

Environmental Insights Webinar
ASTM 1527-21 and All Appropriate Inquiries

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Background

This webinar will address a key environmental transactional issue for which there has been a recent development:

- American Standard for Testing and Materials (“ASTM”) published an update to its Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment ASTM E1527-21
- EPA subsequently promulgated a direct final rule to amend AAI to incorporate and use the E1527-21 standard

Objectives

Today's presentation will address:

- Role of environmental site assessments
- Purpose of ASTM standard E1527-21 interaction with CERCLA/Superfund
- Key changes to ASTM standard E1527
- Adoption by EPA
- Importance of recognizing/addressing in appropriate circumstances non-ASTM issues

Role of Environmental Issues in a Commercial Transaction (including lending)

- Materiality of environmental issues will obviously vary from deal to deal
- Perception of issue as material is as important as reality
- Trap to be avoided is reducing efforts (i.e., assessments) to address environmental issues based on lower value of facility or property (ex. dry cleaners)
- Party must make that choice being fully advised of risks
- Despite Superfund (and storage tank) secured creditor exemptions addressing liability, lenders often play a role in requiring borrower to undertake assessment because of interest in:
 - Maintaining value of collateral
 - Ability of borrower to repay loan

Addressing Environmental Issues Today

Potentially easier because:

- Familiarity;
- Improved ability to quantify environmental issues;
- Experience;
- Revised or clarified liability principles;
- Improved assessment techniques;
- Easier access to government records;
- Efforts by the federal and state agencies to reduce, to the extent possible, the environmental regulatory/liability impediments to financing and/or acquiring/leasing existing facilities (“brownfield” programs);
- Governmental trust funds (i.e., storage tank/dry cleaners); and
- Standardized assessment (i.e., AAI/ASTM)

Key tool is ASTM 1527/AAI

Non-ASTM Items

Recognize Limitations of ASTM Assessments!

Definitions

1.4 Considerations beyond scope:

*“certain environmental conditions that may exist at a subject property that are beyond the scope of this practice, **but may warrant consideration** by parties to a commercial real estate transaction”*

Any pertinent non-scope considerations should be discussed early in scoping!

Non-ASTM Items

Recognize Limitations of ASTM Assessments!

- **Asbestos-containing Materials**
 - Cultural and Historical Resources
 - Ecological Resources
 - Endangered Species
 - **Health and Safety**
 - Indoor Air Quality
 - Industrial Hygiene
 - Lead-based paint
 - Lead in drinking water
 - **Mold/water intrusion**
 - **PCB-containing Bldg. Materials**
 - Naturally-occurring Radon
 - **Regulatory Compliance**
 - Emerging Contaminants, PFAS
(not defined as hazardous substances)
- Phase II *(quantification/delineation)*
 - EHS compliance audit *(restrictions to operations/on-going issues and costs)*
 - Utilities Assessment – quality and quantity *(e.g., water, wastewater, power)*
 - Flood Plain Survey
 - Local zoning/growth plans
(Potential impacts on development)
 - Post-acquisition integration
 - EHS Management Systems
 - Permit changes/transfers *(air, wastewater, tanks)*
 - Storage tank compliance
 - Tank trust fund eligibility

Tailor Assessment to Facility/Property

CAVEAT!!!

Example –

Retail Motor Fuel Outlet

If limited assessment funds, what is more important?

A non-ASTM inspection of tank compliance (i.e., leak detection, etc.) and tank trust fund eligibility (registration, fees, etc.)

or

ASTM Phase I/AAI?

Environmental Assessments

Other examples of non-scope issues might include:

1. Bank financing commercial development on property that will require Corps 404 wetland permit to initiate construction.
2. Buyer of office buildings calculation of reconstruction/remodeling costs may vary materially on the amount and condition of asbestos-containing materials present.
3. Buyer/Lessor of multi-family apartment complex is attempting to budget for repairs that may be driven by water intrusion/mold issues. If HUD funding is accepted, Lead paint inspection will be required.

What is AAI?

All Appropriate Inquiries (AAI), environmental site assessment (ESA) standards, or environmental due diligence, is the process of evaluating a property for potential environmental contamination and assessing potential liability for any contamination present at the property

AAI in Perspective

All Appropriate Inquiries often is the first step in a continuum of property investigations.

- AAI
- Phase II / Sampling and Analysis
- Additional site characterization

How Does AAI Affect You?

