letter as required. There were also questions about how to classify a cleanup that had been remediated without supervision of a regulatory agency but that otherwise met regulatory standards.

To eliminate this uncertainty, the CREC definition was amended to add the term "property use limitation." This phrase captures any limitations or restrictions adopted following a cleanup, even those not recorded in the land records, provided the cleanup

was performed in accordance with applicable regulatory criteria that allow contaminants to remain at the target property at concentrations exceeding unrestricted use standards.[28]

Several discussion paragraphs were also added to the CREC definition explaining that CRECs may include recorded use restrictions, NFAs based on zoning or the current use, and even do-it-yourself or self-directed cleanups. However, the EP needs to review the actual sampling data and sampling methodology to determine if the cleanup satisfies regulatory guidelines. [29]

For example, a condition that was classified as CREC in a prior Phase I report may no longer qualify for that status if: (i) the cleanup standards have become more stringent so that the site no longer meets the current risk-based criteria; (ii) there are new contaminants of concern that were not previously evaluated such as PFAS; (iii) there is now an exposure pathway such as vapor intrusion that was not considered previously; or (iv) if the user intends to change the property to a higher (i.e., more sensitive) use.

Under E1527-21, EPs must now explain in the Findings and Opinions sections of the report how the CREC complies with an applicable regulatory authority, identify the particular control, and comment on the apparent integrity of the control.

Revised definition: Historical Recognized Environmental Condition (HREC)

Historical Recognized Environmental Conditions (HREC) refers to contamination from a release that has been remediated to an unrestricted cleanup standard.[30] A cleanup that utilized engineering or institutional controls such as deed use restrictions or prohibiting use of the target property in some way does not qualify as an HREC.

E1527-21 adds several discussion paragraphs to the HREC definition[31] reminding EPs that a previously-remediated REC may no longer qualify as an HREC if, during the course of the Phase I, new conditions or information are identified, such as a change in regulatory criteria or a subsequently identified migration pathway, which was not previously known or evaluated when the initial HREC determination was made. The EP is expected to evaluate the criteria and data from the prior cleanup to confirm that it still qualifies as an HREC. The consultant has to explain its conclusion in the Findings and Opinions sections of the report that the previous cleanup continues to meet current standards for unrestricted use.

Clarifying environmental lien and title searches

Under AAI, certain of the 10 categories of inquiries are the responsibility of the EP, while the party seeking to qualify for the LLPs or otherwise relying on the report (identified as "user" in E1527) is responsible for completing other inquiries.[32] One of the mandated inquiries is searching for environmental liens and recorded institutional controls (known in ASTM parlance as "activity use limitations" or AULs). These instruments are potentially important because they can provide an indication of a past or present release at the property. AAI has assigned this task to parties seeking to qualify for LLPs.

E1527-21 clarifies how users may comply with their environmental lien and AUL search obligations, as well as the role of the EP. The user may rely on either the title insurance work such as preliminary title reports or title commitments that are usually generated as part of procuring title insurance. The revised standard suggests that users closely review this documentation for encumbrances or "restrictions on record" for indications of AULs or environmental liens.[33]

Alternatively, the user may rely on title search documents such as Condition of Title, Title Abstract, AUL/Environmental Lien, or similarly titled reports.[34] The title search reports shall be designed to identify "environmental covenants, environmental easements, land use covenant and agreements, declaration of environmental land use restrictions, environmental land use controls, environmental use controls environmental liens, or any other recorded instrument" that restrict or encumber the property because of the presence of contamination. The title search must review the records dating back to 1980. [35]

Moreover, because some states record environmental liens in judicial records and not in land title records, E1527-21 further provides that if judicial records are not reviewed as part of the alternative title search approach, the title report shall: "include a statement providing that the law or custom in the jurisdiction at issue does not require a search for judicial records in order to identify environmental liens."[36]

Searching and evaluating land title records or judicial records requires specialized expertise that is ordinarily not possessed by environmental consultants. Thus, the revised standard clarifies that the environmental professional is not required to search title records or judicial records as part of its obligation to do a regulatory records review.[37] The consultant is expected to ask the user for the results of its title and lien search but is not required to evaluate the results of the title and lien search.

