

To: Our Clients and Friends

January 15, 2014

EPA Adopts New ASTM Phase I Standard

The Environmental Protection Agency (EPA) closed out 2013 by publishing a final rule adopting the new ASTM E1527-13 standard as an additional means of satisfying the “all appropriate inquiries” (AAI) requirements of certain Comprehensive Environmental Response Compensation and Liability Act (CERCLA) defenses. EPA now allows and recommends ASTM International’s revised “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,” E1527-13, as a means for meeting the AAI requirements.

Background

CERCLA holds current and former owners and operators of contaminated properties strictly liable for cleanup costs, but the statute allows limited defenses for innocent purchasers, bona fide prospective purchasers, and contiguous property owners. To be eligible to assert any of these defenses, owners must show that they conducted AAI within one year prior to their purchase of the property. Through regulations published at 40 C.F.R. § 312, EPA adopted standards to clarify what actions meet the AAI requirements. The prior standard, ASTM E1527-05, was adopted into these regulations in 2005, and EPA’s recent rule adopts the new ASTM E1527-13 standard, effective December 30, 2013. Additionally, EPA has noted an intent to withdraw the 2005 version as a route to compliance in the near future. Going forward best practices will be to follow the ASTM E1527-13 standard.

Changes in the Standard

With the new standard, ASTM revised or created a handful of relevant definitions, clarified the role of vapor migration, and instituted regulatory file review requirements.

- *Recognized Environmental Condition Definition* - ASTM modified the definition of “recognized environmental condition” (REC) in an effort to simplify the language. It defines the term as “the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: (1) due to 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.”

- *Historical Recognized Environmental Condition Definition* - The standards also clarify a “historical recognized environmental condition” (HREC) as referring only to “a past release of any hazardous substances or petroleum products” where the remedial measures taken allow for unrestricted residential use or meet the satisfaction of the applicable regulatory authorities without the use of any controls. Whether or not a property is subject to unrestricted use, however, is based on current standards, not on the standards in place when the property was cleared for use. As a result, the environmental professional assessing what is thought to be an HREC may need to conclude that it is a REC if the property would not be cleared pursuant to current regulations.
- *Controlled Recognized Environmental Condition Definition* - HREC can be contrasted with the new term “controlled recognized environmental condition” (CREC), which refers to past releases where contamination remains in place and where land use is contingent on institutional controls or similar restrictions. CREC is the appropriate classification wherever a hazardous substance or petroleum product remains and a use limitation or institutional control persists as a means of maintaining regulatory closure. Notably, CRECs must be identified as RECs in the conclusion section of a Phase 1 Report.
- *Vapor Migration* - By adopting ASTM E1527-13, EPA has clarified the role of vapor migration analysis when conducting AAI. EPA notes that the new standard, by defining “migration” to include subsurface vapors, requires “an assessment of the real or potential occurrence of vapor migration and vapor releases on, at, in or to the subject property.” While the updated standard is more clearly inclusive of vapor intrusion and vapor migration, EPA stresses that the 2005 standard already accounted for vapor exposures in the requirements to identify conditions that indicate existing, past, or threats of releases. The new version, however, leaves no ambiguity: subsurface vapor migration pathways must be evaluated. Though not officially adopted by EPA, ASTM International’s E2600-10, Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions, provides additional information for assessing vapor intrusion.
- *Regulatory File Review* - Finally, ASTM E1527-13 updates the Regulatory File Review requirements by necessitating a greater explanation if the environmental professional chooses not to review pertinent regulatory records. While the standard retains the professional’s discretion to not review the records, the explanatory burden is heightened in an effort to encourage the use of increased information.

Key Takeaways

Cost Increases

With the new standard arrives the potential for increased assessment costs. Creating more thorough and complete reports will increase the time environmental consultants spend preparing reports, and this will in turn increase costs. The increased regulatory record review burden likely adds time, and therefore expense, to the analysis. Similarly, the new standard’s explicit inclusion of vapor migration ensures all evaluations will include aspects that some may have omitted as outside of scope in the past. Such in-depth treatment will likely result in increased expense. Further, the analysis of HRECs against current standards may result in increased future assessments and activity than otherwise may have been necessary.

Increased Emphasis on Vapor Migration

While EPA claims vapor migration and intrusion analyses were always a necessary component of a site assessment, the adoption of the updated standard for AAI and an April, 2013, EPA external review draft of “OSWER Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air” (available [here](#)) indicate increased regulatory focus on the topic. Recent instances of EPA reopening sites because of vapor intrusion further suggest that this is an area of additional risk for purchasers.

Continuing Obligations

Prospective property purchasers should also recall that meeting AAI requirements does not guarantee liability protection. Instead, landowners must meet “continuing obligations” after the purchase ensuring that restrictions on the land are met and reasonable steps are taken to prevent hazardous releases. ASTM E2790-11, Standard Guide for Identifying and Complying with Continuing Obligations, provides guidance on fulfilling these obligations. In addition, two courts have weighed in on the requirements for meeting these continuing obligations. In *PCS Nitrogen Inc. v. Ashley II of Charleston*, 714 F.3d 161 (4th Cir. 2013), the landowner’s failures to appropriately maintain protections and substandard maintenance activities precluded the owner’s claim that it did not cause or exacerbate releases. However, in *3000 E. Imperial v. Robertshaw Controls*, 2010 WL 5464296 (C.D. Cal. 2010), an owner’s actions to clean but not remove underground storage tanks was sufficient for the defense, with the owner required to take reasonable actions but not all possible steps to maintain the defense. The new standard’s delineation of RECs, HRECs, and CRECs may help purchasers better identify what is required to meet these continuing obligations.

Ultimately, the 2013 standards do not constitute a drastic change in course from the 2005 standards. Those who plan to seek the limited CERCLA defenses, however, should expect some changes in meeting the AAI burden and a corresponding cost increase. Finally, while the current regulations momentarily retain the 2005 standards as an acceptable route for AAI, going forward the 2013 version presents the preferable assessment tool for parties who wish to ensure protection through the CERCLA liability defenses.

If you would like to discuss how this matter may affect your organization, please speak with your regular Bryan Cave contact or one of the following members of Bryan Cave’s [Environmental Client Service Group](#):

Dale A. Guariglia
Partner, St. Louis
314 259 2606

daguariglia@bryancave.com

Brian M. Jacobson
Associate, St. Louis
314 259 2264

brian.jacobson@bryancave.com

Bryan E. Keyt
Partner, Chicago
312 602 5036

bryan.keyt@bryancave.com