



PERSPECTIVES

ASTM 1527-21 Phase I Environmental Site Assessment Standards Update Summary

Our perspectives feature the viewpoints of our subject matter experts on current topics and emerging trends.

INTRODUCTION

On November 1, 2021, the American Society for Testing and Materials (ASTM) revised the standard for conducting Phase I Environmental Site Assessments (ESAs). The goal of an ASTM Phase I ESA is to identify the confirmed presence, likely presence, or a material threat of the presence of hazardous substances or petroleum products at a real property, also known as a Recognized Environmental Condition (REC).

The new standard, known as E1527-21 – Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, made several modifications to the previous ASTM Phase I Standard Practice (E1527-13). Some of the more prominent modifications in E1527-21 include:

- Clarified definitions of Recognized Environmental Condition (REC), Historical REC (HREC), and Controlled REC (CREC)
- Clarified report viability (aka Report Shelf Life)
- Updated requirements for conducting title searches for identifying Environmental Liens and Activity Use Limitations (AULs)
- Clarified the requirements for historical reviews of adjoining properties
- Added Emerging Contaminants, such as polyfluoroalkyl substances (PFAS) as a non-scope consideration
- Included a REC vs HREC vs CREC logic diagram as an appendix

ASTM has submitted the E1527-21 Standard to the US Environmental Protection Agency (EPA) for the agency's review for compliance with the federal All Appropriate Inquires (AAI) regulations. Currently, US EPA only recognizes E1527-13 as being compliant with the AAI rule. Until the US EPA concludes their review, environmental consultants have several options for implementing the new E1527-21 Standard, including:

1. Continue using ASTM E1527-13 until the EPA approves ASTM E1527-21 for compliance with AAI

2. Use and cite ASTM E1527-21 now but realize that it is currently not recognized by USEPA as being compliant with the AAI rule
3. Cite ASTM E1527-13 and indicate that the Phase I Report also incorporates ASTM E1527-21

J.S. Held prepared this document to provide a summary of the most prominent revisions made to ASTM E1527-21. The following sections describe revisions which may be of most impact/interest to those involved with commercial real estate transactions, such as lending institutions, real estate equity firms and investment trusts, and real estate transaction attorneys.

RECOGNIZED ENVIRONMENTAL CONDITION

The definition of a recognized environmental condition (REC) definition was clarified in E1527-21:

A REC is defined as (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. A de minimis condition is not a recognized environmental condition.

This is an alteration of the REC definition in E1527-13, which defined a REC as the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property due to the above-referenced conditions.

CONTROLLED REC AND HISTORICAL REC

Minor editorial changes were made to the definitions of a CREC and an HREC. However, the most significant addition

in E1527-21 is the inclusion of processes/steps for assisting the environmental professional in concluding that a finding is in fact a CREC or an HREC, or if it should be identified as a REC. E1527-21. ASTM also included a REC vs HREC vs CREC logic diagram as an appendix to the standard.

VIABILITY OF ENVIRONMENTAL SITE ASSESSMENT (AKA REPORT SHELF LIFE), PRESUMED VIABILITY & REPORT UPDATES

A Phase I ESA report is viable when it is conducted within 180-days of the property transaction. The dates that the following parts of the ESA are conducted must be identified in the ESA report:

- Interviews with owners, operators, and occupants
- Reviews of federal, tribal, state, and local government records
- Visual inspections of the subject property and of adjoining properties
- The declaration by the environmental professional responsible for the assessment or update

A Phase I ESA report can be updated, and the report can remain viable, provided the following components are conducted/updated within 180 days prior to the date of the acquisition or the property transaction:

- Interviews with owners, operators, and occupants
- Searches for recorded environmental cleanup liens (a user responsibility)
- Reviews of federal, tribal, state, and local government records

- Visual inspections of the subject property and of adjoining properties
- The declaration by the environmental professional responsible for the assessment or update

Overall, the change from the E1527-13 standard regards the requirement to include the dates that certain aspects of the ESA report are conducted into the Phase I ESA report.

