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Environmental Protection Agency Recognizes ASTM E1527-21 as Satisfying All Appropriate Inquiries Rule

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In this article, the authors discuss a final rule issued by the U.S. Environmental Protection Agency setting forth what is needed to satisfy the agency's all appropriate inquiries rule.

It has taken a year to obtain greater certainty of what is required to satisfy the U.S. Environmental Protection Agency's (EPA) all appropriate inquiries (AAI) rule.[1]

Earlier last year, EPA issued a direct final rule[2] as well as a companion proposed rule inviting comment on the direct final rule, in which it indicated its intention to recognize both the older standard, E1527-13, and the newer standard, E1527-21, as satisfying AAI.

After receiving multiple comments objecting to continued recognition of the older standard, the EPA withdrew its direct final rule on May 2, 2022.[3]

EPA has now issued a final rule, agreeing that only the newer standard should be used going forward but allowing users to take up to a year after the effective date (i.e., until February 13, 2024) to become familiar with and start using the newer E1527-21 standard.

The changes in the standard are intended to reflect what industry views to be the current state of "good commercial and customary practice" in preparing Phase I environmental site assessments (ESAs) and to weed out low-cost providers that prepare what many view as deficient reports. Other changes were made to provide greater consistency in the language of Phase I ESA reports. Several of the changes are very nuanced. Other changes were not uniformly supported, particularly by members of the legal profession. This article highlights some of the key improvements as well as areas where deviation from the language in the E1527-21 standard may be appropriate.

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During this transition period, in order to maximize liability protections, it is important for users and their counsel to discuss:

- Which ASTM International Standard should be used and when they should insist that their consultants use the updated version;
- Whether historical records are available for adjoining properties; and
- Whether the inquiry should address any non-scope items, such as per- and polyfluoroalkyl substances (PFAS).

As before, a best practice is to share a copy of the Phase I report, in draft, with counsel before the report is finalized in order to identify any factual errors and to discuss the draft findings and conclusions.

NUANCED CHANGES TO REC DEFINITION

In order to try to reduce the amount of variability in opinions of whether recognized environmental conditions (RECs) are present on a property, the ASTM E50.02 Committee made a nuanced change to the REC definition in order to obtain more consistent interpretations. The new definition of REC in Section 3.2.73 reads as follows:

> (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 conditions is not a recognized environmental condition.

This revised definition is supplemented with examples in Appendix X4 that are intended to clarify what each of these three phrases in the definition means.

For example, under the first part of the definition (the presence of hazardous substances or petroleum products in, on or at the subject property due to a release or likely release to the environment), an environmental professional (EP) could not conclude that an off-site property was a REC.

Under the second part of the definition (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), an EP could conclude, based upon his or her experience and observations, that the subject property's usage as a gas station or dry cleaner for a significant period of time prior to regulatory controls or the presence of a bare-steel underground petroleum storage tank installed at the subject property decades ago without any leak detection systems may be examples of a REC due to the likely presence of a release of hazardous substances or petroleum products to the environment.

Finally, Appendix X4 provides examples of what constitutes a material threat of a future release under the third part of the definition, including precariously stacked drums and bulging tanks.

Appendix X4 also explains that the past closure of a leaking underground storage tank may not constitute an Historical Recognized Environmental Condition (HREC) unless the EP has evaluated the data associated with that closed tank to be sure that the sampling data meet current regulatory standards for unre-

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stricted use and whether there is an open vapor exposure pathway.

Appendix X4 also provides examples of RECs, HRECs and Controlled Recognized Environmental Conditions (CRECs) in order to try to achieve greater consistency in the use of these terms.

These written examples are supplemented further by a REC, HREC and CREC diagram in Appendix X4. All of this supplemental information should facilitate more informed discussions between users, their counsel and EPs to be sure that the consultants are using the terminology of E1527 as intended and reaching consistent conclusions of whether a given fact pattern constitutes a REC, HREC or CREC.

HISTORICAL RESOURCES TO BE REVIEWED ON ADJOINING PROPERTIES

The E50.02 Committee made significant changes in Section 8.3 regarding the scope of review of historical records. This section was reorganized to emphasize that the standard historical information sources include aerial photographs, fire insurance maps, local street directories, topographic maps, building department records, interviews, property tax files, zoning/land use records and other historical resources. When evaluating the uses of adjoining properties (Section 8.3.9), the standard now emphasizes reviewing the "top four" sources of historical information (aerial photographs, fire insurance maps, local street directories and topographic maps) for those properties as well, at least if the "top four" sources were obtained for the subject site and included the adjoining properties.

> 8.3.9 *Uses of the Adjoining Properties* - During research of the *subject property*, as described in 8.3.8, uses of the *adjoining properties* that are obvious shall be identified to evaluate the likelihood that past uses of the *adjoining properties* have led to *recognized environmental conditions* in connection with the *subject property*. . . . This task requires reviewing the following *standard historical resources* if they have been researched for the *subject property* (see 8.3.8), provide coverage of one or more *adjoining properties*, and are likely to be useful in satisfying the objective in 8.3.1:
>
> I. *aerial photographs* (see 8.3.4.1),
> II. *fire insurance maps* (see 8.3.4.2),
> III. *local street directories* (see 8.3.4.3), and
> IV. historical *topographic maps* (see 8.3.4.4).
>
> In cases where any of the preceding four *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 *report* why such a review was not conducted. Additional *standard historical resources* should be reviewed if, in the opinion of the *environmental professional*, such additional review is warranted to achieve the objective in 8.3.1. . . .

