

Users of Phase I Environmental Site Assessments Should Be Aware of These Changes to the ASTM Standard

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In November 2021, ASTM International published an updated standard for preparing a Phase I Environmental Site Assessment (Phase I). Purchasers of real property have used ASTM Standard E1527 to meet the “all appropriate inquiries” requirement of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to assert the innocent landowner, contiguous property owner, or bona fide prospective purchaser defenses to CERCLA liability. ASTM International published the first version of the ASTM E1527 standard in 1997 and published subsequent revisions in 2000, 2005, and 2013 before the most recent revision in November 2021. ASTM International has submitted the new standard (E1572-21) to the United States Environmental Protection Agency (EPA) for the EPA to review and confirm that the updated standard can be used to meet the statutory defenses noted above. The EPA is expected to take up to one year to complete its review.

The purpose of conducting a Phase I is to identify “Recognized Environmental Conditions” (RECs), and the November 2021 standard tweaks the definition of a REC and incorporates a new Appendix X4 to further explain this definition and provide related examples. We break down these and other notable changes to the standard below:

1. The REC Definition – The 2021 REC definition includes a minor tweak to the 2013 definition. The new standard retains the previous three-pronged definition of a REC but limits the adverb “likely” to only one of these prongs (where before it applied to all three). As such, a REC is now defined to include (i) the known presence of hazardous substances or petroleum products due to an identified release to the environment, (ii) the likely presence of hazardous substances or petroleum products due to either a known or likely release to the environment, and (iii) the known presence of hazardous materials or petroleum products under conditions that pose a material threat of future release to the environment. The REC definition also clarifies that the use of the phrase “likely” is meant to include items that “can be expected or believed by a reasonable observer based on the logic and/or experience of the environmental professional, and/or available evidence.” These definitions are contained in Sections 3.2.73 and 3.2.73.1 of the new standard.
2. Appendix X4 – The new Appendix X4 provides a detailed discussion of the REC definition, adds a flow chart to visualize the process of characterizing findings (including whether a finding should be considered a REC), and provides examples of how certain findings could be characterized using this process. Environmental practitioners should review Appendix X4 carefully. Notably, the flow chart indicates that a finding may not fall into any of the categories under the standard and therefore may simply be a “finding.”

3. Timing – Under the 2013 standard, a Phase I was presumed to be viable for up to 180 days prior to a property acquisition. This requirement has been clarified in the 2021 standard, which now specifies that the following components of the Phase I must be completed or updated within 180 days prior to the transaction for the report to be presumed viable: (i) interviews with owners, operators, and occupants, (ii) searches for recorded environmental cleanup liens, (iii) reviews of federal, tribal, state, and local government records, (iv) visual inspections of the property and adjoining properties, and (v) the environmental professional's declaration. As such, if a final report is less than 180 days old, but one of these five components was completed more than 180 days prior to the anticipated transaction, an updated report should be prepared. The new standard will require the environmental professional to identify the date each of these components was completed, making it easier to confirm that each was completed less than 180 days prior to a transaction.
4. Historical Use Review – Under the 2013 standard, an environmental professional had more discretion in determining which historical sources to review in connection with identifying historic uses of a property. The new standard requires the consultant to review four specific types of historical sources: (i) aerial photographs, (ii) topographic maps, (iii) fire insurance maps, and (iv) city directories. If the consultant does not review one or more of these sources, the report must explain why such a review was not conducted.
5. Historical Retail Use – The updated standard recognizes that certain historical retail uses could result in releases to the environment and could, under the right circumstances, be considered RECs. As such, where a historic retail use is identified, the new standard indicates that additional historical sources should be reviewed to try to identify more specific uses. The standard notes for example that dry cleaning operations were typically conducted in retail spaces and could be significant in considering the potential for historic releases at a property.
6. PFAS and Emerging Contaminants – As we previously wrote, the ASTM decided to include per- and polyfluoroalkyl substances (PFAS) and other emerging contaminants as a “non-scope consideration.” As a non-scope consideration, the user of the Phase I could request that PFAS and/or other emerging contaminants be considered and discussed in the report, but ultimately, a Phase I report would not need to consider PFAS in order to constitute an “all appropriate inquiry” for purposes of establishing the statutory CERCLA defenses listed above.

Until the EPA confirms that the updated standard meets the “all appropriate inquiries” requirement under CERCLA, reports should continue to contain language indicating that they were prepared in compliance with the existing standard E1527-13. In the interim, firms should familiarize themselves with the new standard and could incorporate language into their Phase Is confirming that they were also prepared in compliance with the new standard E1527-21. Users of Phase Is should consider updating internal guidance or scopes of work with environmental professionals to confirm whether (1) reports should be completed to the old standard or to both (until the EPA approves the new standard), and (2) emerging contaminations, including PFAS, should be included in the property evaluation as a “non-scope consideration.”

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