

UPDATE: Important New Phase 1 Environmental Site Assessment Standard

By: John Parker

In November, ASTM International (“ASTM”) published the new Phase I Environmental Site Assessment (“Phase 1”) standard, updating the previous requirements. Property purchasers should consider using the new standard when undertaking their due diligence when acquiring commercial or industrial properties.

The purpose of the Phase 1 is to identify environmental conditions that may exist on property during purchase transactions. The Phase 1 inquiry is necessary for property purchasers to qualify for liability protections under the federal CERCLA or “Superfund” law for hazardous substances on the property, which can prove to be costly and time consuming to address. A Phase 1 is the best practice in real estate transactions, particularly if the property has had previous uses where environmental contamination is possible and likely, such as manufacturing and on-site dry cleaning activities. The Phase 1 must be written to comply with the ASTM standard.

The notice for the new standard states that:

The purpose of this practice is to define good commercial and customary practice in the United States of America for conducting an environmental site assessment of a parcel of commercial real estate with respect to the range of contaminants within the scope of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. § 9601) and petroleum products. As such, this practice is intended to permit a user to satisfy one of the requirements to qualify for the innocent landowner, contiguous property owner, or bona fide prospective purchaser limitations on CERCLA liability (hereinafter, the “landowner liability protections,” or “LLPs”): that is, the practice that constitutes all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial and customary standards and practices as defined at 42 U.S.C. § 9601(35)(B). (See Appendix X1 for an outline of CERCLA’s liability and defense provisions.)

The new revised standard clarifies a variety of items commonly found in the Phase 1 and, notably, the definitions for:

recognized environmental condition (“REC”),
historical REC (“HREC”); and,
controlled REC (“CREC”).

The new standard sets forth in detail the REC determination process, including flow charts for further clarity. Among the revisions to the REC language, the new standard makes clear that property that is the subject of the Phase 1 must be impacted by the identified Historical RECs (HRECs) and Controlled RECs (CRECs). The REC definition update adds “likely release” to the REC definition. The term “likely” is defined as:

that which is neither certain nor proved, but can be expected or believed by a reasonable observer based on the logic and/or experience of the environmental professional, and/or available evidence, as stated in the report to support the opinions given therein.

Thus, the REC definition now includes “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.”

Among the revisions found in the new Phase 1 standard are additional requirements for: identifying data gaps in the assessments and encouraging that they be addressed; clarifying the scope of the site visit; simplifying the presentation of site specific details (site plans); and clarifying the government and historical databases that should be reviewed. It also includes a requirement that the Phase 1 clearly indicate the timeline for the viability of its use, which is within 180 days of property acquisition with some parts of the report remaining usable for 1 year.

The new standard does not recognize emerging contaminants such as PFAS and PFOS, as a REC because these chemicals are not currently regulated hazardous substances under CERCLA. USEPA is moving forward with regulating PFAS and PFOS as hazardous substances in 2022 (with final rule expected in 2023). The new Phase 1 standard classifies emerging contaminants as business environmental risks which are “non-scope” items to be considered. In contrast to USEPA, the New York State Department of Environmental Conservation finalized regulatory authority over PFOA and PFOS as hazardous substances in March 2017, underscoring the importance of considering these chemicals during a due diligence environmental site assessment. *See*, 6 NYCRR § 597.

Conclusion: Use the New Phase 1 Standard

The Phase I report is necessary to assert hazardous substance liability defenses under CERCLA and it must meet the “all appropriate inquiry” requirement. USEPA is not likely to revise its regulations consistent with the new E1527-21 standard before 2023.

The new E1527-21 standard is now widely considered a best commercial practice and necessary to meet the CERCLA “all appropriate inquiry” standard.¹ Thus, to ensure viable and robust CERCLA liability defenses, the most protective approach is for Phase I Environmental Site Assessment reports to meet the new E1527-21 standard. To remove any ambiguity or confusion until USEPA adopts the standard, all Phase 1 reports should note that they meet both the previous E1527-13 standard and the new E1527-21 standard.

¹ 42 U.S.C. § 9601(35)(B) identifies that in order for a party to show that it “did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility” it must prior to acquiring a facility carry out “all appropriate inquiries ... in accordance with generally accepted good commercial and customary standards and practices.”