

Practice Update

Effect of New Phase I Standard Already Being Seen in Environmental Due Diligence

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The U.S. Environmental Protection Agency (EPA) is in the process of rulemaking to adopt a new national standard for Phase I environmental site assessments. While the EPA had hoped to adopt the new Phase I standard more quickly in 2022, it has been a slower process.^[1] Still, the EPA is expected to adopt the new *ASTM E1527-21 Standard Practice for Phase I Environmental Site Assessments: Phase I Environmental Site Assessment Process* as constituting “all appropriate inquiries” (AAI) under the 2002 Brownfield amendments to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), known as the Superfund law.

Background

While CERCLA generally imposes strict environmental liability on current property owners and current operators (even if they did not cause environmental contamination), various parties, particularly new buyers of sites, can gain a valuable defense to CERCLA liability. Conducting AAI – by having a valid, current Phase I report in hand completed by the time of site acquisition – is critical to establishing landowner liability defenses under CERCLA.

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For buyers of real property, the key CERCLA defense to secure is the bona fide prospective purchaser (BFPP) defense, which can apply even if the prospective buyer obtains knowledge of site contamination. To establish the BFPP defense, a party must conduct AAI before closing, satisfy threshold statutory criteria, and meet ongoing, continuing obligations post-closing by exercising “appropriate care” with respect to site contamination by taking “reasonable steps” to stop any continuing release, preventing any threatened future release, and preventing or limiting exposure to contamination. Establishing the BFPP defense is self-executing – in other words, it is up to the buyer to do so on its own.

At present, a large number of U.S. Brownfield and environmental practitioners have already shifted to using the new Phase I ASTM standard while the EPA works to complete rulemaking. Based on the current unique status of the Phase I standard – 1527-21 has been issued by the American Society for Testing and Materials (ASTM) but not yet adopted by the EPA – environmental practitioners are employing various approaches: some are using the prior Phase I 1527-13 standard, some are using 1527-21, and some are taking a hybrid approach using both. Overall, Phase I reports are considered sound environmental diligence to assist prospective buyers evaluate a site’s history and previous uses in order to understand the potential for environmental impacts.

In the meantime, it is helpful to review the changes made by the 1527-21 standard:

1527-21 ASTM Standard

The 1527-21 standard includes a number of definitional and other changes from the 1527-13 standard. These revisions affect how environmental professionals prepare a Phase I Environmental Site Assessment (Phase I ESA or Phase I report) and impact their substantive content. Below are some notable changes in the 1527-21 standard.

- **Recognized Environmental Condition (REC).** The key purpose of a Phase I is to identify whether the property has any RECs, which can materially affect the environmental risks associated with a real estate transaction, the steps parties take to manage these risks, and a party's environmental obligations. In an effort to provide clarity, the 1527-21 standard defines REC 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.” This definition limits use of the term “likely” by only including it in the definition's second prong instead of in all three prongs under 1527-13. The updated definition also discusses what “likely” means.
- **Controlled Recognized Environmental Condition (CREC).** The 1527-21 standard modifies the definition of a CREC, which generally relates to property with contamination but which has achieved environmental regulatory closure through institutional and/or engineering controls to manage environmental impacts. The 1527-21 standard defines CREC as a “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 to remain in place subject to implementation of required controls (for example, activity and use limitations or other property use limitations).” The new standard also includes a section elaborating on the meaning of a CREC, noting that a release previously qualifying as a CREC might no longer constitute a CREC at the time of the Phase I “if new conditions or information have been identified, such as... a change in regulatory criteria, a change of use at

the subject property, or a subsequently identified migration pathway that was not previously known or evaluated.”

