

A revised ASTM Standard

for Phase I ESAs is HERE



ASTM INTERNATIONAL

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Presenter



Julie Kilgore, Chair, ASTM E-1527 TASKFORCE

- President of Wasatch Environmental based out of Salt Lake City
- 25 years of experience in environmental assessment, investigation, remediation, and regulatory agency coordination
- Chairs the task group responsible for revising the E1527 Standard Practice for ESAs: Phase I ESA Process
- Served on the ASTM International Board of Directors
- Appointed by the EPA as an environmental professional representative on the regulatory negotiation Federal Advisory Committee to assist in developing the federal All Appropriate Inquiry regulation that ultimately adopted by reference the ASTM E1527-05 standard practice
- An incredibly bright and accomplished individual, a great friend of ERIS, and the entire environmental assessment and remediation industry!



Moderator



Scott Davis, SVP, Operations, ERIS

Phase I Environmental Site Assessment / All Appropriate Inquiries

State of the Revision Process

November 1, 2021

E1527 Phase I ESA

Revision Drivers

- ▶ Federal law requires that All Appropriate Inquiries be conducted “*consistent with good commercial and customary practice*”
- ▶ Review of recent litigation and claims also provide insight for areas where the standard can be improved.
- ▶ ASTM is a process of consensus among Users and Producers to agree on a **consistent** process that is expected to result in a **consistent** deliverable.
- ▶ Inconsistencies in process and quality are signals of areas where the standard can be improved.

Current Status

- ▶ Anticipate publication early November 2021
- ▶ Will be available through astm.org (redline also available)
- ▶ Once published, E1527-13 becomes a “historical standard,” but nothing prevents its use
- ▶ ASTM has submitted a formal request to EPA to reference E1527-21 as compliant with All Appropriate Inquiries
- ▶ It may take EPA a year or so to complete the reference process

What the Heck is a REC?

Recognized Environmental Condition (REC) definition reworded:

1. **Presence** of HS or PP due to a release to the environment
2. **Likely** presence of HS or PP due to a release or **likely** release to the environment, or
3. Presence of HS or PP under conditions that pose a **material threat** of a future release to the environment

What is “Likely”?

New Note added to the REC Definition:

“Likely” is 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 opinion given therein.

REC vs HREC vs CREC

- ▶ Recognized Environmental Conditions:
 - Presence or likely presence of a release . . . to the environment
- ▶ Historical Recognized Environmental Condition (revised in 2013)
 - Past releases affecting the subject property, addressed to unrestricted use
 - Must consider current regulatory framework (rules change)
 - HRECs are not RECs
- ▶ Controlled Recognized Environmental Condition (introduced in 2013)
 - Past releases affecting the subject property, addressed to anything above unrestricted use
 - CRECs are a subset of RECs (meets the “presence” test) and must be included in the conclusions section of the report

New Definition: Property Use Limitation

- ▶ Not a new concept
- ▶ E1527-13 states “. . . controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls)
- ▶ Task Group revised “property use restrictions” (not previously defined) to “property use limitations” (now defined)”
- ▶ E1527-21: PUL defined broadly to capture a wide variety of risk-based mitigation end points:
 - “limitation or restriction on current or future use of a *property* in connection with a response to a **release**, in accordance with the applicable regulatory authority or authorities that allows **hazardous substances** or **petroleum products** to remain in place at concentrations exceeding unrestricted use criteria.”

CREC

- ▶ A release that has been addressed to risk-based concentrations is based on some type of control such as:
 - Commercial or industrial use (even in implied or inferred)
 - Distance from sensitive receptors
 - Environmental Covenant
 - Agency No Further Action letter and supporting data meeting risk-based criteria
 - Self-directed investigation/mitigation meeting risk-based criteria adopted by a regulatory authority or authorities
- ▶ It is critical to understand the data and the applicable regulatory program
- ▶ It is critical it identify **any** residual contamination above unrestricted use criteria as a REC or a CREC – see next slide

REC vs HREC vs CREC

- ▶ If there is residual contamination **present** at concentrations above unrestricted use criteria, that condition, by definition, will be either a REC (not yet fully addressed) or a CREC (fully addressed and controls understood).
- ▶ If there is residual contamination **present** at concentrations above unrestricted use criteria, that condition cannot, by definition, be an HREC.
- ▶ Proposed new Appendix to provide guidance on the REC/HREC/CREC decision process, a flow chart, and some simple examples.

Physical Setting Review

- ▶ Include physical setting source information obtained from agency file reviews

Historical Restructuring

- ▶ Clarified Property Identification:
 - Properties may be different in use, size, configuration, or address than in the past
 - The subject property is defined by its current boundaries
 - Research of additional addresses may provide further information necessary to meet the objective

- ▶ 8 Standard Historical Sources
 - 8 Standard historical resources (aerials, fire insurance maps, street directories, topographic maps, building dept records, interviews, property tax files, zoning records)
 - Other

Historical Restructuring

- ▶ Intervals (unchanged):
 - Not required to review at less than 5-year intervals.
 - If a specific use is unchanged over a period longer than five years, it is not required to research the use during that period
- ▶ Data Failure (substantially unchanged):
 - The historical research is complete when the objective is achieved
- ▶ Clarified Type of Use:
 - Specific information about uses is more helpful than general information
 - If the general type of use is retail, industrial, or manufacturing, then additional *standard historical resources* shall be reviewed if they are likely to identify a more specific use and are *reasonably ascertainable*
 - **Note:** Merely identifying that a building is present may not satisfy the historical research objective. For example, tenant operations in a retail building may have included past dry cleaning or other activities of concern.

