**A Hard Look At A 'Clarified' Site Assessment Standard**

Law360, New York (December 04, 2013, 11:56 PM ET) --

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In early November, ASTM International published its new version of its “Standard Practice for Environmental Assessments: Phase I Environmental Site Assessment Process” (E1527-13). The new standard revises and replaces the existing phase 1 standard (known as E1527-05) which was published in 2005.

Although ASTM has characterized the E1527-13 revisions as clarifications to the superseded E1527-05, a number of these changes are substantive in nature and are likely to increase the costs of phase 1 reports. E1527-13 also includes a completely revised legal appendix and a new business environmental risk ("BER") appendix to help property owners and lenders select the scope of the phase 1 that best meets their risk tolerance.

**Background**

ASTM initially published the E1527 standard in 1993 to define “good commercial and customary practice” for environmental site assessments. Since then, E1527 has become the accepted industry standard for satisfying the preacquisition "all appropriate inquiries” ("AAI")[1] requirement that is required to assert one of the liability defenses available under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA or Superfund").[2] After taking title or possession, parties must also comply with certain “continuing obligations” to maintain the LLPs.[3]

When the U.S. [Environmental Protection Agency](http://www.law360.com/agencies/environmental-protection-agency) promulgated its AAI rule in November 2005[4], the agency determined that E1527-05 could be used to satisfy AAI. In August, the EPA published a direct final rule and a proposed rule to add E1527-13 to AAI. However, the agency declined to delete the superseded E1527-05 standard from the AAI regulation. The EPA received adverse comments that the dual standards would cause confusion in the marketplace and make it more difficult to qualify for the already elusive CERCLA liability protections. As a result, the EPA subsequently withdrew the direct final rule and is proceeding with finalizing the proposed rule. The EPA has indicated that it hopes to complete responses to comments and issue a final rule incorporating a reference to the new version by the end of 2013.[5]

**Key Changes to ASTM E1527-13**

Among the key changes to E1527-13 are new and revised definitions, expanded regulatory file review obligations and clarifying the role of vapor pathway assessments in phase 1 reports.

**Revised Definition: Recognized Environmental Condition**

The goal of a phase 1 is to identify a recognized environmental condition ("REC"). This term does not appear in CERCLA but was developed by ASTM to help consultants distinguish minor spills from conditions that would be required to be investigated or remediated. Unfortunately, the REC definition was not artfully drafted and has led to much confusion. As a result, it is not unusual for a property owner or its counsel to disagree with an environmental consultant if a certain condition rises to the level of a REC.

To minimize such disagreements, the REC definition has been streamlined so it more closely tracks the CERCLA definition of release.[6] The revised REC definition now refers to "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 future release to the environment."

**Revised Definition: Historical Recognized Environmental Condition**

The term historical recognized environmental conditions ("HREC") was added to E1527 in 2000 for sites where contamination was remediated to applicable standards. Instead of labeling the former contamination as a REC, consultants could now identifying the former spill as an HREC, confirming that it has been remediated and no longer poses a risk to human health of the environment.

Although the HREC term can be a useful tool, many consultants were unclear on when they could make an HREC determination. Some made HREC determinations without verifying the cleanup standard used in the past was still valid and that the remedy (i.e., engineering or institutional controls) was still protective and functioning as designed. Meanwhile, consultants maintained that the continuing presence of residual contamination was a REC, notwithstanding regulatory approval. This was a significant concern since most cleanups now employ risk-based approaches where some remnant of contamination is allowed to remain so long as institutional or engineering controls are used to prevent unreasonable exposure to the residual contamination.

This confusion partially stemmed from the awkward REC definition. Despite the fact that the ASTM task force amended the definition of release in E1527-13, the HREC definition was amended so that it now only applies to contamination that has been remediated to an unrestricted cleanup standard.[7] If the cleanup utilized engineering or institutional controls such as deed use restrictions or prohibiting use of groundwater, the consultant may no longer use HREC but instead use the new term controlled recognized environmental conditions ("CREC").

**New Definition: Controlled Recognized Environmental Condition**

If a cleanup does not meet the unrestricted cleanup standards and relies on engineering or institutional controls, the consultant must now identify this remediated spill as a CREC.[8] This new term is technically a type of REC and must be listed in the findings section of the phase 1 report.

