

Revised Phase I ESA Standard Released by ASTM

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ASTM International released its revised standard for Phase I Environmental Site Assessments on November 1, 2021. The new standard (ASTM E1527-21) updates the 2013 version of the standard (ASTM E1527-13), which is widely used by the commercial real estate industry. This Client Advisory highlights some of the more significant changes in the 2021 version of the standard.

The definition of the term "Recognized Environmental Condition," commonly referred to as a "REC," has been updated. While the changes to the definition are somewhat technical, the goal is to achieve more consistent results when Environmental Professionals who prepare reports based on the new standard apply the updated REC definition to the information that has been gathered concerning the subject property.

The new standard also includes several examples of RECs in an appendix in an effort to provide more context, one of which is potentially problematic. Example 7 in Appendix X4 indicates that a known release that achieved regulatory closure by meeting the unrestricted use standards in effect at the time of the release and the related cleanup is still a REC if the data show that conditions at the property do not meet current unrestricted use regulatory standards. This means that the Environmental Professional preparing the report will now need to check whether the relevant cleanup data satisfy two sets of regulatory standards: those in effect when regulatory closure was first achieved, and the standards that are currently in effect. While in a (re)development context an Environmental Professional might ordinarily check both sets of standards, that might not have been so in a simple property transfer situation. Further, many state regulatory programs do not provide reopeners regarding sites that were closed out in accordance with the regulations in effect on the date of the closure, even if those regulations are subsequently revised and made more stringent.

As a result, it seems it is now possible for there to be a mismatch between some situations when the new ASTM standard will identify a REC, while at least some state hazardous waste site cleanup regulations will conclude NFA is required. For what is worth, the new ASTM standard also notes that "[t]hese examples are provided for illustrative purposes only. Nothing herein is meant to suggest that these opinions are absolute or to be universally applied in similar situations." Perhaps that caveat will give Environmental Professionals enough wiggle room to resolve such a potential conflict.

The new standard encourages more detailed research regarding the use of adjoining properties. Specifically, if researched for the subject property and available, then (i) aerial photographs, (ii) fire insurance maps, (iii) local street directories, and (iv) historical topographic maps should also be researched for adjoining properties. Some participants in the ASTM update work group are

concerned that this aspect of the new standard will mean much more work will need to be performed, particularly regarding urban locations, to prepare an ASTM-compliant report. Others point out that this type of research was already being performed by many environmental engineering firms. If nothing else, be sure this new approach is followed once the 2021 standard takes effect. (More on that later.)

The new standard now groups the previous use of the relevant property for retail purposes along with industrial or manufacturing uses, apparently due to the possibility that past dry cleaning operations may have occurred at that retail location. The impact is that additional historical resources are now supposed to be reviewed regarding the past use of any property previously used for retail purposes if those resources are reasonably available.

The possibility that there may be state law requirements that are beyond the scope of the 2021 ASTM standard is acknowledged in the new standard. This issue is highlighted currently by the fact that per- and polyfluoroalkyl substances ("PFAS") have not yet been designated as "hazardous substances" by the USEPA under the federal Superfund statute, and so technically those compounds are not within the scope of the new ASTM standard, even though PFAS are subject to stringent regulations under an increasing number of state drinking water and hazardous waste site cleanup programs. The point is that the User of the subject environmental site assessment may want to have possible PFAS issues (and other non-ASTM scope issues) added to and included in the scope of the report and the associated analysis.

The 2021 standard adds more detail regarding, and complicates the process of determining, the shelf life of the final report. These site assessment reports were previously understood to be valid for 180 days following their completion.

Now, each of the following components of the report (i.e., not just the date of the final report) must be completed within 180 days of the relevant transaction in order for the report to be considered valid: "(i) interviews with owners, operators, and occupants; (ii) searches for recorded environmental cleanup liens (a user responsibility . . .); (iii) reviews of federal, tribal, state, and local government records; (iv) visual inspections of the subject property and of adjoining properties; and (v) the declaration by the environmental professional responsible for the assessment or update." In addition, the date that each of these tasks was performed must be included in the report.

Effectively this means that the 180 day shelf life of the report begins to run on the date that the first of these tasks was completed.

The new ASTM standard notes that the User of the site assessment report must have a title search performed regarding the possible existence of environmental liens and AULs that have been filed or recorded with respect to the subject property. The 2021 standard also specifies that such a title search must involve reviewing the relevant records from 1980 until the present. This can ordinarily be addressed by coordinating the real estate due diligence work concerning the subject property with the corresponding environmental due diligence work.

Finally, although ASTM approved and issued its new standard on November 1, 2021, when does the new standard become fully effective? The 2021 standard is now being reviewed by the USEPA. The

new standard will be fully effective once the USEPA has completed that review and adopted the new standard as part of its All Appropriate Inquiry regulations. That process will likely take several months, and will also likely include a transition period when satisfying either the 2013 or the 2021 standard will be considered adequate to meet EPA's All Appropriate Inquiry requirements. In the meantime, people in the commercial real estate industry should become familiar with the new standard so they are able to use it when it takes effect.