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Revised Phase I Environmental Assessment Standard Issued

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On November 6, 2013, ASTM International issued its revised Phase I Environmental Assessment Standard, E1527-13, “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.” Perhaps the most significant change to the previous E1527-05 standard is the addition of subsurface vapor migration to the definition of “migration.” This change will require a new layer of risk analysis by environmental professionals (“EPs”) conducting Phase I environmental site assessments in accordance with the revised standard. We anticipate that the inclusion of vapor migration in the E1527-13 standard will result in an increased awareness of, and a heightened sensitivity to, the risks associated with conditions identified in Phase I reports.

Vapor Migration

E1527-13 expands the E1527-05 definition of “migration” by adding “the movement of . . . vapor in the subsurface.” The new standard requires EPs to consider the potential for vapor migration in connection with any release to soil or groundwater, and requires vapor migration to be identified as a Recognized Environmental Condition (“REC”) unless an EP determines that no vapor migration can occur. This represents an increased analytical burden for EPs, particularly as vapor migration is often more difficult to identify than soil or groundwater contamination.

Hazardous substances that are present as solids or dissolved solids typically migrate through groundwater in a down gradient direction. In contrast, hazardous substances that are present in the subsurface as gaseous vapors can potentially migrate in any direction. Thus EPs may now have to deem conditions on adjacent properties, which under the old E1527-05 standard may not have constituted RECs due to presumed groundwater flow, RECs under the new 1527-13 standard.

Neither E1527-05 nor E1527-13 requires that a REC be subjected to air, soil or groundwater sampling and laboratory analysis to definitely determine the presence or absence of hazardous substances. That said, parties who choose to perform “Phase II” investigations

based on E1527-13 – compliant Phase Is will likely find such investigations to be broader in scope, as these Phase Is will, on balance, contain a greater number of findings under the new standard.

Definitional Changes

Other notable changes in E1527-13 include the introduction of a new category of environmental condition and the clarification of the two existing categories. While these changes involve new terminology and may result in the classification of more conditions as RECs, and, in some cases, recommendations for additional assessment, we do not anticipate that they will, on balance, have a significant impact on the production, evaluation or application of Phase Is.

New Category of Environmental Condition – CREC

E1527-13 introduces a new category of environmental condition: the Controlled Recognized Environmental Condition, or CREC. Under the new standard, a CREC is “a REC resulting from a past release . . . 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.” The CREC classification covers areas where unrestricted property use is not permitted, thereby replacing the HREC for historic conditions that require some ongoing maintenance. The introduction of the CREC, along with new vapor migration considerations, may also lead to situations in which a release may be considered a CREC with regard to the contamination of soil, but a REC with regard to vapor, particularly where measures taken to address the soil contamination did not adequately resolve vapor issues. Such changes in classifications, however, will likely be more matters of definition than of substance.

Revised Definitions – REC and HREC

In the updated standard, ASTM has revised the definition of Historical Recognized Environmental Condition (“HREC”) to make clear when a condition qualifies as a REC and when it qualifies as a HREC. In order for a past release to qualify as a HREC, rather than a REC, two requirements must be met:

1. The release must (a) have been addressed to the satisfaction of the applicable regulatory authority or (b) meet unrestricted use criteria established by a regulatory authority; and
2. The EP conducting the Phase I must determine that the release is not a REC at the time the Phase I is conducted.

This second requirement addresses the situation of a past release that has been cleaned up and has received closure from the relevant regulatory authority, but is subsequently subject to a change in regulatory criteria that renders the prior closure insufficient or incomplete—i.e., where closure documentation does not accord with current regulations. Under the new definition, a change in regulatory criteria would require the classification of the release as a REC, rather than as a HREC.

Finally, the definition of REC has been refined, referring simply to “release(s) to the environment.” This language links to those terms as defined in the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”).¹ We do not expect this change to have a substantive effect on how Phase Is are conducted or evaluated.

¹ 42 U.S.C. § 9601 et seq.

Additional Records Review

Under the E1527-13 standard, EPs “should” review pertinent regulatory files and records relating to any listing of a site or an adjoining property that is identified in a search of relevant government records (e.g., CERCLIS).² The EP must either (i) perform the review and include a summary of the information obtained, along with an opinion on the sufficiency of the information, in the Phase I report; or (ii) provide justification in the Phase I report for why review was not necessary. Additionally, E1527-13 clarifies that title professionals conducting searches for environmental liens and “activity and use limitations” must search judicial records as well as deeds and land records. These changes represent a tightening of records review requirements and may entail increased diligence costs and timeframes.

AAI

On December 30, 2013, the Environmental Protection Agency (“EPA”) issued a final rule approving E1527-13 as a method for satisfying the requirements of All Appropriate Inquiry (“AAI”)³ under CERCLA.⁴ In the final rule, EPA indicated its intention to propose rulemaking to eliminate E1527-05 as a method of compliance with AAI “in the near future.” Accordingly, we recommend that parties interested in satisfying AAI use E1527-13 going forward.

Conclusions

ASTM E1527-13 represents a change of both form and substance over E1527-05. Although the definitional changes and the creation of the CREC will likely have no substantive impact on those who perform or rely on Phase Is, the new requirements relating to vapor migration and records review represent moderate but significant changes to the environmental due diligence process, with related cost increases. In particular, we anticipate that where Phase II investigations are contemplated, they will be broader in scope and entail greater transactional risk for sellers; and sellers may continue to opt for the E1527-05 standard in part for this reason. However, lenders and buyers will likely push for the use of E1527-13, as the standard requires a more robust analysis of site conditions, and in light of the pending EPA rulemaking to render it the sole method for satisfying the AAI requirements. Regardless of their transactional positions, parties should begin taking the new standards into account for current and future transactions.

² This new form of records review is in addition to the required environmental records review for the purpose of identifying RECs, which was included in E1527-05.

³ 42 USC § 9601(35)(B). AAI is intended to satisfy the investigative component of the three landowner liability defenses provided for under CERCLA—the bona fide prospective purchase defense (42 U.S.C. §§ 9601(40) and 9607(r)), the innocent landowner defense (42 U.S.C. § 9607(b)(3)), and the contiguous property owner defense (42 U.S.C. § 9607(q)).

⁴ 78 Fed. Reg. 79319

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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