

New Standard for Environmental Assessments Gaining Traction

The American Society for Testing and Materials ("ASTM") standard for Environmental Assessments was revised in 2013 for the first time since 2005. The Department of Housing and Urban Development has now adopted the updated standard, which the Environmental Protection Agency (the "EPA") had already adopted as consistent with its All Appropriate Inquiries Rule. While the new ASTM standard does not create additional regulatory requirements, lenders and prospective purchasers of property should be aware of the changes, including specifically the emphasized requirement of agency file reviews and the assessment of vapor migration of contaminants. The new standard also creates a distinction between historical releases on a property which have been remediated to achieve no use restrictions and those historical releases which remain subject to ongoing use restrictions.

Effective May 16, 2014, the Department of Housing and Urban Development ("HUD") adopted an updated standard for conducting Phase I Environmental Site Assessments. See 79 Fed. Reg. 21479-01. The new standard (ASTM E1527-13) updates HUD guidance documents that previously referenced the 2005 standard (ASTM E1527-05). HUD's regulations require that all property used in the department's programs be free of hazardous substances, contamination, toxic chemicals and gases and radioactive substances that could affect the health and safety of occupants. To satisfy these regulations, a Phase I Environmental Site Assessment ("ESA") in accordance with the standard is required by HUD documents. Any Phase I ESA subject to the HUD regulations must now be done in accordance with the new standard.

The American Society for Testing and Materials is an international standards organization that develops and publishes voluntary technical standards for a wide range of materials, products, systems, and processes. The revised ASTM E1527 standard was originally published in November 2013. This new standard refines the definition of good commercial and customary practice for conducting ESAs, including with respect to contaminants within the scope of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The ASTM E1527-13 standard is used not only in HUD-required assessments but can be used, for example, in a negligence action to establish a standard of care, or in a defensive case under the All Appropriate Inquiries Rule.

The Environmental Protection Agency had already adopted the ASTM E1527-13 standard as consistent with its All Appropriate Inquiries Rule at 40 C.F.R 312 ("AAI Rule"). The AAI rule, in general, is used to protect prospective purchasers of property from liability under CERCLA (or its state analogues) for certain environmental conditions if a prospective purchaser has conducted an investigation that satisfies the AAI Rule. On December 30, 2013, the EPA formally recognized ASTM E1527-13 as demonstrating compliance with the AAI Rule when conducting Phase I ESAs. While the 2013 standard is similar to the previous 2005 Standard, the EPA recommends that environmental professionals and prospective purchasers use the new standard for any Phase I assessments prepared going forward. However, the old standard is not yet invalid for purposes of AAI and will not become invalid until and unless the EPA formally amends the AAI Rule to remove references to it.

Key Changes in ASTM E1527-13

The 2013 standard introduces several changes to the Phase I ESA process. There are three major changes:

1. Changes to the definitions of Recognized Environmental Conditions, Historical Recognized Environmental Conditions, and the newly defined term Controlled Recognized Environmental Conditions.
2. Clarifications regarding vapor migration/intrusion assessment requirements.

3. Requirements pertaining to Regulatory Agency File Reviews.

1. Changes to Definitions of Environmental Conditions

A. RECs

ASTM E1527-13 revises the definitions of the terminology relating to “environmental conditions.” The definition of a Recognized Environmental Condition (“REC”) has been simplified to align more closely with the AAI Rule, meaning a release, likely release, or material threat of a release of hazardous substances to the environment on the property. ASTM E1527-13 also modifies the definitions of “release” and “environment” to more closely track the definitions of those terms as set forth in the text of CERCLA itself. Although the definition of a REC has been simplified, in practice RECs should remain largely the same.

