

A revised ASTM Standard
for Phase I ESAs is coming!



ERIS Webinars - **Q&A - January 12, 2021**

1. How is the presence of radioactive materials or waste handled?

The presence of high alpha or beta particles, in my experience, is being widely missed.

No specific contaminants of concern are identified in the E1527

2. Is there a certain amount of time before a laundry at a property is no longer considered a REC?

For example, if a property was listed on a FIM as a laundry in the early 1900s then residential since the year 1910, is the existence of a laundry still a concern in the year 2021?

See link to reference document regarding dry cleaner history here: <https://www.erisinfo.com/webinars/webinar-revised-astm-standard-phase-esas-coming/>

3. For HRECs, does "affecting subject property" need proof or can it be likely?

Yes, the concept of the HREC is that 1) there was a release affecting the property, and 2) that release has now been addressed to unrestricted use criteria.

4. If the release originated off of the subject property and impacted the subject property, requiring remediation or a control to the subject property, are HREC and CREC still applicable?

That scenario is precisely when the HREC and CREC applies. The release and the remediation or control are specific to the subject property.

5. To meet the requirements of the UQ, is the user obliged to do a lien/AUL search? In other words, can a user meet the UQ requirements by simply stating that they did not do the search?

No, the EP is not required to do a lien/AUL search. Refer to Section 6 of the E1527 standard that speaks directly to this. The EP is obligated to ask the user if they are aware of EL or AULs. The lien/AUL search is a User obligation, so if the User replies that they have not yet done title work, they can state such in the UQ.

6. Can AULs be part of the BERs? Or do the two have to be addressed separately in findings and conclusions?

BERs are intended to address non-scope considerations, such as ACM, LBP, wetlands, etc. AULs are specific to presence or likely presence of contamination, so if there is an AULs, that is not a BER.

7. Does a Phase I meet the ASTM standard if the User chooses not to provide the lien/AUL search?

Yes, as long as the EP states that in the report and considers the lack of information in the context of a data gap and opines on whether the missing information from the User represents a significant data gap. The AAI rule speaks directly to this scenario.

8. Does the EP need to tell the User they must do the title/AUL search in order to meet the standard?

Section 6 of the ASTM standard does not specify that the EP is obligated to instruct the User to conduct a title/AUL search to meet their AAI obligations.

9. If the User doesn't provide detailed title records (which they often don't), is the EP then required to perform the 1980-present AUL and liens search? And is a chain of title search required as well?

No and No. The user is only obligated to answer the EP's question. The EP is not required to perform an AUL/lien search. A chain of title is NOT the same product. Chain of title is specific to historical research. Chain of title is one of the 8 standard historical sources and is unrelated to the AUL/EL search.

10. Will there be clarification on number of units to evaluate when performing a Phase I on a multi-family complex?

No

11. Can we say "the Subject Property, hereafter referred to as the Property", or is it recommended to use "subject property" every time?

There is no requirement either way. The standard is being revised to consistently use "subject property" only for clarity.

12. Any consideration to reducing database search radii for highly urban areas?

There is an option in the existing E1527 that allows the EP to do that very thing. The EP just needs to explain how and why the EP chose to deviate from the standard.

13. I have a recent issue with NOA, Naturally Occurring Asbestos. It's not a REC until it's dug up. And it won't be dug up until construction starts. So at the time of my site visit, there is no REC. Will this type of future issue be addressed in the new standards?

No

14. Is this definition going to change to just say "meeting unrestricted use criteria"?

That is the current proposal

15. The requirement for PIA requests associated with RECs can create timing problems. Any thoughts to allowing PIA requests to be completed as part of PhII rather than requiring this as part of the PhI process?

The Task Group has discussed that this might be a situation where "additional investigation may be warranted."

16. Will the list of hazardous substances under CERCLA be included as appendix?

No

17. Any description on who specifically should be conducting these reports? Resumes required for licensed professional geologists, for example?

Qualifications are required under the existing standard. There is no further change proposed.

