

Assessing the Impact: ASTM E1527-13 and EPA's Final Rule on AAI.

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Purpose of Phase I ESA? Who is asking?

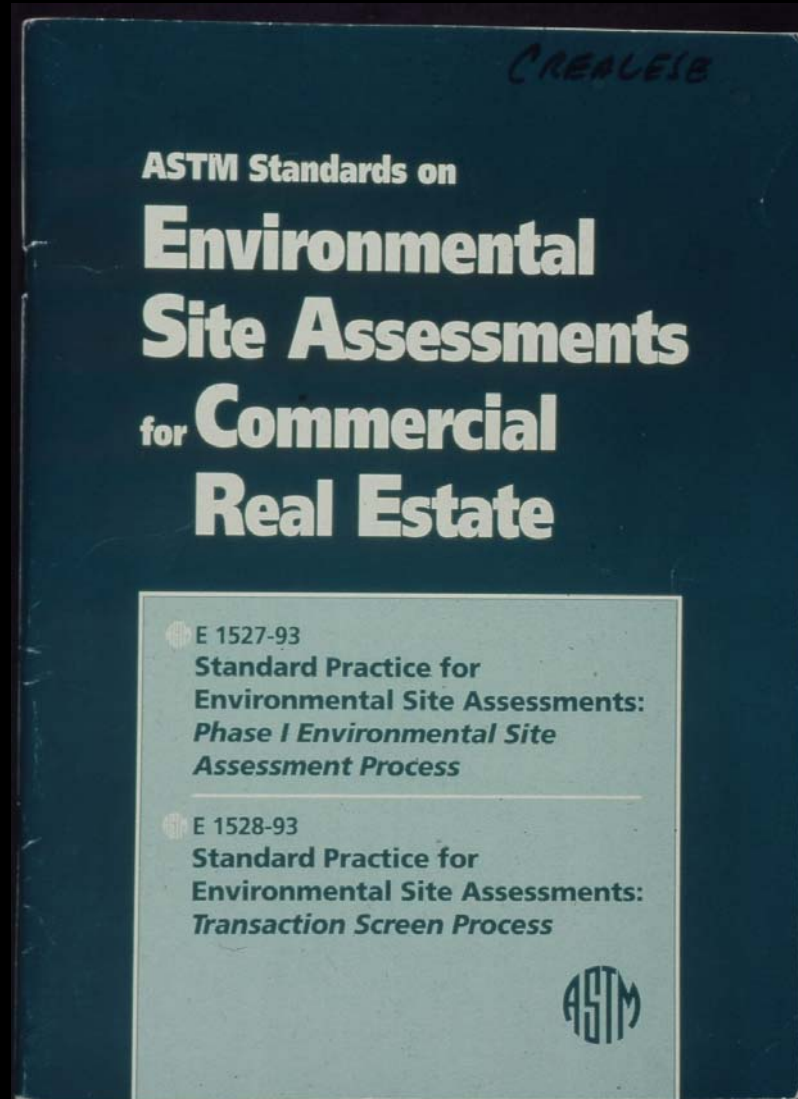
Perspectives:

- Buyer
- Seller
- Lender
- End User
- Practical



The Original

Committee convened in 1989, and published the first Standard in 1993. Originally, 2 standards. The most successful selling Standard in ASTM history.



November 2013

**ASTM
International
Publishes
E1527-13:
Standard
Practice for
Environmental
Site
Assessments**

On November 1, 2013, the final version of “ASTM E1527-13: Standard Practice for Environmental Site Assessments” Phase I Environmental Site Assessment process” was published by ASTM International.

The new standard updates the 2005 version and provides new designations for Risk-Based Closures, consideration of Vapor Intrusion Pathways, and obligates environmental consultants to evaluate HRECs against current regulatory criteria.

December 2013

**U.S. EPA
publishes Final
Rule adopting
ASTM E1527-13**

On December 30, 2013, EPA published a Final Rule adopting ASTM E1527-13 as a standard that satisfies the “All Appropriate Inquiry” (AAI) requirement for landowners liability defenses under CERCLA.

EPA’s adoption of the updated ASTM E1527-13 standard represents a significant development for landowners and the environmental consultants and attorneys who advise them.

Innocent Landowner Defense – IP did not know and had no reason to know. 42 USC 9601(25)

Practice Tip: EPs need to consider the role that ASTM plays in meeting the AAI Final Rule. Why is the Phase I being completed?

Revised Definitions

Recognized Environmental Condition (“RECs”)

Ref. 1.1.1

RECs mean “...the presence or likely presence of any hazardous substances or petroleum products in, on or at a property:

- 1.) due to any release to the environment
- 2.) under conditions indicative of a release to the environment; or
- 3.) under conditions that pose a material threat of a future release to the environment.