Revised Historical Research – Subject Property

- ▶ 1940 or first developed use (unchanged)
- ▶ The following standard resources shall be reviewed if reasonably ascertainable, likely to be useful, and applicable to the subject property
 - * Aerials
 - * Fire Insurance Maps
 - * Topos
 - * City Directories
- ▶ If not reviewed, state why
- ▶ Additional standard historical resources **shall** be reviewed, as needed, to satisfy **the objective**
- ▶ Can use “other historical resources,” but not required (unchanged)

What Is Good Commercial and Customary Practice – Adjoining Properties

- ▶ Recent litigation and user input regarding insufficient review of adjoining properties
- ▶ EPs currently interpreting **E1527-13** differently:
“Uses in the area surrounding the *property* shall be identified in the *report*, but this task is required only to the extent that this information is revealed in the course of researching the *property* itself”
- ▶ **E1527-13** currently says factors to consider include:
“. . . the time and cost involved in reviewing surrounding uses
(for example . . . reviewing *local street directories* **for more than the few streets** that surround the site is typically too time-consuming)

New Historical Research Section – Adjoining Property

- ▶ During research of the subject property, 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 RECs in connection with the subject property.
- ▶ Requires reviewing the following standard historical resources if they have been researched for the subject property, provide coverage of one or more adjoining properties, and are likely to be useful in satisfying the objective (if reviewed for the subject property and not the adjoining property, say why):
 - * Aerials
 - * Topos
 - * Fire Insurance Maps
 - * City Directories
- ▶ Additional standard historical resources **should** be reviewed if in the EP's opinion additional review is warranted to satisfy the objective. Factors to consider: reasonably ascertainable; likely to be useful; the time and cost involved in reviewing such resources (for example, reviewing property tax files for adjoining properties may be too time-consuming); and local good commercial and customary practice.
- ▶ Can use "other historical resources," but not required

Historical Research Section – Surrounding Area

- ▶ Substantially unchanged
- ▶ Uses in the area surrounding the *subject property* shall be identified in the *report*, but this task is required only to the extent that this information is revealed in the course of researching the *subject property* itself (for example, an *aerial photograph* or *fire insurance map* of the *subject property* will usually show the surrounding area).
- ▶ Retained the prior language:
 - Factors to consider in making this determination include . . . *reasonably ascertainable*; the time and cost . . . (for example, analyzing *aerial photographs* is relatively quick, but reviewing *local street directories* for more than the few streets that surround the *subject property* is typically too time-consuming); information is useful, accurate, and complete . . .

Significant Data Gap

New Definition:

- ▶ 3.2.84 *significant data gap*—a *data gap* that affects the ability of the *environmental professional* to identify a *recognized environmental condition*.

Strengthen the Deliverable

- ▶ Consistent use of “Subject Property”
- ▶ More robust and detailed discussion about how significant data gaps affect the EP’s opinion.
- ▶ Conclusions must include RECs, CRECs, and Significant Data Gaps
- ▶ Include Photos
- ▶ Include Site Map

PFAS/PFOS Today . . . Tomorrow?

- ▶ Proposed clarification in Section 13: Non-Scope Considerations for “emerging contaminants”
- ▶ Proposed additional discussion proposed in the Non-Scope Considerations appendix
- ▶ Language has to be carefully crafted to be non-specific to a particular substance
- ▶ Once the emerging contaminants are defined to be a ***hazardous substance*** under CERCLA, as interpreted by EPA regulations and the courts, these substances must be evaluated within the scope of E1527

How will E1527 Changes Affect Me?

- ▶ Changes reflect a compilation of industry input from across the country, professionals who share their own internal process and structure
- ▶ EPs producing quality deliverables will likely see little change in process
- ▶ Double check the *current* standard – are reports currently compliant?

When will E1527 Changes Affect Me?

- ▶ Upon publication, E1527-13 becomes a “historical” standard
- ▶ E1527-13 is currently the standard recognized by EPA as compliant with “all appropriate inquiries”
- ▶ An updated EPA reference to E1527-21 could take a year or so
- ▶ Suggestions:
 - Continue citing E1527-13 until EPA updates reference to E1527-21
 - Implement E1527-21 as the current Phase I ESA process
 - Cite E1527-13 (since that is the standard referenced by EPA as compliant with AAI), and note that the assessment also incorporates that procedures set forth in E1527-21

Other ASTM Standard Revisions

- ▶ E1528 Transaction – Currently under review, may be issued in 2022
- ▶ E2247 Phase I ESA for Forestland and Large Ag Properties – Review and revision process recently initiated, may be issued in 2022/2023
- ▶ D6008 Environmental Baseline Surveys – Currently under review, may be issued in 2022/2023
- ▶ E1903 Phase II ESAs – no current activity

COMMENTS OR QUESTIONS?



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