18. Any changes to shelf life of the report?

No changes, but clarification that the shelf life is not based on the date of the report but each of the components outlined by AAI that must be conducted within 180 days prior to acquisition.

19. Has there been any discussion of clarification to the "readily available" and "reasonably ascertainable" language?

Discussion, but no change

20. Can Emerging Contaminants be also part of BERs?

Yes

21. Why are "junk yards" not addressed?

No specific businesses are addressed

22. What will happen in the period between 12/2021 and the TBD 2022 EPA adoption date of the new ASTM 1527-21 standards?

Similar to -05 and -13 updates. Some consultants reference conformance with both the current standard and the recently published standard. Some consultants stick with the current until EPA formally adopts.

23. Are lessees still required to conduct a phase one?

Not addressed in the standard. CERCLA liability applies to owners, occupants, and operators.

24. My understanding was that the standard required we have at least 2 historical resources that appropriately cover the history of the site. Is that so?

No, the current and all prior versions do not specify how many resources. The standard only states that chain of title cannot be the only source.

25. Will the standard update address PFOS/PFAS?

Sort of. The current proposal is to not specify any particular contaminant of concern, but to instead refer more broadly to "emerging contaminants."

26. How long will we have to implement the new standard, after it has been adopted?

From an ASTM standpoint, the new standard could be implemented immediately. EPA often specifies a phase-in period.

27. Will the changes to E1527 include a mandatory Table of Contents for Ph I reports?

No. The current proposal is to refer to a "recommended" or "suggested" TOC.

28. Will consideration of vapor intrusion related to HREC/-CRECs be taken more seriously?

While not required to do a full assessment under ASTM 2600 I do feel I see a lot of reports that ignore potential VECs. The objective of the E1527 is to identify the presence or likely presence of hazardous substances or petroleum products at the property. An evaluation of vapor intrusion is beyond the scope of E1527.

29. Any additional modifications regarding "vapor migration in the subsurface" or "exposure pathway" (e.g., inhalation of vapors)? If not, any discussion and context of the discussion.

No

30. Are there any anticipated updates regarding clarifying the expiration dates?

We've had questions in the past regarding when the clock starts ticking, specifically from the issue date of the report or the date each component was completed.

Yes. clarification that the shelf life is not based on the date of the report but each of the components outlined by AAI that must be conducted within 180 days prior to acquisition.

31. Can we discuss some about unregistered water wells on the Subject Property being used for drinking supply? I consider this a business env. risk. Your thoughts please.

The objective of the E1527 is to identify the presence or likely presence of hazardous substances or petroleum products at the property. The question about unregistered wells, if not specifically tied to HS or PP, appears to be a BER.

32. You mentioned litigation regarding insufficient review of adjoining properties. Can you tell us more? Name of Case?

Bank United, N.A. v. Merritt Environmental Consulting Corp, 2018 U.S. Dist. Lexis 214448 (S.D.N.Y. 12/20/2018) (see <https://www.environmental-law.net/2019/01/24/consultants-in-bank-lawsuit-saved-by-the-statute-of-limitations-bell/>)

33. If a release received an unrestricted NFA 10 years ago, but remaining impacts at that time exceed current screening levels, is that release considered a REC then and not a HREC even with a closure letter?

Correct

34. In regard to Records Review - do you expect we will see any revision to which databases are required per the ASTM standard? Thank you!

Yes, some of the databases listed in the current standard no longer exist.

35. I spend my life doing reviews for banks. Almost all the issues I have would be solved by having EPs that are real professionals. Please discuss any changes to definition of an EP. Thanks.

There are no proposed changes to the EP definition. The EP definition comes directly from the EPA AAI regulation.

36. Will vapor encroachment be re-defined at all?

No

37. Will the new standard include any kind of mandate to use outside regulatory agency database searches, rather than obtain and review data directly from the state and federal agencies?

No

38. If the standard refers to "the subject property" it should also refer to "property reconnaissance", property photographs", "property maps" (instead of site map, site figures, site photos, site reconnaissance, etc.)

The task group talked about that, but opted not to do that.