CLARIFICATION OF REPORT SHELF LIFE

Section 4.6.1 of the standard describes how long the Phase I report will be presumed to be viable. It will be presumed to be viable if the report was completed no more than 180 days prior to the date of acquisition or up to one year if certain components of the report have been updated: the interviews, review of government records, visual inspection of the property and EP Declaration.

The E50.02 Committee clarified that this update clock begins to run from the first of these activities and that the date for each component (interview, environmental lien search, review of governmental records, visual inspection and EP Declaration) must be identified in the report. If the EP conducts the environmental lien and activity and use limita-

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tion (AUL) search, the date of that report must also be listed in the Phase I ESA.

CLARIFICATION THAT AUL/ ENVIRONMENTAL LIEN TITLE REPORTS MUST SEARCH LAND RECORDS BACK TO 1980

The user is responsible under Section 6.2 of the standard for providing land title records that describe any environmental liens or AULs. The revisions to the standard explain in greater detail how this is typically done: through a Preliminary Title Report/Title Commitment or through a Condition of Title Report/ AUL/Environmental Lien Title Report.

An important issue that came to the attention of the E50.02 Committee Group was that many companies running so-called AUL/ Environmental Lien Title Reports were searching the land records only back to the last change in title, giving purchasers a false sense of security that there were no environmental liens or AULs. The E50.02 Committee addressed this issue by clarifying the methods for searching title in Section 6 and explaining that companies preparing AUL/Environmental Lien Title Reports must search the land title records back to 1980 for potential restrictions on title. Users who rely on these types of searches are encouraged to talk with the companies performing these searches for them to be sure that they are prepared to comply with this clarification of the current requirement.

> 6.2.1 *Method 1 Transaction-Related Title Insurance Documentation Such as Preliminary Title Reports and Title Commitments* - The *user* may rely on title insurance documentation, commonly fashioned as preliminary title reports or title commitments, which are prepared in the course of offering title insurance for the *subject property* transaction to identify *environmental liens* or *AULs* filed or recorded against the *subject property*. Title insurance documentation involves a reliable review of *land title records* or judicial records (see Appendix X1.7.4 discussing title insurance documentation.) However, the *user* (or a title professional engaged by the *user*) should closely review the title insurance documentation, particularly the areas of the documentation listing *subject property* encumbrances or "restrictions on record," for indications of *AULs* or *environmental liens.*
>
> 6.2.2 *Method 2 Title Search Information Reports Such as Condition of Title, Title Abstracts, and AUL/Environmental Lien Reports* - Alternatively, *users* may rely on title search information reports to identify *environmental liens* or *AULs* filed or recorded against the *subject property*. Title search information reports, commonly fashioned as Condition of Title, Title Abstract, AUL/Environmental Lien or similarly titled reports, provide the results of *land title record* and/or judicial records research (as applicable) for information purposes only, rather than for the purposes of offering title insurance. *Users* may rely on title search information reports as long as the title search information reports meet the following scope.
>
> *6.2.2.1 Scope of Title Search Information Reports* - Title search information reports shall identify environmental covenants, environmental easements, land use covenant and agreements, declaration of environmental land use restrictions, environmental land use controls, environmental use controls, *environmental liens*, or any other recorded instrument that restricts, affects, or encumbers the title to the *subject property* due to restrictions or encumbrances associated with the presence of *hazardous substances* or *petroleum products.* Title search information reports shall review *land title records* for documents recorded between 1980 and the present. If judicial records are not reviewed, the title search information report shall include a statement providing that the law or custom in the jurisdiction at issue does not require a search for judicial records in order to identify *environmental liens.*

FINDINGS/CONCLUSION

To improve the phrasing of the conclusion in a typical Phase I report, the Task Group has changed the phrasing of Section 12.7 so that it reads as an affirmative statement:

> 12.7.1 "We have performed a *Phase I Environ-*

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mental Site Assessment in conformance with the scope and limitations of ASTM Practice E1527-21 of [insert address or legal description], the *subject property*. Any exceptions to, or deletions from, this practice are described in Section [?] of this *report*. This assessment has revealed no *recognized environmental conditions, controlled recognized environmental conditions*, or *significant data gaps* in connection with the *subject property*," or

12.7.2 "We have performed a *Phase I Environmental Site Assessment* in conformance with the scope and limitations of ASTM Practice E1527-21 of [insert address or legal description], the *subject property*. Any exceptions to, or deletions from, this practice are described in Section [?] of this *report*. This assessment has revealed the following *recognized environmental conditions, controlled recognized environmental conditions*, and/or *significant data gaps* in connection with the *subject property*:" (list).