TITLE SEARCHES FOR IDENTIFYING ENVIRONMENTAL LIENS AND ACTIVITY USE LIMITATIONS (AULS)

The prior ASTM Phase I Standard E1527-13 included the recommended processes for searching for the existence of environmental liens and AULs. These recommended processes were updated and clarified in E1527-21.

The most significant revision to the review of title search reports that typically identify environmental liens and AULs is the requirement to review land title records for documents recorded between 1980 and the present. If they are not reviewed back to 1980, justification must be provided in the ESA report. The inclusion of the year 1980 is also a change from E1527-13.

HISTORICAL RESEARCH REQUIREMENTS

The ASTM Phase I standard identifies standard historical resources as aerial photographs, fire insurance maps, local street directories, topographic maps, Building Department records, interviews, property tax files, zoning/land use records, and other historical sources. The term “other historical resources” means a resource or resources that are credible to a reasonable person and that identify past uses of properties. This can include but is not limited to miscellaneous maps, news articles, books about the

history of the area being researched, imagery, land title records, and any other resources that may provide information about past land uses.

The aforementioned standard historical resources are not new additions to E1527-21; however, the historical research requirements in E1527-21 were clarified in that the uses of adjoining properties that are obvious shall be identified in the ESA report to evaluate the likelihood that past uses of the adjoining properties led to REC(s) on the subject property. If any of the standard historical resources are not reviewed for the adjoining properties, but they were reviewed for the subject property, the environmental professional shall indicate in the ESA report why such a review was not conducted.

NON-SCOPE CONSIDERATIONS

There may be environmental issues or conditions at a property that do not present potential CERCLA liability, but which parties may wish to assess, that are outside the scope of E1527-21. Examples of typical non-scope issues were included in E1527-13 and continue to be included in E1527-21.

E1527-21 included substances not defined as hazardous substances pursuant to CERCLA 42 U.S.C. § 9601(14), including some substances sometimes generally referred to as “emerging contaminants.” These substances may include: (1) some substances that occur naturally or through biological digestion (for example, methane), and (2) substances about which human understanding is evolving (for example, per- and polyfluoroalkyl substances, also known as “PFAS”). These and any other emerging contaminants not identified as a hazardous substance by CERCLA are not included in the scope of E1527-21 but are listed as non-scope considerations.

Although emerging contaminants are non-scope considerations in E1527-21, the potential presence of emerging contaminants may require consideration under applicable state laws. In those instances, it is permissible to include analysis and/or discussion of these substances in the same manner as any other Non-Scope Consideration. If and/or when such emerging contaminants are defined to

be a hazardous substance under CERCLA, such substances will need to be evaluated within the scope of E1527-21.

CONCLUSION

This paper has identified, described, and briefly discussed only what are likely the most noteworthy and/or impactful revisions to the previous ASTM Phase I Environmental Site Assessment Standard, namely various definitions, changes in expected information to be included in assessments, and so forth. Professionals interested in a complete detailing of the updated standards should refer to the authoritative document ASTM E1527-21 available through the ASTM International official website.

ACKNOWLEDGMENTS

We would like to thank Jeffrey Magdon for providing insight and expertise that greatly assisted this research.

Jeffrey Magdon is a Project Manager and a New Jersey Licensed Site Remediation Professional with J.S. Held’s Environmental, Health & Safety Practice. He is responsible for the management of environmental due diligence services in the J.S. Held Summit, New Jersey office. Mr. Magdon has been conducting environmental due diligence assessments for over 20 years and has completed several hundred site assessments.

Contact Jeffrey Magdon at jmagdon@jsheld.com or (973) 528-7022

This publication is for educational and general information purposes only. It may contain errors and is provided as is. It is not intended as specific advice, legal or otherwise. Opinions and views are not necessarily those of J.S. Held or its affiliates and it should not be presumed that J.S. Held subscribes to any particular method, interpretation or analysis merely because it appears in this publication. We disclaim any representation and/or warranty regarding the accuracy, timeliness, quality, or applicability of any of the contents. You should not act, or fail to act, in reliance on this publication and we disclaim all liability in respect to such actions or failure to act. We assume no responsibility for information contained in this publication and disclaim all liability and damages in respect to such information. This publication is not a substitute for competent legal advice. The content herein may be updated or otherwise modified without notice.