

Strategic Brief for Commercial Real Estate Lenders

The ASTM E 1527 Standard: Update on Proposed Changes

Remember when the U.S. Environmental Protection Agency's All Appropriate Inquiries rule took effect back in 2005? For the first time since then, there will soon be a revised version of ASTM E 1527—perhaps as early as Spring 2013. If your financial institution has environmental policies in place that reference E 1527, the time to begin preparing is now.

This Technical Brief contains EDR Insight's summary of the three primary areas of proposed changes in the latest consensus draft document. It is important to note that the proposal is still undergoing ASTM's rigorous balloting process, which will be followed by EPA review to verify that the revised ASTM standard continues to satisfy AAI/Brownfields Act requirements, as well as providing the agency ample detail and notice to eventually reference the updated standard in the federal AAI rule. The specific revisions to language in ASTM E 1527 will therefore not be considered final until after these important procedures are complete.

The ASTM Process

The latest proposed draft of E 1527 is the result of numerous debates conducted over the past three years at Task Group meetings across the country and dozens of conference calls attended by environmental professionals and end users, all dedicated to having a voice in how the new standard takes shape. Representatives from the U.S. EPA were also active in the ASTM revision process to ensure that the standard maintains its role as a protocol for satisfying the requirements of AAI, which are necessary for CERCLA liability protection. EDR Insight has had firsthand involvement in the process, most recently at the Task Group meeting in Atlanta on October 17, 2012—and has been closely following changes made to the draft standard since then.

Key Areas of Clarification

Below is a brief overview of three key areas of change and the potential implications for lenders and other end-users with environmental policies that reference E 1527.

1. Clarifications to Recognized Environmental Condition (REC) and Historical REC (HREC) Terms and Addition of a New Term: Controlled REC (CREC)

At the core of the Phase I ESA process under E 1527 is the identification of RECs. The proposed draft includes a simplified definition of a REC, expanded clarification of an HREC and the introduction of a new term, the CREC. The draft REC definition is designed to make it more closely resemble CERCLA's text, while still maintaining the instructive language from the current definition.

The revisions to the HREC definition go hand in hand with the introduction of the new CREC term, or "controlled" REC. The revised draft definition for HRECs applies to RECs that meet unrestricted land use criteria after remediation/risk-based cleanup. In contrast to HRECs, the CREC draft language would apply to past releases that were addressed, yet have contamination remaining subject to the implementation of required activity and use limitations (AULs) (e.g., institutional controls or engineering controls). The CREC is designed to provide environmental professionals with a new term to better address situations where there are land use restrictions associated with the cleanup. The revised standard also specifies that CRECs are to be considered RECs.

Implications of CREC, HREC and REC Language

Financial institutions will need to get comfortable with the new/ revised terminology in their risk management practices, and work with knowledgeable environmental professionals who are aware of the revisions and can assist in differentiating between HRECs and CRECs during Phase I investigations.

ASTM E 1527-13 – Key Areas of Proposed Changes

RECs, HRECs & CRECs

Vapor Migration

Regulatory Agency File Reviews

2. Addition of Vapor Migration

The Task Group is also proposing to add another definition to the standard: "migrate/migration," which includes both contaminated groundwater and vapor migration. This clarifies that vapor migration should be considered no differently than contaminated groundwater migration in Phase I investigations. The change also establishes a standardized definition consistent with the existing CERCLA and AAI definitions of a release (e.g., solid, liquid and vapor) to the environment. The revised standard will specifically reference the ASTM E 2600-10 Vapor Encroachment Standard Guide as a consensus-based methodology for assessing vapor migration in Phase I investigations.

Implications of Vapor-Related Proposed Revisions

There is a great deal of inconsistency in how vapor is treated in today's Phase I ESAs. Some environmental consultants automatically include consideration of vapor migration, while others do so only at a client's request. Likewise, some financial institutions require vapor screens on all Phase I ESAs, while others do so only on a case-by-case basis. This revision to ASTM E1527 is one in a series of recent developments that are bringing vapor risk front and center. Notably, the U.S. EPA is about to release a final guidance document more than a decade in the making that presents the federal position on vapor-related risk and mitigation. It is critical that risk managers at financial institutions understand what these documents mean in terms of the industry standard of care and how it might affect their own practices. Financial institutions will need a deeper understanding about the risk that vapor migration presents to make educated decisions about how and whether to revise their environmental due diligence policies to specifically address vapor risk.