39. Is there any additional guidance or discussion given related to "good commercial practice" as it relates to site visits for larger parcels (100 to 1000+ acres)

No

40. Will there be any limitations on the need to include past reports in the appendices sections. It just seems that the Phase I ESA is a 40 page report with 500+ sheets in the appendix section.

No

41. Is there any update/clarification on BER?

Only the deletion of one word. The current standard says ". . . not necessarily related to those environmental issues required to be investigated by this practice." Removing "necessarily" to make it more clear that BER is non-scope. If it's required to be investigated by this practice, it's not a BER.

42. What is the point of using "Subject Property" versus the more succinct "Site"? Why not simply define "Site" clearly, given that the standard is for Environmental Site Assessment, not Environmental Subject Property Assessment?

The objective was to select a term that would be consistent throughout the practice. The task group discussed many options, and settled on "Subject Property." "Site", "Facility", and other options raised various regulatory concerns.

43. What about the use of drones as part of the site reconnaissance?

Discussed, but ultimately not addressed in the proposed changes.

44. Regarding viability of a Phase I ESA report- if a report is more than 180-days old but a Phase II was conducted to evaluate a REC, is an update of the ESA report required for the User to qualify for LLPs?

There are specific components that the EPA AAI regulation requires be conducted or updated within 180 days prior to acquisition. Some of those components may not have been included in a Phase II

45. The term "Controlled Recognized Environmental Condition" is defined by ASTM as resulting from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority, with hazardous substances or petroleum products allowed to remain in place subject to the implementation of required controls. Is the definition of "control" going to be further defined? i.e. closed spill vs. inactive spill. Does a "control" that is not filed constituent a control? i.e. a spill is inactivated with the understanding that the site use is not to be changed, however there is no deed restrictions.

There is a proposed definition for "property use limitation" which is currently used in E1527-13 but not defined. To your second question, if you mean a "control" that is not "filed" as a deed restriction, the CREC definition is not limited only to controls that have been recorded in land title records.

46. HREC - I have question about the definition when subsurface investigation does NOT reveal actual contamination. Since there is no reason to notify agency, I feel like I can't call this a Historical release, but I also feel like its not a current REC since we have proof of no actual contamination.

Correct. That would be no REC. You have no information that a release has occurred.

47. I have seen differences in the regulatory records that are sourced for a Phase I. Can you provide any clarification on the actual requirement and if there will be any changes?

Yes, some of the databases listed in the current standard no longer exist.

48. There are areas of the country that do not have Sanborn maps. Why ask for it in the Big 4? Similar for topographic maps of older urban cities where all you see is red/pink background saying it is "urban land" with no further detail.

Through industry outreach efforts, the task group found that most of the time, where fire insurance maps are available, EPs obtain and review them. That is how the current proposed language reads. "Where available", fire insurance maps, city directories, aerials, and topos will be reviewed. The EP has the option in the current proposed language to eliminate any of these, so if the EP feels that an urban topo is not useful, the EP can just state that and opt for other sources that are more appropriate.

49. What is viability period of an update, and is any historical description required in an update? Touching on differences between full Phase I and update would be nice.

See prior answer proposed clarifications regarding shelf life.

50. Has there been any conversation specifically about how the reports are valid for 180 days from "completion" of the report, but often there is a large time gap between when the site visit and other report components are completed, and when the report is actually finalized? Should we be tying the report expiration date to the earliest completed report component to cover our bases?

Correct observation. See prior answer regarding proposed clarifications regarding shelf life.

51. Aerial photos should be included in the reports at a scale that one can see something at the property. The scale is usually too large, (or the properties too small) to see anything, much less to identify changes in the final report.

The current standard addresses that. 3.2.5 aerial photographs—photographs taken from an aerial platform with sufficient resolution to allow identification of development and activities.

52. As drone technology becomes cheaper and more economically feasible for an EP, what is the future look like for the use of drones for ESA's?

Discussed but not addressed in the current proposed revision.

53. A lot of our Phase I work in the telecommunication industry are new poles in the rights-of-way. No "subject property" exists because there is no formal address or APN. So we look at the adjacent properties. Will the new standards give us this lee-way to look at immediately adjacent properties?