A CREC will not require further action so long as the controlled conditions remain in effect. At first glance, this would seem to provide comfort to lenders and purchasers. However, E1527-13 states that consultants do not have to confirm the adequacy or continued effectiveness of the control when making its CREC determination. This undermines the usefulness of the CREC since the client will not know if the remedy is protective or if further action is required. This limitation also appears to conflict with the revisions to the file review obligations (discussed below). As a result, purchasers and lenders should consider requiring consultants to confirm the effectiveness of controls before making a CREC determination.

**New Definition: De Minimis Conditions**

The original definition of REC provided that de minimis conditions were not RECs. This statement was moved from the revised REC definition and made into a new separate definition.[9] A de minimis condition applies to releases that do 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 governmental agencies.

**Clarification of Role of Soil Gas/Vapor Migration Pathway**

Since vapor intrusion became a concern a decade or so ago, there has been much confusion in the environmental consultant community if vapor intrusion had to be evaluated as part of the standard phase 1 scope of work. The confusion stemmed from the fact that the E1527-05 definition of a REC included releases into structures while the E1527-05 list of non-scope considerations in section 13 included indoor air quality.

E1527-13 attempts to clarify the role of the soil gas pathway in phase 1 reports in a number of ways. First, a new definition "migrate/migration" was added that refers to vapors in the subsurface.[10] The definition also states that the soil gas pathway does not have to be evaluated using the ASTM protocol to satisfy AAI.[11] The revised legal appendix discusses EPA guidance documents that describe when CERCLA authority may be used for indoor contamination. Finally, the new BER appendix explains that the indoor air quality non-scope item does not include impacts to air quality relating to CERCLA releases.

Thus, under E1527-13 consultants are only obligated to express an opinion if there is a soil gas condition that qualifies as REC and determine if that pathway poses an actual risk to human health. Indeed, in many cases, the mere presence of contaminated vapors in soil gas may simply be a de minimis condition. Sub-slab or indoor air sampling to confirm if the vapor pathway is completed (exposures are occurring) or to determine the indoor air contaminant concentrations is outside the scope of E1527-13.

Again, the job of the consultant is to identify RECs. If the source of the contaminated vapors is an on-site source, that condition will be flagged as a REC. Thus, from a practical standpoint, identifying the vapor pathway as a REC will only be an issue when contaminated vapors are migrating onto the property from an off-site source.

**Regulatory Agency File and Records Review**

Agency files can contain critical information about historic contamination and adequacy of the cleanup. However, many consultants have exploited ambiguities in E1527-05 and have not routinely include file reviews in the standard phase 1 scopes of work. Instead, they have been charging clients an additional fee for this work as an additional task.

In what may be the most significant change to the ASTM standard, E1527-13 now creates a presumption that consultants should review agency files when the property or adjacent properties are identified on one of the standard databases that are required to be searched to determine if a REC, CREC, HREC or de minimis condition exists at the property. A consultant that believes a file review is not required must provide a detailed explanation why the review was not performed. Alternatively, the consultant can rely on records provided from other sources (e.g., user-provided records or interviews with regulatory officials) to determine if there is sufficient information for identifying RECs and thereby avoid the time and cost of reviewing regulatory files. Depending on the accessibility of state files and their size, the agency file review may result increased phase 1 costs and delays.

**Lien and Institutional Control Searches**

Under AAI and E1527, the persons seeking to assert the liability protections (i.e., users) are responsible for providing certain information to the environmental consultant. Revised section 6 now provides that environmental liens and AULs searches must be examined not only in land title records but also in judicial records for those jurisdictions where that information is maintained.[12] Users may want to ensure that judicial records are searched in those jurisdictions when ordering title searches.

**Recommendations Are Not Required**

E1527-13 clarifies that recommendations are not required.[13] All the consultant is required to do is to express an opinion and conclusion on the presence or potential presence of a REC or CREC.

Many users, particularly lenders, often require a consultant to include a recommendation in the phase 1 report. However, failure to comply with recommendations can cause a property owner to be deemed to have failed to comply with its post-acquisition “appropriate care” obligations and fail to qualify as a bona fide prospective purchaser ("BFPP") or satisfy the “due care” requirement of the third party defense.

Thus, if a client wants a recommendation, it should be prepared to timely implement the recommendation or risk losing its BFPP status. The better approach would be to have all recommendations — including those involving any non-scope items addressed by the report — contained in a separate letter addressed to counsel.

**Should a Purchaser or Consultant Use E1527-13?**

In the past, environmental consultants immediately transitioned to the new E1527 version when it was published. However, this is not a normal transition since this is the first time that E1527 revision has occurred since the standard was embedded into regulatory language that establishes defenses to CERCLA liability.