RECOGNITION THAT EMERGING CONTAMINANTS PERHAPS SHOULD BE ADDRESSED IN THE PHASE I ESA (AS A NON-SCOPE CONSIDERATION)

If someone is commissioning a Phase I ESA in a state where emerging contaminants such as PFAS are an issue, the EP will not identify the contaminants unless explicitly added to the EP's scope of work. ASTM continues to consider these compounds to be "non-scope," so users in the growing number of states that are regulating PFAS under one or more of their regulatory programs should be alert to adding PFAS as a non-scope item (13.1.5.15) to their consultant's scope of work.

ASTM addressed this issue indirectly via a footnote in Section 1.1.4 of the standard by reminding users and EPs that there may be other state requirements, including those that may define emerging contaminants as hazardous substances:

Many states and other jurisdictions have differing definitions for terms used throughout this practice, such as "*release*" and "*hazardous substance*." If a *Phase I Environmental Site Assessment* is being conducted to satisfy state requirements and to qualify for the state (or other jurisdiction) equivalent of LLPs, *users* and *environmental professionals* are cautioned and encouraged to consider any differing jurisdictional requirements and definitions while performing the *Phase I Environmental Site Assessment*. Substances that are outside the scope of this practice (for example, emerging contaminants that are not *hazardous substances* under CERCLA), may be regulated under state law and may be federally regulated in the future. Although the presence or any *release*/threatened *release* of these substances are "non-scope considerations" under this practice, the *user* may nonetheless decide to include such substances in the defined scope of work for which the *environmental professional* conducting the *Phase I Environmental Site Assessment* is engaged. See Section 13.1.2.

CRECS AND PULS

Many in the legal community were adamantly opposed to the inclusion of the phrase "property use limitation" (PUL) in the standard as part of the definition of CREC. They pointed out how this phrase was not used in the Brownfields Amendments of 2002 or in EPA's updated Common Elements guide. They also pointed out that ASTM had made the decision more than 20 years ago that risk-based corrective action did not include any "controls," which was why ASTM developed an institutional controls standard (E2091) in 2000. They argued that users needed bright line tests to know whether they would qualify for landowner liability protections (LLPs) and that the inclusion of this new terminology would simply cause greater confusion rather than adding the needed clarity.

3.2.17 *controlled recognized environmental condition - 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

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> to remain in place subject to implementation of required controls (e.g., *activity and use limitations or other property use limitations*). For examples of *controlled recognized environmental conditions*, see Appendix X4. *Discussion* - . . .
>
> (2) In determining whether a *recognized environmental condition* is "subject to implementation of required controls (e.g., *activity and use limitations or other property use limitations*)," the *environmental professional* shall identify the documentation providing the control(s) that addresses the *recognized environmental condition* in the *report's* Findings and Opinions section(s).
>
> (3) When the *environmental professional* determines that a *recognized environmental condition* is "subject to implementation of required controls," this determination does not imply that the *environmental professional* has evaluated or confirmed the adequacy, implementation, or continued effectiveness of the control(s) . . .

The AUL terminology in E2091 is consistent with the 2002 Brownfields Amendments statutory language and with EPA's 2019 Common Elements Guide, both of which require a purchaser to be in compliance with land use restrictions and not to impede the integrity or effectiveness of institutional controls in order to maintain its LLPs. Neither the 2002 Brownfields Amendments nor the Common Elements Guide uses the term PUL, and it is not defined in E1527-21. This phrase is also inconsistent with explicit language in the 2019 EPA Common Elements Guide, which emphasizes that parties seeking to qualify for one of the LLPs need to consult with EPs and legal counsel and that land use restrictions are "legally binding use or activity restrictions or limitations on land or other resources associated with land." In other words, in order to comply with the "continuing obligations" under the 2002 Brownfields Amendments, making such a determination is not just a technical process. EPs who make judgments about what constitutes a land use restriction or institutional control (the terminology used in the statute) put themselves at risk of rendering legal judgments without a license and put their clients at risk of losing their LLPs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

KEY TAKEAWAYS

Many of these changes are quite nuanced but important and should lead to greater consistency in the findings and conclusions of Phase I ESA reports if taken to heart by EPs. EPA made it clear in its response to comments that the ASTM standard is not an EPA regulation and that users are not required to use the standard. For this reason, it is important to review the findings and conclusions in Phase I ESA reports carefully, and clients should ask for revisions in any report that does not include any actual institutional control or land use restriction when concluding whether an environmental condition constitutes a REC, CREC or HREC.

CONCLUSION

In summary,

- ASTM International's E1527-21 Standard Practice on Phase I Environmental Site Assessments has been recognized by the EPA as satisfying the AAI rule.

- EPA will no longer recognize both the older version of the standard, E1527-13, and the newer version, E1527-21. Nevertheless, users can continue to use the older standard, E1527-13, until February 13, 2024, while they become familiar with the new standard.

- EPA acknowledged in its response to

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comments that the ASTM 1527 standard is not an EPA regulation and that use of the E1527 standard is not required to comply with AAI.

NOTES:

[1]40 C.F.R. Pt. 312.

[2]87 Fed. Reg. 14174 (Mar. 14, 2022).

[3]87 Fed. Reg. 25572.

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