

Environmental Law

The newsletter of the Illinois State Bar Association's Section on Environmental Law

Editor's Note

BY RAYMOND T. REOTT

In the area of environmental due diligence, nothing is as critical as the ASTM "All Appropriate Inquiry" standard later adopted by USEPA. ASTM has just updated its 2013 standard with important new changes. This edition of the newsletter

will offer two perspectives on those changes and how to manage projects in the interim before USEPA decides whether to accept the ASTM changes. ■

ASTM E1527-21: The New 2021 Standard for Phase I Environmental Site Assessments

BY WILLIAM J. ANAYA

I have always objected to the notion that there is a standard investigation *necessary* to satisfy what Congress and the Illinois General Assembly call an "all appropriate inquiry" relating to statutory environmental cleanup liability. See 42 U.S.C. §9601(35)(B) and 415 ILCS 5/22.2 (j)(4.6)(B).

Necessary for whom? Consultants, judges, state and federal environmental agencies, or lawyers? Surely not lawyers!

Since the early 1980s, I have resisted the idea of a national standard applicable to lawyers involved in environmental due diligence associated with commercial real estate. Long before there was serious

concern for statutory environmental cleanup liability, I was instructed in the art of due diligence by grizzled old veterans who schooled me in contract law, and concepts of *caveat emptor*, latent and patent defects, documenting the benefit of the bargain, identifying the consideration, understanding rescission and reformation, and understanding the current and historic operations at the property. I was taught to perform an "all appropriate inquiry" with the goal of protecting clients in all issues related to environmental tort liability (i.e., nuisance and trespass) associated with what was then described as "pollution,"

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to assisting the ‘user’ determine liability (or take advantage of a statutory defense) is sophomoric slop. The Phase I Report is likely only one part of the investigation. And, read it completely, not just the Executive Summary. Are you satisfied? Do you need more?

US EPA codified its interpretation of the all appropriate inquiry rule at 40 CFR §312.11. There, the Agency cites E 1527-13 as the standard that reportedly satisfies an “all appropriate inquiry” investigation under the cleanup statute for the Agency’s purposes. Some worry that by following the 2021 standard, they will not be able to take advantage of the Agency’s exoneration at 40 CFR §312.11. First of all, the Agency is not qualified to determine liability (only an Article III judge is—hence the lawyer’s interpretation of the facts is critically important), and it is abundantly clear to me that following the 2021 standard is simply following the guidance provided by the 2013

standard, only better. Following the 2021 standard will satisfy US EPA’s “all appropriate inquiry” rule.

These latest revisions to the Standard clearly improve the investigation, but are focused on assisting the consultant avoid liability based on the previous vague language in the Standard. The focus of the Standard is not necessarily to provide you or your client with better information, but these 2021 changes will help the consultant as well as the client—especially those changes that support more reliable data, clearer definitions and conclusion, and analysis with supportable conclusions providing an adequate foundation necessary to become part of the record as admissible evidence. ASTM did not make the changes to make lawyers happy, but rather to improve its members’ performance and to assist consultants in avoiding professional liability. Nonetheless, the changes are welcome.

Now, to answer the first question raised

above. It should be abundantly clear to every lawyer that the ASTM Standard is only a guidance for consultants, and lawyers who merely accept the findings, conclusions and recommendations at face value, do so at their peril. That is not to say that the information is valueless. It clearly has value—but the conclusion that the investigation is adequate is the lawyer’s to decide, regardless of the language in the standard or US EPA’s “all appropriate inquiry” rule.

Now, it’s the lawyer’s job to determine if the consultants followed ASTM’s 2022 guidance.

Our job never ends. ■

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Summary of New ASTM E1527-21 Standard Practice for Phase I Environmental Site Assessments

BY VINCENT OLESZKIEWICZ & JULIA WU

On November 1, 2021, the American Society for Test and Materials (ASTM) Committee on Environmental Assessment, Risk Management and Corrective Action approved a new standard for conducting Phase I Environmental Assessments (ESAs) replacing the prior ASTM Phase I Standard Practice (ASTM E1527-13) approved in 2013. The new standard, known as “E1527-21-Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” (E1527-21) modifies the requirements for conducting Phase I ESAs while also clarifying ambiguities that arose while applying the prior ASTM E1527-13 standard. The following is a brief summary highlighting the primary modifications to the Phase I ESA requirements promulgated under the new E1527-21 standard.

New Definition of ‘Recognized Environmental Condition’ and the Related Term ‘Likely’

Under the prior ASTM E1527-13 standard, the definition of a REC included the term “likely” when describing all three instances in which a REC is found:

*“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.”*

In recognizing that this caused confusion amongst many environmental professionals and consultants, the new E1527-21 standard

provides a revised definition for a REC where the term “likely” is only used when describing one instance where a REC is found:

*“(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.”*

In addition, the new E1527-21 standard clarifies that the term “likely” means 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.”

1. NEW DEFINITION OF HISTORICAL RECS (HREC).

The new E1527-21 standard updates the definition of a Historical REC (HREC) and defines it “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).” The new E1527-21 standard further requires environmental consultants and professionals to evaluate any past closures of a contaminated site and the environmental assessment data associated with such closure to confirm that the assessment meets the current standards for unrestricted use.