Sometimes, the user asks the consultant to complete the environmental lien search. The revised standard clarifies that when the consultant is asked to perform this task, it is only required to search in the land title offices where records affecting title are generally held. E1527-21 has a new term—Land Title Records—so consultants know where to look for these records.[38]

CONTINUED VIABILITY (SHELF LIFE) OF PHASE I REPORTS

AAI provides that all inquiries must have been completed within one year of the date that the party seeking to qualify for the LLPs acquires title or possession of the property (or refinancing), but certain inquiries need to be updated after six months.[39] Many parties have assumed the date of the report was used to measure compliance with the "shelf life" rule; in other words, if the date of the report was between six to 12 months old, the purchaser or lender assumed it had to be updated. However, this is incorrect.

ASTM E1527-21 clarifies that the date of the report generally does not represent the date that the individual inquiries were completed and should not necessarily be used when evaluating compliance with the 180-day or one-year AAI requirement.[40] Instead, the "shelf life" begins to run from the earliest date that the following inquiries are commenced:

- Interviews with knowledgeable persons;
- Review of government records;
- Review of environmental liens;
- Visual inspection of the property; or,
- Declaration by the EP.[41]

For Phase I reports six to 12 months old, if any of the above five inquiries were not completed within 180 days of the transaction date, it must be repeated.

CLARIFICATION ON SCOPE OF HISTORICAL RESEARCH REQUIREMENTS

Environmental professionals are required to research properties back to 1940 or first-developed use, whichever is earlier, to determine if past uses could have led to a REC. [42]

Historical research is one of the most critical and time-consuming tasks of a Phase I. While prior versions of E1527 identified the standard historical sources that environmental professionals should review, the EP had discretion to determine how many of the standard historical sources were needed to meet the objectives of an ASTM Phase I environmental site assessment (ESA).

However, the E1527 Task Group learned that one of the principal reasons for inconsistent Phase I reports was that low-cost providers were not thoroughly reviewing the "Standard Historic Resources."[43] Another problem was that some consultants were not recognizing that site boundaries may have changed over time or that a target site may have been part of a larger contaminated facility in the past.

As a result, E1527-21 now requires that consultants review the following four Standard Historical Resources (the Big Four) for the target property: Aerial Photographs, Topographic Maps, Fire Insurance Maps, and Local Street Directories, provided that they are reasonably ascertainable, likely to be

useful, and applicable to the target property.[44] If the consultant does not review any of the Big Four historical resources, it must explain the reason why these resources were not used.

If the consultant determines, after reviewing the Standard Historical Resources, that it cannot meet the objectives of the Phase I report (i.e., determining if the past uses contributed to a release of hazardous substances or petroleum product at the target property), additional Standard Historical Resources such as building department records, interviews with knowledgeable persons, property tax files, and zoning/land use records should be reviewed. The EP may also supplement these resources with what are known as "Other Historical Resources"[45]

MORE DETAIL REQUIRED ABOUT USES OF TARGET PROPERTY

The revised standard now encourages the EP to provide more specific information about the target property. It explains that merely identifying that a building is present or used for retail or commercial purposes may not satisfy the historical research objective.

This change is largely driven by the growing recognition of the dangers posed by commercial dry cleaners.[46] Dry cleaners are the leading source of contamination at commercial real estate properties. According to the EPA representatives that participated in the ASTM Task Group, contamination from dry cleaners is now the most common reason sites are placed on the new federal superfund list.