- Threshold Criteria for Brownfields Grant Applicants
 - An entity may have to seek protection from CERCLA liability to be eligible for a grant.
- Recipients of Brownfields Assessment Grants
 - Must conduct assessment in compliance with AAI.
- Liability Determinations
 - Parties seeking protection from CERCLA liability as bona fide prospective purchasers, contiguous property owners, or innocent landowners must conduct AAI prior to purchasing property.
- Targeted Brownfields Assessment (TBA)
 - In most cases, TBAs should be performed in compliance with AAI (or American Society for Testing and Materials [ASTM] to ensure prospective property owner's liability protection and ensure eligibility for future cleanup grant.

How Does AAI Affect You?

- To understand potential environmental risks/liabilities associated with a property prior to: purchase, sale, lease, joint venture, purchase of insurance, financing
- Gain information that will help property owner comply with "continuing obligations" after purchase

E1527

ESA Revisions – Why?

- Federal law requires that All Appropriate Inquiries be conducted "*consistent with good commercial and customary practice*"
- 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.
- EPA now provides that ASTM 1527-21 is equivalent to AAI.

Note: ASTM is not required for AAI. The AAI requirements are also described in 40 CFR 312.

Effect of E1527 Changes

- Upon publication, E1527-13 became a “historical” standard
- E1527-21 is a standard now recognized by EPA as compliant with “All Appropriate Inquiries” because of adoption by direct final rule.

Key Differences Between ASTM 1527-13 and 21

- Shelf Life: New standard requires reports to identify the viability term start day. 180-day viability term of a Phase I is initiated from the date of the first assessment activity undertaken to prepare the report.
- Good commercial and customary practice: Additional detail provided for good commercial and customary practice in conducting site inspections.
- Significant Data Gap: 21 provides a formal definition of a “significant data gap” and requires a discussion of how the gap might prevent the environmental professional from identifying a REC.

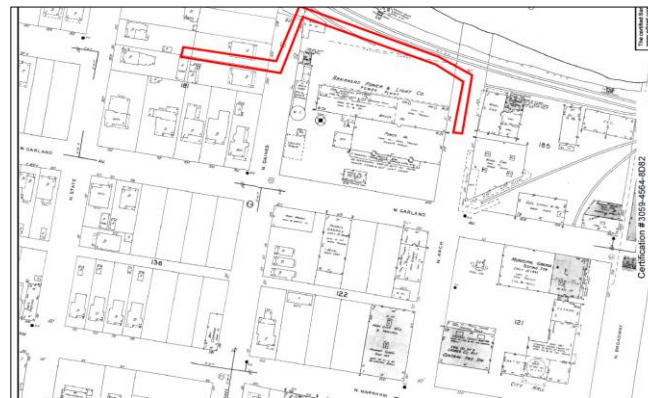
Key Differences Between ASTM 1527-13 and 21

Emerging contaminants

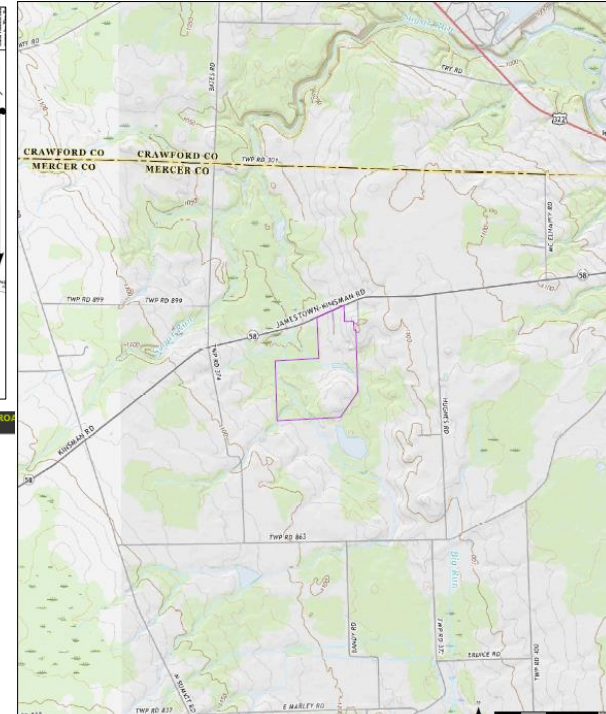
Definition of “Federal, State, and Local Environmental Laws” A footnote addresses the need to include PFAS and *other emerging contaminants* (i.e., those not yet federally regulated as hazardous substances that are expected to be regulated in the future) in the scope of work for users who want to claim state liability defenses. Suggests that users request their environmental professionals to include these substances, even though an ASTM E1527-21 Phase I ESA does not yet require it. May be addressed as “Non-Scope” or “Business Risks.”