Yes. Subject property has been defined as whatever it is that is the subject of the Phase I ESA. So if it's a 5-foot diameter pole area, that's your Subject Property.

54. There is a major disconnect on the current HREC interpretation. For example, an old closed LUST case. Some consultants (and attorneys) argue this is a HREC based only on known closure (but no documentation other than database listing indicating the case is closed). Other consultants (and attorneys again) argue that it's a REC unless all prior documents are available, obtained, and reviewed to confirm lack of controls and current standards. Much of this is due to the "or" in the definition. Does the new HREC definition help clarify these two interpretations?

Data is needed to determine if the LUST closure meets unrestricted use criteria (HREC) or commercial/industrial/site-specific/or other restricted use criteria (CREC).

55. How would you handle PFAS then; would you need to have a statement whether PFAS were handled at the subject or adjacent properties?

Currently, PFAS is not listed as a CERCLA HS, so it's being addressed as a BER, or if regulated at the state level, incorporated by state regulation.

56. Is there any clarity for practice of engineering or geology and requiring the Phase 1 reports? Should registered professionals be required for those preparing the Phase 1?

Not addressed. The EP definition mirrors the EPA AAI regulation.

57. Several states have requirements for discussions of geology in PH Is to be prepared by licensed geologists. Any discussion of this issue by the committee?

Discussed, but no changes are proposed. The EP definition mirrors the EPA AAI regulation.

58. It occurs to me that the fine line being drawn regarding emerging contaminants mine not be appreciated by Clients/Buyers who don't understand the fine definition - as they could be liable to State or others for this contamination.

Agree. Section 1.1.4 of the current E1527 speaks to this.

59. Is the new standard taking any steps to cover VEC discrepancies? Since the 1527-13, we have been seeing wide variety of reports.. some not even including VEC evaluation as part of the scope, or some being very strict and punishing property owners for owning properties in the "surrounding area" of a drycleaner.. Will the 2021 update plan to bring some consistency to wide range of professional judgement?

No proposed language

60. If PFAS use or disposal is documented on the Subject Property it appears as though it cant be caled a REC due to the fact PFAS isnt regulated at the federal level as of yet (e.g., no MCL). How should consultant address this in a Phase I ESA report? Are you indicating that it should be considered a non-scope item? or could it be called a Business Environmental Risk or soemthing else? Many States have adopted regulatory enforcement standards for PFAS.

Currently, PFAS is not listed as a CERCLA HS, so it's being addressed as a BER, or if regulated at the state level, incorporated by state regulation. See Section 1.1.4 of the current E1527-13

61. Does the Level 1 require consideration of vapor intrusion risk?

No

62. Does No Further Action justify a HREC determination?

No

63. About PFAS in PA... they have standards now. Do you need to address them?

Currently, PFAS is not listed as a CERCLA HS, so it's being addressed as a BER, or if regulated at the state level, incorporated by state regulation. See Section 1.1.4 of the current E1527-13

64. Is a "potential REC" a common term? I have seen that used for adjacent properties that may be a potential source of contaminants but no "proof" of an actual exposure on the subject property.

It's redundant. A REC is the presence or "likely" presence.

65. Has committee discussed requiring the Site Recon to be performed by EP as opposed to under the "supervision or responsible charge of EP"? And, when a clearinghouse simply hires a 1099-subcontract person to collect photos and walk the site, is that truly under the "supervision or responsible charge"?

Discussed, but no changes proposed

66. When will the revised standard be issued and become final?

Anticipated Fall of 2021

67. Does the 180 day clock for AAI start with the start date or finish date of FIRST component of AAI or the start date or finish date of the LAST component of AAI that was completed (i.e., one of 4 dates I'm talking about).

See prior answer proposed clarifications regarding shelf life.

68. I am very happy to see an industry standard to use the term "subject property," and not "subject site, project site, target property, etc." Have their been discussions to standardize the term "adjoining property" so that similiary mixed language, such as "adjacent" or "neighboring" is no longer used?