- **Historical Recognized Environmental Condition (HREC).** The 1527-21 standard also revised the HREC definition, which applies to historical environmental impacts. HREC is now defined as “a previous release of hazardous substances or petroleum products affecting the subject property that has been addressed to the satisfaction of the applicable regulatory authority or authorities and meeting unrestricted use criteria established by the applicable regulatory authority or authorities without subjecting the subject property to any controls (for example, activity and use limitations or other property use limitations). A historical recognized environmental condition is not a recognized environmental condition.” The 1527-21 standard provides an HREC discussion section, which notes that a release previously identified as an HREC may no longer merit this treatment if new conditions or information have been identified, such as a change in regulatory criteria or an identified migration pathway not previously known or assessed.
- **REC Flow Chart.** Determining whether an environmental issue qualifies as an REC, HREC, or CREC can involve nuanced, fact-specific analysis. To help, the 1527-21 standard contains Appendix X4 with analysis and examples of these classifications. The appendix also has a flow chart. Although this guidance likely will not remove all uncertainty, it should provide additional clarity and facilitate Phase I decision-making.
- **Significant Data Gap.** Another notable change is the newly added definition of “significant data gap.” To clarify what data gaps justify discussion, the 1527-21 standard adds a definition of “significant data gap” as follows: “a data gap that affects the ability of the environmental professional to identify a recognized environmental condition.” The 1527-13 standard had left this term undefined (it only defined “data

gap”). If a “significant data gap” is present, under the new 1527-21 standard, the environmental professional must “comment on the impact” of such data gap on the professional’s ability to identify RECs.

- **Subject Property.** The 1527-21 standard also seeks to add consistency concerning the terminology applicable to the property evaluated in the Phase I. Phase I reports frequently refer to the property at issue using various terms (e.g., property, site, subject property). The 1527-21 standard encourages use of the term “subject property” in Phase I ESAs when referring to the examined property -- and defines “subject property” as “the property that is the subject of the environmental site assessment described in this practice.”
- **De Minimis Condition.** The 1527-21 standard revises the definition of a “de minimis condition,” which is defined as “a condition related to a release that generally does not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.” This new definition explains that the condition must be “related to a release” for it to be a de minimis condition.
- **PFAS.** PFAS, an emerging contaminant that has drawn intense regulatory attention in recent years, is not currently regulated or defined by CERCLA as a hazardous substance and, therefore, does not fall within the present scope of a Phase I. Still, the EPA is undertaking a complex regulatory process that ultimately is expected to lead to PFAS being defined as a CERCLA hazardous substance. In discussing PFAS, the 1527-21 standard notes that PFAS may, as directed by the user and/or to reflect state or local laws, be included in a Phase I as a non-scope consideration. PFAS is not expressly mentioned in the 1527-13 standard.

- **180-Day Time Period.** The 1527-21 standard clarifies the time period for Phase I report validity. Under the new standard, while some information may be collected within one (1) year before the date of site acquisition, for a Phase I to be valid and to qualify for CERCLA landowner liability protections, the following components must be completed within 180 days before the date of acquisition: (1) interviews with owners, operators, and occupants; (2) searches for recorded environmental cleanup liens; (3) review of governmental records; (4) visual inspections of the subject property and adjoining properties; and (5) declaration by the environmental professional responsible for the assessment or update.
- **Historical Sources.** The 1527-21 standard requires, in most cases, that the environmental professional, at a minimum, review the following historical sources for the subject property and adjoining properties: (1) aerial photographs; (2) fire insurance maps; (3) local street directories; and (4) historical topographic maps. If these sources cannot be reviewed, the environmental professional must indicate why. The 1527-13 standard allowed the environmental professional to review the historical sources the professional believed were necessary to satisfy the Phase I objectives.
- **Title Work.** The 1527-21 standard provides that title search reports must review land title records for documents recorded at least from 1980 through the present.

Preparation of a valid, current Phase I ESA is critical to both (i) sound environmental due diligence as well as (ii) establishing the BFPP defense or other landowner liability defenses to CERCLA liability. The opportunity is time-limited: If a Phase I ESA is not prepared by the time of closing, a party generally cannot go back in time to prepare one, so the BFPP defense is lost.

Akerman's Brownfield and environmental attorneys are able to assist clients evaluate the relevant Phase I standards and their relevance and application to clients' projects.

[1] The EPA withdrew a direct final rule in May 2022 (after receiving negative comments) that would have quickly adopted the new Phase I standard but would have still allowed parties to still use and rely on the older 1527-13 standard.

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