Key Differences Between ASTM 1527-13 and 21

- Standard Historical Source review: 21 requires ESAs to include, at a minimum, Historical Aerial Photographs, Historical City Directories, Historical Topographic Maps, and Historical Fire Insurance Maps on subject AND adjacent properties.



2016	HUGHES ROAD	2016	KINSMAN RD
SOURCE: DIGITAL BUSINESS DIRECTORY		SOURCE: DIGITAL BUSINESS DIRECTORY	
119	JESSICA THOMAS.../Residential	303	COLLEEN SHINE.../Residential
119	LINDA SMALL.../Residential	303	DONALD SHINE.../Residential
131	J MCCLURE.../Residential	303	MAUREEN SHINE.../Residential
131	MARY MCCLURE.../Residential	310	JAMES FOULKROD.../Residential
150	EDDY HOWARD.../Residential	310	MICHAEL FOULKROD.../Residential
150	PATRICIA HOWARD.../Residential	310	ROBIN FOULKROD.../Residential
174	CHARLES BURNS III.../Specialized Freight (see Used-Goods) Trucking/Log-pile	325	TROY WIAND.../Residential
174	KELLY BURNS III.../Residential	357	ERNEST YOGER.../Residential
174	THERESA BURNS III.../Residential	357	MARTHA YOGER.../Residential
197	DOUGLAS MILLER.../Residential	357	WHISPERING PINES GREENHOUSE.../Commercial/Nursery
198	CHARLES BURNS.../Residential	364	DAVID LAURIE.../Residential
198	CHERYL BURNS.../Residential	364	JOHN LAURIE.../Residential
		364	SANDRA LAURIE.../Residential
		364	THOMAS LAURIE.../Residential
		365	EUGENE CARR.../Residential
		371	LOIS ROWE.../Residential
		371	WILLIAM ROWE.../Residential
		388	COMBINED SYSTEMS INC.../Federal Government Contractor
		431	PATRICIA LEOTERS.../Residential
		434	JAMES MERRICK.../Residential
		435	BARBARA CALVIN.../Residential
		435	TERENCE CALVIN.../Residential
		450	PETER YOGER.../Residential



Key Differences Between ASTM 1527-13 and 21

- Environmental Conditions: Clarifies definitions of REC, CREC, and HREC with examples.

De Minimis conditions (i.e., those “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”) are still excluded from the new definition of a REC.



Revised Definition of “Recognized Environmental Condition”

(REC)

1. Presence of hazardous substances or petroleum products due to a release to the environment
2. Likely presence of hazardous substances or petroleum products due to a release or likely release to the environment, or
3. Presence of hazardous substances or petroleum products under conditions that pose a material threat of a future release to the environment

“Likely” is Described in a Note

“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. (See 3.2.73.1)

Historical Recognized Environmental Condition (HREC)

Past releases affecting the property, addressed to:

- the satisfaction of the regulatory authority; or
- an unrestricted use.

NOTE:

Historical RECs may change if site conditions, migration pathways, or clean-up criteria change.

Definition of Controlled Recognized Environmental Condition (CREC)

Release that has been addressed to risk-based concentrations and is based on a type of control which may include:

- Commercial or industrial use;
- Distance from sensitive receptors;
- Environmental Covenant;
- Agency No Further Action letter and supporting data meeting risk-based criteria; or
- Self-directed investigation/mitigation meeting risk-based criteria adopted by a regulatory authority or authorities