Thus, E1527-21 provides that if the general type of use of the target property is retail, industrial, or manufacturing, the EP is expected to review additional Standard Historical Resources if they are likely to identify a more specific use and are reasonably ascertainable.[47]

MORE DETAIL REQUIRED FOR CURRENT AND HISTORIC USES OF ADJOINING AND SURROUNDING AREA

The ASTM Task Group learned that under the prior version of E1527, some EPs would develop historical information about surrounding property only to the extent that this information was available while researching the target property. These EPs generally were not separately collecting information to fill in gaps about the history of adjoining properties.[48]

The revised standard provides that whichever of the Big Four historical resources are used for the property being investigated should also be reviewed for the adjoining properties where those resources provide coverage of one or more adjoining properties and are likely to be useful in satisfying the objective of the historical research section.[49] If the Big Four historical resources are not reviewed for the adjoining properties but they were reviewed for the target property, the EP must indicate in the report why such a review was not conducted.[50] Like with the target property, additional Standard Historical Resources should be reviewed, if warranted, to satisfy the objective, and "Other Historical Resources" can be consulted to satisfy the objectives of the report.

In contrast, the guidance for researching uses of surrounding properties remains unchanged. An EP is only required to identify uses of surrounding properties to the extent that this information is revealed while reviewing historical resources for the target property (for example, aerial photographs or topographic maps of the target property usually show the surrounding area).[51]

EMERGING CONTAMINANTS

The phrase "emerging contaminants" refers to a group of synthetic chemicals that federal and state authorities have begun to focus on because of the potential threat these chemicals pose to human health and the environment. The term "emerging" does not necessarily mean the contaminants are newly manufactured. Indeed, some of these chemicals have been widely used in a variety of industrial and commercial processes since the 1940s. What is "emerging" is the ability to detect the presence of these substances at trace levels in the environment and the recognition of their associated risks.

Perhaps the most prevalent emerging contaminant is the class of chemicals known as per- and

polyfluoroalkyl substances (PFAS), perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS). Common consumer products containing PFAS include non-stick cookware, grease-resistant paper, fast food wrappers, microwave popcorn bags, stain-resistant carpets and fabrics, water-resistant cloth, cleaning products, and personal care products. They were also present in fire foam used by military installations and airports. Because they help reduce friction, PFAS were also used by a variety of industries such as aerospace, automotive, construction, and electronics factories and businesses.

PFAS are thermally, chemically, and biologically stable, and are highly mobile and water soluble, which allows them to travel vast distances. As a result, PFAS do not easily break down in the environment, earning them the moniker "forever chemicals." Although the toxicity of many PFA compounds is still being analyzed, some compounds have been linked to adverse human health effects.

PFAS are not currently regulated as CERCLA hazardous substances, but many states recognize PFAS as a hazardous substance under state superfund laws.[52] Since the purpose of E1527 is to qualify for the federal CERCLA landowner liability protections, consultants and users have been unsure if and how to address PFAS in Phase I reports.

To provide guidance to consultants and users, the revised standard addresses PFAS in three ways. First, footnote 3 to Section 1.1.4[53] explains that emerging contaminants that are not regulated as hazardous substances are outside the scope of E1527 but may be included as a non-scope item of section 13 of E1527-21. However, if the purpose of the Phase I Environmental Site Assessment is to satisfy the equivalent landowner liability protections that may be available under state law, and that state regulates emerging contaminants as a state hazardous substance, then the user may consider including the substances in the defined scope of work.

Next, section 13.1.5.15 of E1527-21 provides that substances such as emerging contaminants that are not defined as federal hazardous substances may be considered non-scope items until they become classified as CERCLA hazardous substances.[54]

Finally, the Legal Appendix explains that where the Phase I is performed to satisfy both federal and state requirements, or when otherwise directed by the user of the report, it is permissible to include an analysis and/or discussion of PFAS or other emerging contaminants that are not yet defined to be a hazardous substance under CERCLA.[55]

It is important to remember that states are only regulating a handful of the thousands of chemicals that have been manufactured and used in commerce. It is possible that a PFA substance that is not regulated by a particular state may have been used at the target site. Thus, transacting parties should consult with their EP if a particular property is likely to have been impacted with PFAS either because of prior use or perhaps because there may have been a fire that was extinguished using chemicals that contained PFAS. Not surprisingly, PFAS are beginning to show up at sites with dry cleaners because of clothes that had water- or stain-resistant clothing that contained PFAS.