3. Regulatory Agency File Reviews

An agency file review is a common industry term used to describe the search for and review of files maintained by local, state, or federal authorities whereby an environmental professional physically travels to the file location. The Task Group added a new section that indicates the EP should do an agency file review if a subject property or adjoining property is identified in any of the standard environmental records sources. If the EP decides not to undertake such a file review, the justification must be included in the Phase I report (e.g., the files are not reasonably ascertainable).

Implications of Agency File Reviews:

The majority of EPs routinely include agency file reviews in their Phase I ESA when applicable. Others do not. The level of effort behind conducting file reviews ranges from easy to onerous, depending on distance, the level of sophistication at the agency office, data availability and other factors (including the availability of adequate documentation online or on site). The impact the revisions have on any individual firm will be a function of what they are currently doing. Financial institutions should work with their environmental professionals to discuss whether agency file reviews are typically included in the scope of a Phase I ESA. It is also important to work with consultants who have established solid relationships with state and local offices, which may help streamline the file review process up front by allowing them to find out if and when information will be available before they need it. Financial institutions should also explore with their consultants the types of situations in which the EP may determine that an agency file review is "not reasonably ascertainable," and discuss the types of reliable alternative sources that may be considered. It is also important to clarify upfront whether an agency file review will have any impact on the price or turnaround time of a Phase I ESA.

Status of Revisions

After the resolution of any outstanding negative votes to the recent draft, and successful balloting by the entire ASTM Committee E50, the final version of the standard will go to the U.S. EPA. The changes to the standard are expected to be published in 2013 after EPA completes its review for AAI compliance.

What financial institutions should be doing to prepare

When the AAI rule was promulgated and when the EPA-recognized ASTM E 1527-05 standard was published, it was an important time for education and awareness on property environmental risk, policies and decision-making. Today is no different. Release of a new version of the ASTM standard should shed light on the need for attention to the process, the need for necessary improvements and valuable reminders of several areas of environmental due diligence, such as user responsibilities, that risk managers may not have given much thought to in the past eight years—or even longer. Based on the information available now, and while the proposed consensus changes enter the final stages of review, here are some things that risk managers at financial institutions can do:

- Start by getting educated on the revisions to E 1527-05
- Work with your environmental professionals to:
 - determine if there are any necessary updates to your environmental policies to recognize the new version of the standard
 - clarify what the CREC/HREC determinations mean to your due diligence decisions
 - address how agency file reviews are currently handled and how that might change after the new standard is in place
 - how your policy may need to change to specifically address vapor migration risk
- Ensure that internal staff are aware of the key areas of change, particularly CREC determinations, vapor migration and agency file reviews
- Plan for any necessary changes to the internal Phase I ESA timing/price, scope of work and report format
- Stay in tune with the schedule for the standard's release as it is likely to take effect immediately at publication

What EDR Insight is doing to help you

- Webinars
 - Tuesday, December 11 at 1:00 p.m. EST ([Register now!](#))
 - U.S. EPA to Release Final Vapor Intrusion Guidance: What Every Environmental Risk Manager Needs to Know
 - Friday, December 14 at 2:00 p.m. EST ([Register now!](#))
 - Upcoming Revisions to ASTM E 1527: Are You Prepared for 2013?
 - Tuesday, February 12, 2013 at 1 p.m. EST
 - Vapor Intrusion and Environmental Liability—Learning from Past Mistakes
 - Date to be announced
 - EPs and End Users Share Their Views on the New E 1527
- A new monthly series of technical briefs on these topics:
 - Meeting the Challenges of Agency File Reviews
 - The Role of Vapor Migration in the Phase I ESA
 - Making CREC Determinations
 - Addressing User Responsibilities
 - And more

EDR Insight is committed to helping you prepare for the clarifications to the E 1527 standard. Stay tuned for the latest and greatest developments as ASTM E 1527 moves closer to its next iteration.

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Questions or comments?

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