2. A NEW TYPE OF REC. The new E1527-21 standard provides for a new, third type of REC, known as a “Controlled Recognized Environmental Condition (CREC), which is defined under 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).”

3. GUIDANCE DISTINGUISHING REC vs. HREC vs. CREC. In recognizing that environmental consultants vary in their individual determinations as to what constitutes a REC, a HREC or a CREC, the new E1527-21 standard includes a flow chart on Appendix X 4, which is intended to assist

environmental consultants in classifying property conditions as a REC, HREC or a CREC. While the Appendix will not eliminate all variability with respect to such determinations, it is intended to create more consistency among environmental consultants and professionals when classifying a property condition in a Phase I ESA.

4. EMERGING CONTAMINANTS.

The new E1527-21 standard clarifies that environmental consultants and professionals are not required to include emerging contaminants, such as per- and polyfluoroalkyl substances (PFAS), in their scope of work with conducting a Phase I ESA until the emerging contaminant is regulated as a federal CERCLA hazardous substance. However, the new E1527-21 standard also provides that the examination of such emerging contaminants may be added to the scope of the Phase I ESA as a “Non-Scope Consideration” if requested by the user of the Phase I ESA. In states where regulatory standards have been adopted for emerging contaminants that are not yet regulated as a federal CERCLA hazardous substance, the consideration of the emerging contaminant as a “Non-Scope Consideration” is imperative.

5. USE OF THE TERM “SUBJECT PROPERTY”.

For the sake of clarity and to avoid any possible confusion caused by the use of varied terms, the new E1527-21 standard recommends that environmental consultants and professionals consistently use the term “Subject Property” throughout the Phase I ESA when referencing the property subject to the Phase I ESA.

6. SHELF LIFE OF A PHASE I ESA.

The new E1527-21 standard provides that a Phase I ESA must be completed no more than 180 days prior to the date of acquisition to remain viable or up to one year if five specific components of the Phase I ESA have been updated, specifically

the (i) interviews; (ii) searches for recorded environmental cleanup liens; (iii) review of government records; (iv) site reconnaissance of the subject property; and (v) the Environmental Professional [EP] Declaration. Further, the new E1527-21 standard requires that the Phase I ESA identify the dates on which each component was completed and further provides that the 180-day or one year time period commences on the date when the first of these components were completed.

7. REQUIREMENT TO USE STANDARD HISTORICAL SOURCES.

The new E1527-21 standard requires the environmental consultant to review a minimum of four historical sources in connection with the examination of the property subject to the Phase I ESA along with examining the adjoining properties, which not only include properties with abutting property lines but any properties that are across the street or across an alley from the subject property. If one or more of the four required sources cannot be reviewed, the Phase I ESA should include a statement explaining why the source could not be reviewed. Additional Standard Historical Sources should also be reviewed as needed to identify applicable RECs at the subject property.

8. USE OF ADDITIONAL STANDARD HISTORICAL SOURCES.

The new E1527-21 standard stresses the importance of providing detailed information regarding the specific historical use of the subject property even if the general historical use of the subject property is not considered to be a source of hazardous contamination. In such instances, the new E1527-21 standard requires that additional historical sources should still be reviewed should a more specific use be reasonably ascertainable.

9. INTERVIEWS. The new E1527-21 standard now classifies interviews as part of the ASTM Standard Historical Sources of Information component rather than it being a

separate standalone component.

10. SIGNIFICANT DATA GAP. The prior ASTM E1527-13 standard required significant data gaps to be identified in the Phase I ESA but did not provide any guidance on what constituted a “significant data gap”. The new E1527-21 standard now includes a definition for a “significant data gap” and provides that it is “a data gap that affects the ability of the environmental professional to identify a recognized environmental condition.” In addition, the new E1527-21 standard requires a discussion of how significant data gaps affect the environmental consultant’s ability to make conclusions regarding any RECs.

11. INCLUSION OF MAPS/ PHOTOGRAPHS: The new E1527-21 standard requires the Phase I ESA to include photographs

of the subject property along with a map showing the boundaries of the subject property. The photographs should also include major site features and locations of property conditions that are considered RECs as well any *de minimis conditions* as defined under the E1527-21 standard.

ASTM has submitted the new E1527-21 standard to the Environmental Protection Agency (“EPA”) for the agency’s review for compliance with the federal All Appropriate Inquiries (“AAI”) regulations. It is anticipated that the agency’s review could be up to one year. In the interim, environmental consultants have three options for implementing the new E1527-21 standard:

1. Continue using and citing to the prior E1527-13 standard until the EPA approves the new E1527-21 standard for compliance with the AAI regulations;

2. Commence using and citing the new E1527-21 standard; or
3. Cite to the prior E1527-13 standard, but also indicate that the Phase I ESA also incorporates procedures as prescribed in the new ASTM E1527-21 standard.

In connection with the new E1527-21 standard, we recommend that clients require their environmental consultants to use the new E1527-21 standard for all Phase I ESAs. It is further recommended that clients modify any existing agreements with their environmental consultants to use and cite to the new E1527-21 standard and to use and cite to the new E1527-21 standard in any other consulting proposals for a Phase I ESA performed for the client. ■

Should you have any questions regarding the new E1527-21 standard or Phase I ESAs, please contact Vincent Oleszkiewicz at voleszkiewicz@leechtishman.com or Julia Wu at jwu@leechtishman.com

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