SHOULD PROPERTY OWNERS BEGIN USING THE REVISED STANDARD?

ASTM has submitted a formal request to EPA asking the agency to recognize E1527-21 as compliant with the AAI rule. It is anticipated that EPA may take up to a year to recognize the revised standard and remove the reference to E1527-13. So, what are property owners, tenants, and lenders to do during this interim period?

While ASTM now considers E1527-13 to be a "historical standard," nothing prevents its continued use. Until EPA completes its process of recognizing E1527-21, consultants and their clients have basically three options:

- Continue using/citing E1527-13 until EPA references E1527-21;

- Use and cite E1527-13 (the standard referenced in the AAI Rule), and note that the assessment also satisfies the requirements in E1527-21;[56] or
- Use E1527-21 and cite both E1527-13 and E1527-21 as the applicable standards.

CONCLUSION

The first question most property owners and lenders will probably ask is if the revised standard will result in increased costs and delays as compared with the prior version of the standard. Since E1527-21 represents the standard of care that most higher quality environmental engineering firms across the nation were already exercising, users who engage environmental professionals that have been producing quality deliverables will not likely see significant increased costs or delays.

In the meantime, commercial real estate professionals should familiarize themselves with these changes and consider updating their internal due diligence requirements.

Notes

1 For a discussion reviewing the 2013 changes to E1527, see Larry Schnapf, ASTM Publishes New Phase 1 Standard—But Will It Matter?, The Practical Real Estate Lawyer (Mar. 2014).

2 42 U.S.C. § 9601 et. seq.

3 40 C.F.R.§ 312.

4 42 U.S.C. § 9607(a)(1).

5 42 U.S.C. § 9607(a)(2).

6 42 U.S.C. § 9607(b)(3).

7 42 U.S.C. § 9601(35)(A).

8 42 U.S.C. § 9601(40).

9 42 U.S.C. § 9607(q).

10 42 U.S.C. § 9601(40)(A).

11 42 U.S.C. § 9601(40)(H).

12 42 U.S.C. § 9601(40)(B). EPA promulgated its AAI rule at 40 C.F.R. 312.

13 42 U.S.C. § 9601(40)(D). The other continuing obligations are: complying with all release reporting requirements; cooperating, assisting, and providing access to persons authorized to conduct response actions or natural resource restoration at the property; complying with any land use restrictions established as part of a response action and not impeding the effectiveness or integrity of any institutional control used at the site; provide access to persons authorized to operate, maintain, or otherwise ensure the integrity of land use controls at the site; and comply with any the EPA request for information or administrative subpoena issued under CERCLA. See 42 U.S.C. § 9601(40)(C), (E)-(G).

14 ASTM initially published E1527 in 1993 (E1527-93). The standard was subsequently revised in 1994 (E1527-94), 1997 (E-1527-97), 2000 (E1527-00), 2005 (E1527-05) and 2013 (E1527-13).

15 The AAI rule was published on November 1, 2005 at 70 Fed. Reg. 66070. It became effective on November 1, 2006. The AAI rule is a performance-based standard while ASTM E1527 is more prescriptive in nature since it tells consultants how to conduct the various required inquiries.

16 EPA initially published a final rule which provided that persons conducting AAI could use the procedures included in ASTM E1527–13 to comply with the AAI Rule. 78 FR 79319 (Dec. 30, 2013). The agency then amended AAI again to remove the reference to the ASTM E1527-05. 79 Fed Reg. 60087 (Oct. 6, 2014). The effective date of the removal was October 6, 2015. EPA confirmed that parties that acquired properties after the agency recognized ASTM E1527-13 and used ASTM E1527-05 before the October 6, 2015 effective date would be deemed to have complied with the AAI Rule. Id. at 60088.