Generally, revised definition of REC clarifies several points and incorporates concept of vapor intrusion issue.

Practice Tip: VI is weaved through ASTM E1527-13.

Revised Definition

“De Minimis Condition”

Ref. 3.2.22

- De Minimis Condition – a condition 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 government agencies.
- Conditions determined to be de minimis are not RECs nor CRECs

Practice Tip: Enforcement priorities vary greatly by jurisdiction (intrastate, and state to state). What is an “enforcement action” today may be different tomorrow. Enforcement actions are greatly subjective and change with political priorities.

Revised Definition

“Environment”

Ref. 3.2.29

Adopts definition of Environment under CERCLA, 42 USC Sec. 9601(8)

Practice Tips: Includes “navigable waters”, “ocean waters”, surface waters, ground water, drinking water, land surface or subsurface strata, or *ambient air* within the U.S. This supports the framework for including VI issues into Phase I ESAs.

Practice Tip: EPs should familiarize themselves with CERCLA. Recommend annotated version of statute.

New Definitions

“Controlled Recognized Environmental Condition” (CRECs)

Ref. 3.2.18

- CREC – A REC resulting from a past release of hazardous substance 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...
- A condition considered by the environmental professional to be a CREC shall be listed in the findings section of the Phase I Report, and as a REC in the conclusion section of the report.

Practice Tip: Imposes new obligation on EP to report on compliance with prior and current regulations and law.

Practice Tip: Consider recommending review by legal counsel.

HRECs

Environmental Professional must evaluate HRECs against current regulatory criteria

HREC – a past release of any hazardous substance or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted use criteria established by a regulatory authority, without subjecting property to any required controls.

EP must determine whether the past release is a REC at the time of the Phase I ESA; if the release is a REC at the time of the time of the Phase I, then it must be included as such in the Report.

Practice Tip: EP should use caution when attempting to decide with “satisfaction” has been achieved. Consider effect of Re-Opener provisions.

Vapor Intrusion Pathway

EP Must Evaluate the Vapor
Intrusion Pathway and the potential
Impacts on the subject property.



No Definition

“Vapor Intrusion”

ASTM E1527-13 does not define “vapor intrusion”.

New Standard - ASTM E2600-10 used on a voluntary basis.

ASTM E1527-13 “Vapor Intrusion must be considered no differently than contaminated groundwater migration in Phase I ESA.

Revised Definitions

Activity Use

Limitations

Ref. 3.2.2

Purpose of AUL is to “...reduce or eliminate potential exposure to hazardous substances or petroleum products...”

Now expressly includes “soil vapor” into the definition.

Includes both Institutional (legal) controls and Engineering Controls.

Practice Tip: VI is weaved through ASTM E1527-13.

Practice Tip: Different jurisdictions use varying terms for AUL. (e.g. DoD, CA, and Land Use Restrictions is not defined in the Brownfields Amendments.

Vapor Intrusion Pathway

Not a defined term under the new standard, but numerous references to “vapor” and “migration” exist in standard.



New Definition

“Migrate/Migration”

Ref. 3.2.56

The movement of hazardous substances or petroleum product in any form, including, for example, solid and liquid at the surface or subsurface, and vapor in the subsurface.

Practice Tip: Consider reviewing published literature regarding when VI can result in potential health hazards.

Practice Tip: Site Recon. should include assessment of potential pathways of migration.

Practice Tip: Consider referral to CIH or Toxicologist review.

New Definition

Reasonable Time and Cost

Ref. 8.1.5

Deletes former definitions of “Reasonable Time and Cost” and “Practically Reviewable” in favor of the 20-Day Rule.

If agency doesn’t produce documents within 20 calendar days, then not a reasonable time.

Practice Tip: Real world rarely gives 20+ days for a Phase I ESA. Addendums?

Practice Tip: Address this issue with client in proposal/contract.

Practice Tips

EPA's adoption of the updated ASTM E1527-13 standard represents a significant development for landowners, and the environmental consultants and attorneys who advise them.

- **Play Nice & Work together**
- **Seller Disclosures**
- **Representations & Warranties of Seller**
- **Know prospective use of Phase 1 ESA**
- **Know client's risk tolerance**
- **Anticipate Potential for VI issues whenever possible**
- **Involve Legal Counsel when HRECs and CRECs are present**
- **Understand Lender Environmental Risk Criteria**
- **Consider Federal Loan Program Underwriting Criteria**

Parting thoughts...

EP plays and increasing role in public health issues.