Yes, clarifications have been made when "adjacent" was used in the standard when "adjoining" should have been.

69. Regarding emerging contaminants: in your judgement, and based on the panel's experiences, should emerging contaminants, like PFAS/PFOS, be identified and discussed within the report, or is it better to leave them out entirely until they are officially determined as hazardous by CERCLA? It seems to me that identifying emerging contaminants is a double-edged sword: depending on the circumstance, identifying such potentially hazardous contaminants could either help or hurt the user (i.e. if a potential contaminant is identified and later becomes a CERCLA hazardous substance, it would be great to have that base covered; conversely, if the contaminant never becomes a CERCLA h.s., detailing it in the report could be a demerit against the user or EP during litigation). What thoughts do you have on this matter? Thank you!

Currently, PFAS is not listed as a CERCLA HS, so it's being addressed as a BER, or if regulated at the state level, incorporated by state regulation. See Section 1.1.4 of the current E1527-13

70. Follow-up to HREC. If you have proof of HREC on adjoining upgradient property, could it also be HREC on subject property, even if there are no data actually on the subject property?

No. The HREC is specific to a release affecting the subject property (it was once there) and has since been addressed to unrestricted use criteria. Difficult to make that determination without data.

71. Will the new standard specify the report format and/or can an EP modify?

The TOC will remain "recommended" or "suggested".

72. Many cities in Texas and I assume elsewhere are requiring Phase I ESAs for roadway projects. These are utility installation and infrastructure projects typically and often all within right of way. Are there plans to include language for these types of reports?

See prior answer regarding definition of "subject property."

73. Regarding the clock for shelf life, Julie's explanation suggests that each section of the report is independent of the others. This leads to not relating information from one section to that of another section.

See prior answer regarding shelf life clarifications.

74. What does the litigation landscape look like around this standard? Are there lots of cases out there?

We have a team of lawyers on the E1527 task group. Input from two I reached out to for your question: There are a growing number of cases evaluating compliance for BFPP purposes. It's not a large number, by any means. There are routinely E&O cases against producers on these standards. Most of these cases settle and don't make it trial. Those that do don't usually get appealed. There is one current appeal in the 7th Circuit, which will be discussed in the updated E1527 legal Appendix. There have been a handful of cases that specifically refer to ASTM E1527. ▶▶

Most of the cases involve failure to identify contamination (<https://www.environmental-law.net/2013/12/03/2nd-circuit-affirms-dismissal-of-negligence-claim-against-consultant/> ; <https://www.environmental-law.net/2013/10/08/ct-allows-claim-against-consultant-for-missing-contamination-at-lowes-site-to-proceed/>). Often times, they relate to inadequate historic research or failure to review local records. (see <https://www.environmental-law.net/2019/01/24/consultants-in-bank-lawsuit-saved-by-the-statute-of-limitations-bell/> ; <https://www.environmental-law.net/2013/07/09/failure-to-identify-dry-wells-and-review-building-dept-file-at-heart-of-consultant-malpractice-case/>). Lots of claims are resolved by carriers and never get into court and then there is a line of classes that dismiss claims against consultants because the consultant did not have contractual relationship with the plaintiff.

75. Yes, there is litigation related to Phase I ESAs. Several lawyers are part of the ASTM task group and they keep us updated on recent case law.

Will the new standard still consider old (pre-1980) residential land use as de minimis? Lead paint, aerial deposited lead, burn ash (backyard trash incineration), OCP, and heating oil tanks are all possible sources that can create soil conditions that exceed health risk standards, threats to groundwater, and hazardous waste if this site is to be redeveloped (i.e., if excavation is going to occur).

76. If PFAS is identified at the subject property, or adjacent properties, how should the determination of a REC be handled?

See prior answer regarding PFAS

77. Another consideration on PFAS. They travel very far, so the radii search should be enlarged if dealing with a site nearby to a hot spot.

Not addressed in e1527

78. Any changes anticipated for "Phase I Update" requirements?

See prior answer regarding shelf life clarifications

79. Is VEC only applicable for the subject property structures?

VEC is not related to subject property structures.