17 A common disagreement is whether the mere presence of a former commercial dry cleaner or a buried, underground storage tank should be considered a REC.

18 The author often asks a consultant if they had confirmed if the prior dry cleaner actually used PCE as opposed to a drop-off location. Other potentially mitigating facts could be if the dry cleaner used best management practices that could minimize the impact of any spillage such as secondary containment around the dry cleaning equipment or drums or if the area had a solvent-grade epoxy floor coating. This information can sometimes be gleaned from prior Phase 1 reports that were performed when the dry cleaner operated or from interviews with prior owners or operators.

19 42 U.S.C. § 9601(22).

20 E1527-21 §3.2.73.1. The attorney sub-group had proposed linking to a probability of 75 percent or more but the producer community argued that, in the absence of comprehensive data, they would not be able to render a consistent quantitative evaluation.

21 E1527-21 § 3.2.75.

22 E1527-21 § 3.2.52 (emphasis added).

23 Id.

24 E1527-21 § 3.2.96

25 When a Phase 1 identifies a data gap, the author asks the EP to discuss the significance of the data gap. If not a significant data gap, the author asks the consultant to so state and that the data gap does not alter the conclusions of the report.

26 E1527-21 § 3.2.78.

27 E1527-21 §3.2.17.

28 E1527-21 § 3.2.67.

29 E1527-21 § 3.2.17.1.

30 E1527-21 § 3.2.39.

31 E1527-21 § 3.2.39.1.

32 User responsibilities are described in Section 6 of E1527-21.

33 E1527-21 § 6.2.1.

34 E1527-21 § 6.2.2.

35 E1527-21 § 6.2.2.1.

36 Id.

37 Some state environmental agencies maintain online registries of institutional/engineering controls where the actual instruments can be reviewed during a regulatory review search. However, many others simply retain these documents in the project files that often are archived after a few years and not readily available for review.

38 E1527-21 § 3.2.45.

39 70 Fed. Reg. 66083-84 (Nov. 1, 2005).

40 E1527-21 § 4.6.3.

41 E1527-21 § 4.6.2.

42 E1527-21 § 8.3.8. The term "developed use" includes agricultural uses and placement of fill dirt, and other uses that may not involve structures.

43 The revised standard now distinguishes between "sources" and "resources." The former are the places where information can be found, such as libraries, historical societies, and government offices. See E1527-§ 8.3.3. Meanwhile "resources" are the types of records that contain information. See E1527-21 § 8.3.4. There are seven Standard Historical Resources.

44 E1527-21 §§ 8.3.4 and 8.3.8.

45 E1527-21 § 8.3.4.9. This category includes, but is not limited to: miscellaneous maps, news articles, books about the history of the area being researched, imagery, land title records, and a variety of other resources that may provide information about past land uses.

46 Readers of The Practical Real Estate Lawyer were advised of this risk in 2014. See Larry Schnapf, Dry Cleaners: The Environmental Scourge of Commercial Real Property, The Practical Real Estate Lawyer (Nov. 2014).

47 E1527-21 § 8.3.7.

48 Adjoining properties are those that are contiguous or partially contiguous to the target property or separated by a street or road. See E1527-21 § 3.2.4.

49 E1527-21 § 8.3.9.

50 Id.

51 E1527-21 § 8.3.10.

52 In its revised PFAS Strategic Roadmap, EPA announced that it will commence rulemaking to designate PFOA and PFOS as CERCLA hazardous substances but the agency does not expect to complete this rulemaking until mid-2023.

53 E1527-21 § 1.1.4 Note 3.

54 E1527-21 § 13.1.5.15.

55 E1527-21 § X6.10.

56 This approach would be particularly helpful where there may be unrecorded deed restrictions. Under E1527-13, unrecorded deed restrictions or use controls might not technically qualify as CRECs and have to be identified as a REC. Under E1527-21, the CREC definition is amended to include unrecorded "property use limitations."