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ASTM E 1527-13: Changes to the Phase I Standard

INTRODUCTION

ASTM rules indicate that all standards have a shelf-life of eight years, at which point the standard needs to be discontinued or re-issued either unchanged or with revisions. This gives ASTM E1527-05 (the Phase I standard) a deadline of late 2013. Given its ties to the federal All Appropriate Inquiries (AAI) Rule and its viability in the real estate market place, the standard will be re-issued. Members of the Phase I committee have taken the opportunity to make updates to the standard to reflect current practices within the Phase I ESA market. EBI Consulting, along with other Phase I Committee members, has been working over the past two years to develop and finalize the revisions. The proposed revisions will then be presented to the USEPA so that they can make similar revisions to AAI.

CHANGES TO ASTM 1527-05

The proposed changes to ASTM E1527-05 are largely editorial, and the standard remains substantially the same. The intent of the changes is to reflect what the majority of environmental consultants are currently doing in the marketplace. As such, the revisions by no means signify a radical departure from the current practice of conducting Phase I Environmental Site Assessments (ESA). Editorial changes include corrections related to grammar and punctuation, rewording, and limited reorganization of several subsections.

More significant changes include the following:

REC Definition: The definition is centered around "a release to the environment." In order to match the USEPA definition of a release under CERCLA, the definition of a REC has been narrowed to exclude a release inside a building from a source inside a building. For example, a drum leaking inside a warehouse that is not likely to impact the land beneath the building is no longer considered a REC.

- **Outcome:** Little impact

HREC/CREC: The term HREC, Historic Recognized Environmental Condition, was added during the last revision to the standard in 2005. An HREC is essentially a resolved or closed out REC (for example, a contaminated site that was cleaned up and received closure from the regulatory agency). The term was added to address a certain segment of consultants who were only discussing current/active environmental concerns and not disclosing resolved environmental issues. Under E1527-05, an HREC included sites that have been completely cleaned up with no use restrictions, as well as sites that have been closed with residual contamination that is managed by an activity and use limitation (AUL).

Since the 2005 revision, concern was raised that the HREC term could be misleading. Sites closed with AULs differ from completely clean sites in that they have "continuing obligations" after case closure that include such items as complying with use restrictions and maintaining

the protective barrier over known contamination. The concern was that Users of Phase I ESAs may see such AUL sites designated as an HREC and think that nothing further is needed.

To address this concern, a new term, Controlled REC (CREC) for closed RECs that are managed under an AUL, will be added to the standard. This limits the definition of an HREC to closed RECs that have been completely resolved ("clean closure") with no restrictions.

- **Outcome:** Little impact

Review Title and Judicial Records for Environmental Liens or Activity and Use Limitations (AULs): This continues to be a User (Client) requirement that is to be conducted by a Title professional. It may be contracted through the environmental consultant or an attorney but is ultimately the responsibility of the User. A concern was raised that Title companies only searched deeds for such liens and AULs but not judicial records (Clerk's office). Wording will be modified to highlight the need to also search judicial records.

- **Outcome:** Need to ensure that Title companies are searching judicial records.

Regulatory File Reviews (Section 8.2.2): The wording of this section has been revised with the intent of having Environmental Professionals explain in greater detail their rationale for when a regulatory file review is or is not warranted rather than simply stating that a site in the regulatory database report is not a concern. The proposed re-wording of this section tightens the approach an Environmental Professional may use to address regulatory sites in the spirit that more information is better than less. While the section maintains the same discretion on the part of the Environmental Professional as to when a file review is necessary, there may be an incremental increase in the need for regulatory file reviews to support the assessment.

- **Outcome:** Likely to recommend regulatory file reviews slightly more often, which in turn results in slightly higher due diligence costs.

Vapor Intrusion: Implicitly, contaminant migration has been part of the standard. The goal of the Phase I standard has always been to identify potential sources of contamination and then evaluate likely pathways to the Subject Property. Soil vapor is one of the pathways along with ground water and soil.

New language has been added to the Standard to more explicitly state that this contaminant pathway needs to be considered in the evaluation of RECs or other environmental concerns. With that said, it is explicitly stated that ASTM E2600 is <u>not</u> a requirement of a Phase I ESA (E1527). ASTM E2600 is a separate, more comprehensive assessment of vapor migration.

Our polling of most major consultants in the Phase I industry, including the Chair of the Phase I Committee, is that the E2600 standard is more than what is warranted in the vast majority of cases. Most environmental consultants are not planning to use E2600, unless it is specified by a client scope of work. Instead, Environmental Professionals will take a more reasonable approach and likely include a subsection within their reports. The section will be consistent with other portions of the Phase I ESA – judgment of the Environmental Professional based upon information collected during the Phase I ESA.

- **Outcome:** Likely to recommend regulatory file reviews or EDR VEC slightly more often.

THE BOTTOM LINE

The changes to the standard are an affirmation of current practices and not a radical departure from the approach to conducting Phase I ESAs. Aside from some revised terminology, there may be an incremental increase in the need for regulatory file reviews and associated cost. For this limited number of sites, the additional information will provide a greater degree of certainty to allow the transaction to proceed more smoothly.