80. Part of report quality is structure. There is a recommended report outline, but not a required one. Will there be a mandatory report structure in the revision?

No, the TOC will remain "recommended" or "suggested".

81. I have seen reports that discuss aerial photographs but do not include a copy of the photographs. In my view, they are essential. The current Standard is not definitive in requiring them to be included.

The proposal standard will require that all historical resources be included or properly cited.

82. Then would it meet material threat? Natural Occurring Asbestos Questions

That is a possible interpretation, particularly if the Subject Property is proposed for development

83. Is there anything in the standard that would allow a government agency to conduct an assessment on a tax delinquent property prior to foreclosing on it? Is lack of site access a data gap that would jeopardize liability protections?

No, there is no proposed language specific to government agencies/tax delinquent/foreclosure. Lack of site access would be a data gap. The EP must determine if that represents a "significant data gap." There is a proposed definition for "significant data gap." AAI allows for significant data gaps that the EP must opine on. Loss of LLP protection is a legal question.

84. Are pcb containing light ballasts or caulking usually considered as part of the site reconnaissance observations for PCBs?

These items that are part of the structure, must like ACM and LBP, are non-scope considerations as long as they remain part of the structure and there is not a "release to the environment".

85. Can you address NOA as a BER and explain "during construction"?

I'm not clear on the the question related to "during construction."

86. Has there ever been a discussion for a proposed minimum # of hours spent on a report?

No

87. State regulatory agencies don't really permit "interviews" these days. It is often performed through the FOIL process. This takes weeks at best. Will the language be softened to allow review of state environmental mappers or other online sources?

No, but the proposed language does acknowledge electronic communication.

88. There really needs to be a concept of "continuous active review" for shelf life. 180 days prior to acquisition or action is too short, especially if Phase II work happens. If a prospective purchaser is involved for a continuous period of time, the environmental data collected to support the transaction should remain valid.

See prior answer regarding shelf life clarifications

89. With the inability to access paper documentation from state entities at this time, and for the foreseeable future, what is best practice for now in relation to not being able to obtain possible NFA's and other potentially valuable documentation?

If the documentation cannot be obtained, and the EP does not have sufficient information to reach a conclusion, this would be treated as a data gap and the EP opines on whether that data gap is a significant data gap (as in, the data gap is so big that it affects the EP's ability to reach a conclusion).

90. Can you add an affirmative statement that the report date of the ESA is not relevant to its Continued Viability

See prior answer related to shelf life clarifications.

91. Do public records searches meet the requirements of the State & Local Government Officials interview process?

No. The standard specifies an "interview", which means human contact with someone, either by phone or by email.

92. What constitutes "relevant experience" in the self determination of as an EP?

The E1527 does not specifically address a definition of "relevant experience" beyond the EPA AAI definition.

93. In general if PFOS/PFAS becomes part of the standard will things like a residential water supply well located in an area where use of these chemicals exist become a REC?

A REC is specific to the presence or likely presence of a release of hazardous substances or petroleum products in on or at the subject property. The REC is the presence or likely presence, not the residential water supply,

94. For a HREC, for a historical issue, if there is no lab data to compare to, is a situation then still a REC?

For an HREC, there has to have been a release (the REC), and that release has been addressed to unrestricted use criteria. It would be challenging to make this determination with no data.

95. I know this question has nothing to do with the 2021 update, but a burning question I have always had is what to do about an occupied residence? I went inside once and it felt really awkward. So I have never done it since. What does the standard say about looking inside an occupied residence for a Phase I ESA?

The goal of the E1527 is to identify the presence or likely presence of a release of HS or PPs. The question that EPs ask themselves is, if I go in that house, what is the likelihood that I am going to find a REC condition?

96. Most Users do not understand the responsibilities for meeting AAI. How can this be addressed? The issue is the Phase I scope comparisons are apples and grapefruit and not understood in the proposal process.

The E1527 addresses this in Section 6, and it may be good practice for EPs to incorporate some of that guiding language in user questionnaires and report language.





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