While the EPA has proposed to recognize E1527-13 as satisfying AAI, the agency has not yet issued its final rule and does not expect to do so until the end of the year or beginning of 2014. Moreover, depending on how the EPA handles the adverse comments it received, it is possible the EPA may be sued which could further delay recognition of E1527-13.

So what are consultants or users to do for transactions requiring a phase 1 prior to the EPA formally recognizing E1527-13? On the one hand, by publishing E1527-13, ASTM is essentially saying that the new version now represents “good commercial and customary practice.” Thus, a consultant failing to use E1527-13 could be exposed to professional negligence claim if, for example, it fails to identify a REC because it did not do a file review or fails to evaluate the soil gas pathway. This would seem to tip the decision towards using E1527-13.

However, E1527-13 is not yet recognized as an acceptable method of satisfying AAI. E1527-13 represents industry compromises that might not be convincing to a court in the absence of EPA approval. Moreover, if the purpose of the phase 1 is for a client to be able to comply with AAI, a consultant stating that its phase 1 complies with AAI could be subject to breach of contract or claims of misrepresentation since only E1527-05 is currently recognized in the AAI rule.

Thus, during this interim period, consultants should carefully review the language they use in their reports about the report complying with AAI. Consultants may want to amend their standard language to discuss that E1527-13 is not yet formally recognized in the AAI rule. Another option might be to refer to both versions of ASTM E1527 during this gap period or simply include a statement that the phase 1 complies with AAI. In any event, consultants should discuss the “gap period” with their clients to make sure they understand the risks in using E1527-13 before the EPA formally recognized the standard as consistent with AAI. Some clients may automatically shift to E1527-13. If AAI is not the primary reason the client is performing the phase 1 (e.g., lenders), the “gap period” may not be important and they may opt to continue to use E1527-05 because of the lower costs.

Finally, by characterizing the changes in E1527-13 as "clarifications" to obtain EPA approval, ASTM may be unwittingly exposing consultants to retroactive liability for past phase 1 reports where file reviews were not performed or the vapor pathway was not considered. The Webster dictionary defines “clarify” as “to make understandable” or “to free of confusion.” This would suggest that consultants had these obligations all along and that E1527-13 is just making their obligations more understandable. It is unclear if a court will interpret these "clarifications" as restatements of the existing duties under E1527-05 or as new prospective obligations. If the latter, then the EPA’s rationale for retaining E1527-05 as an acceptable method for satisfying AAI would seem to be without merit.

E1527-13 is an improvement over the prior version. However, if the EPA sticks with its proposed approach of allowing both E1527-05 and E1527-13 as acceptable methods for satisfying AAI, it remains to be seen if the more costly E1527-13 will gain wide acceptance in the real estate and financial industry.

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[1] To qualify for one of the LLPs, a property owner or operator must perform pre-acquisition due diligence that complies with the EPA AAI Rule codified at 40 C.F.R. 312.  Other pre-acquisition requirements include that all “disposal” of hazardous substances occurred before the purchaser acquired the property, 42 U.S.C. §9601(40)(A), and the purchase did not have an improper affiliation with a responsible party. 42 U.S.C. §9601(40)(H).

[2] 42 U.S.C. §9601 et seq. The affirmative defense include the Bona Fide Prospective Purchaser (BFPP), 42 U.S.C. §9601(40); the contiguous property owner, 42 U.S.C. §9607(q); and the innocent landowner (ILO), 42 U.S.C. §9601(35)(A). The BFPP, CPO and ILO are commonly known as the landowner liability protections (LLPs).

[3] 42 U.S.C. §9601(40)(C)-(G). One of the Continuing Obligations is that the BFPP exercise “appropriate care” to stop ongoing releases and prevent new releases of hazardous substances. Parties seeking to assert the third party defense of 42 U.S.C. §9607(b)(3) must, inter alia, show that they have exercised “due care” with respect to contamination. EPA indicated in its “Common Elements” guidance that the due care caselaw may inform what constitutes “appropriate care.”

[4] The AAI rule was published on November 1, 2005 at 70 FR 66070. It became effective on Nov. 1, 2006.

[5] See Schnapf  “EPA's Rule On ASTM May Bring Confusing Two-Tier System” (Sept. 13, 2013).

[6] E1527-13 § 3.2.77.

[7] E1527-13 § 3.2.41.

[8] E1527-13 §3.2.18.

[9] E 1527-13 § 3.2.22.

[10] E1527-13 §3.2.55.

[11] E2600 Vapor Encroachment Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions.

[12] E1527-13§ 6.2.1.

[13] E1527-13 § 12.15.