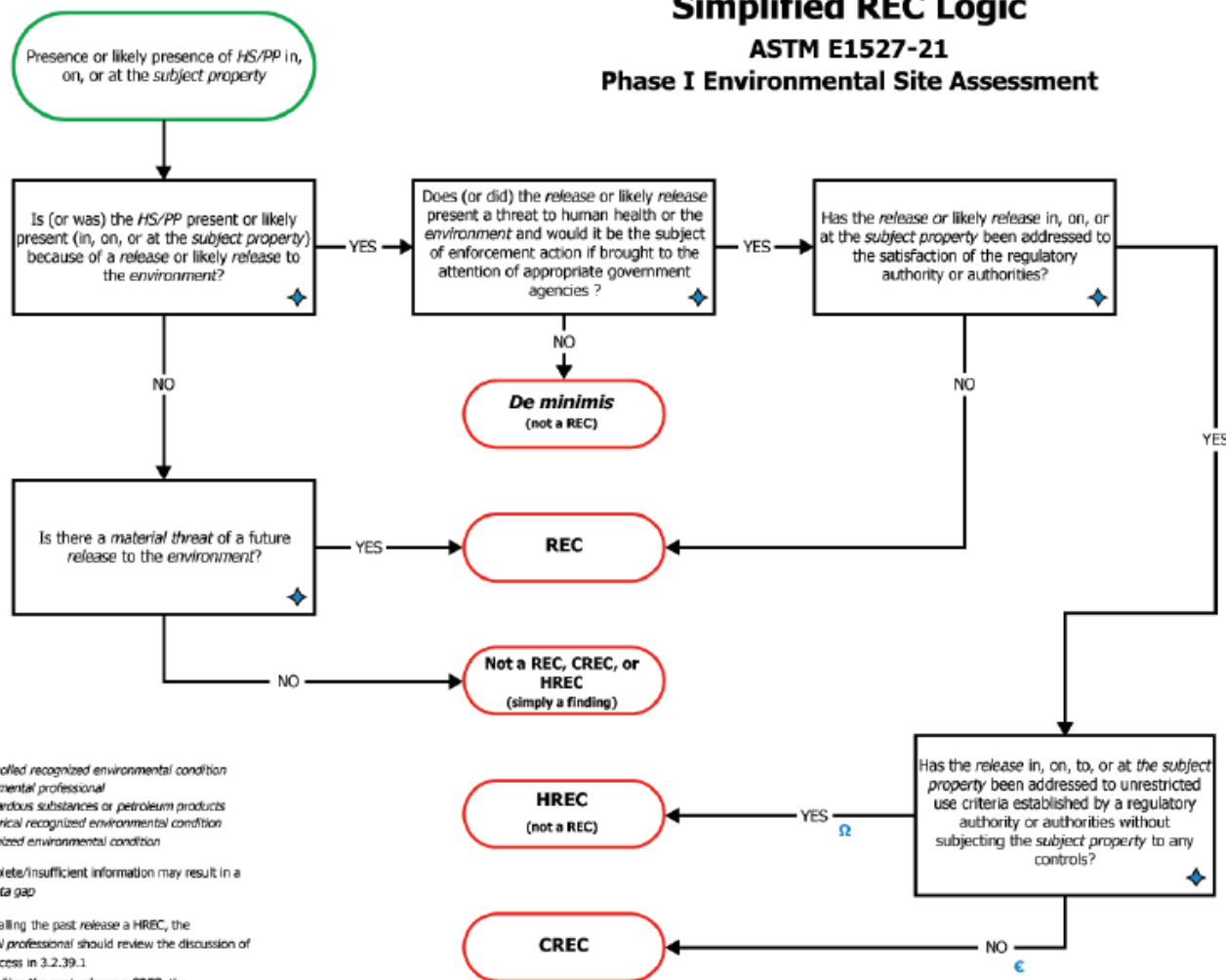
Definition of Property Use Limitation

Defined to include various 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.”

Appendix X4 Decision Flow Chart

Simplified REC Logic ASTM E1527-21 Phase I Environmental Site Assessment



NOTES:

CREC – controlled recognized environmental condition
 EP – environmental professional
 HS/PP – hazardous substances or petroleum products
 HREC – historical recognized environmental condition
 REC – recognized environmental condition

♦ – incomplete/insufficient information may result in a significant data gap

Ω – Before calling the past release a HREC, the environmental professional should review the discussion of the HREC process in 3.2.39.1

€ – Before calling the past release a CREC, the environmental professional should review the discussion of the CREC, process in 3.2.17.1

FIG. X4.1 Simplified REC Logic

Key Takeaways

Change is good...in this case!

- *Additional “improvements” definitions language will allow EPs to provide more consistent documentation and assignment of RECs.*
- *Levels the playing field for EPs who do high quality Phase I work because some “optional” requirements are now standard. (site plans, color site photographs, complete historical review on subject property and adjacent)*

Talk early and often with your EP or attorney about plans and scope appropriate to how you intend to develop the property.

Be willing to discuss the real RISK posed by a REC/CREC.

Be aware of the 180-day clock...this is from when work begins, not the customary report date that has been used in the past.

Questions?



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A BIG THANK YOU!

Harbor

**For CLE Forms, Presentation Materials, and
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