B. HRECs

The definition of a Historical Recognized Environmental Condition (“HREC”) has been modified to apply only to historic releases which have been remediated to the satisfaction of regulatory authorities for unrestricted use. Thus, ASTM E1527-13 limits an HREC to past releases that do not subject the property to any use restrictions, activity and use limitations (AULs), or other engineering or institutional controls. The new definition also requires that the environmental professional evaluate whether releases addressed in the past may be subject to revised cleanup criteria that could require further remedial action. Although some environmental professionals have in the past conducted an analysis of current regulatory cleanup standards for HRECs in connection with drafting a Phase I assessment, ASTM E1527-14 essentially makes this exercise mandatory.

C. CRECs

ASTM E1527-13, in addition to revising the definitions of RECs and HRECs, adds an entirely new category, the Controlled Recognized Environmental Condition (“CREC”). This newly added term describes releases that have been addressed to the satisfaction of regulatory authorities, but in which residual contamination has been permitted to remain in place subject to the implementation of use restrictions, Activity and Use Limitations (an “AUL”) or other institutional or engineering controls. This dovetails with the limitation that HRECs include only those historical releases which have been remediated for unrestricted use. Because a CREC is a new type of REC, ASTM E1527-13 now requires that such conditions also be identified generally as a Recognized Environmental Condition in the Phase I report conclusions. Under the prior standard, controlled, known conditions were often characterized as HRECs, since regulatory closure had been achieved, regardless of whether any restrictions continued. Such controlled conditions are now considered RECs, and may have a practical impact on transactions in the form of financial holdbacks or escrow demands, insurance coverage exclusions or limitations, or requests for sale price or lease concessions.

2. Changes to Vapor Migration Assessment

The new standard identifies the need for a Phase I ESA to address the potential for vapor migration. The definition of “migrate” now expressly includes releases that migrate in the subsurface as vapor. Consultants preparing Phase I ESAs under the new standard must assess possible indoor air quality impacts from vapor intrusion pathways if there is subsurface soil or groundwater contamination at or near the subject site. The standard explicitly states that ASTM 2600 is not a requirement of a Phase I ESA. ASTM 2600, however, remains a separate, more comprehensive assessment of vapor migration.

3. Agency File Reviews

If a property or an adjoining property within the required search distance appears on a federal, state or tribal record, ASTM E1527-13 requires, within the environmental professional’s discretion, a review of the “pertinent regulatory files and/or records associated with the listing.” If the environmental professional chooses not to

conduct a file review, he or she must expressly document the reason(s) for this decision. The environmental professional may also review files and records from alternative sources (for example, on-site records, local agency records, etc.) but a summary of information obtained from the review must be included in the Phase I report and the environmental professional must opine on the sufficiency of the information obtained via file review.

The practical impacts of the file review requirement are likely to be on timing and cost. Agency file reviews can often take several weeks (or even months, in some circumstances), and will likely add some additional costs to a Phase I ESA. The file review requirement and any associated delay is also likely to increase the probability that a Phase I ESA may not be completed at the time of closing.

The standard also indicates that a review of title and judicial records for environmental liens or AULs continues to be a client requirement that should be conducted by a title professional. An environmental professional may conduct this work instead of the client, but does not have an affirmative obligation to do so. These user responsibilities are now mandatory, and the user must also consider its own specialized knowledge, commonly known or reasonable ascertainable information about the property, and the degree of obviousness of the presence or likely presence of releases or threatened releases.

Conclusion

The EPA and HUD believe that ASTM E1527-13 improves upon the 2005 standard and reflects evolving best practices and the level of rigor that will afford prospective property owners necessary and essential information when making property transaction decisions and meeting continuing obligations under the CERCLA liability shield of AAI. While the new rule does not create any additional regulatory requirements, prospective purchasers of property should be aware of the changes. These changes include the emphasized requirement of regulatory agency file reviews and the assessment of vapor migration that many environmental professionals have not, in the past, fully considered in preparing Phase I reports, often as a cost saving measure. Interestingly, the EPA in its adoption of the new standard included an option to “examine the need to further modify the All Appropriate Inquiries Rule (40 C.F.R. 312) to explicitly require the types of enhanced activities provided for in the updated ASTM E1527–13 standard” if those changes are not “being widely adopted”.

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