PHASE I ENVIRONMENTAL ASSESSMENTS

Updates to the ASTM E 1527-13 Standard: What are they and why do I care?

Presented by: Scott Broadwell, Davis Wright Tremaine LLP



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ASTM E 1527-13 Update

- Background: Why do we do Phase I Environmental Assessments in the first place?
- Phase I Assessments: What is the scope and what are the components?
- Update: What has changed?
- Parting thoughts: What to look for from your consultants

ASTM 1527-13 Update

Why Now?

On December 30, 2013, the Environmental Protection Agency published a final rule adopting and affirmatively recommending the updated Phase I standard (ASTM 1527-13) to satisfy the "all appropriate inquiries" standard under CERCLA

(78 Fed. Reg. 79319 (Dec. 30, 2013))

- The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Alaska's Hazardous Waste Cleanup Law, AS 46.03.822, impose strict liability on owners, among others, for costs of environmental cleanup.
- Liability a matter of policy: costs of cleanup should be borne by parties who derived a benefit from property (or at least are tenuously connected to property) rather than tax-payers.
- Often described as a "draconian" liability scheme.

- As originally passed, CERCLA contained only three defenses to liability:
 - An act of God
 - An act of war.
 - An act or omission of third-party with whom the PRP has no contractual relationship. (Note that a sale contract is a contractual relationship. The third-party act defense has in practice proven difficult to sustain.)

- In response to liability concerns, Congress subsequently amended CERCLA to add additional defenses:
 - Innocent landowner (42 USC 9607(b)(3) and 9601(35));
 - Bona Fide Prospective Purchaser (42 USC 9601(40)).

- Common Element of each of the defenses: All Appropriate Inquiries ("AAI").
- AAI has come to mean a Phase I Environmental Assessment.
- Note that Alaska law includes an innocent purchaser defense, but does not include a bona fide purchaser defense. ADEC will, however, enter into prospective purchaser agreements which can, as a matter of contract, limit liability as between a PRP and ADEC.

Phase I Assessments: Purpose

- Contains a review of the liabilities that the site may pose.
- Frequently used before the purchase of a property or site to identify areas of environmental concern and to establish a basis for defenses if contamination is later found on the property.
- Primary purpose is to evaluate the potential presence of contamination on real property from current and historical uses, including from migration.
- Consists of non-intrusive research directed at identifying areas with the most significant on-site impact.

Phase I Assessments: Components

- In a general sense, a Phase I ESA includes:
 - Site visit;
 - Evaluation of risks from neighboring properties;
 - Database review;
 - Interviews of knowledgeable persons regarding property history;
 - Examination of historical aerial photographs;
 - Additional research.

Phase I Assessments: Standards

- Originally a wild frontier, with no consensus on how a Phase I should be performed or what it should include.
- ASTM first published standards for conducting a Phase I in 1993.
- Standards since revised several times.
- EPA published federal AAI rule in 2005 recognizing E 1527-05 as the appropriate protocol.
- That standard sunset, leading to current revision.
- EPA has now adopted the E 1527-13 standard as the appropriate protocol.

Phase I Assessments: Major Updates

- Major Updates to the Phase I standard are:
 - Definitions of RECs, HRECs, and CRECs.
 - Vapor Migration
 - Agency File Reviews

Phase I Assessments: Major Updates

- RECs, HRECs & CRECs
 - Welcome to the wonderful world of environmental acronyms.
 - REC = "Recognized Environmental Condition."
 - HREC = A historical REC.
 - CRFC = A controlled RFC.
 - The ASTM standard update revises the definitions for RECs and HRECs and adds CRECs as a new category.

Phase I Assessments: RECs

- Old Definition: "The presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property, or into the ground, ground water, or surface water of the property. The term includes hazardous substances or petroleum products even under conditions in compliance with laws.
- New Definition: 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 a future release to the environment.
- In addition, clarifies that a *de minimis* condition is not a REC.

Phase I Assessments: HRECs

- Old Definition: "An environmental condition which in the past would have been considered a REC, but which may or may not be considered a REC currently."
- New Definition: "A past release of any hazardous substances or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted residential use criteria established by a regulatory authority, without subjecting the property to any required controls."
- Before calling a past release a HREC, the environmental professional must determine that there have been no changes in regulatory criteria such that the condition qualifies as a REC at the time of the Phase I.

Phase I Assessments: CRECs

New term: "A REC resulting from a past release of hazardous substances or petroleum products 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."

Phase I Assessments: REC, HREC, CREC

REC-HREC-CREC Relationship Contamination in, at or on the target Has it been Is it de minimis? property. addressed? De minimis ("Not a REC") Would regulatory officials view REC cleanup as ("Bad REC") inadequate today? HREC ("Not a REC") Are there **CREC** restrictions? ("Good REC")

Source: Environmental Data Resources 2013

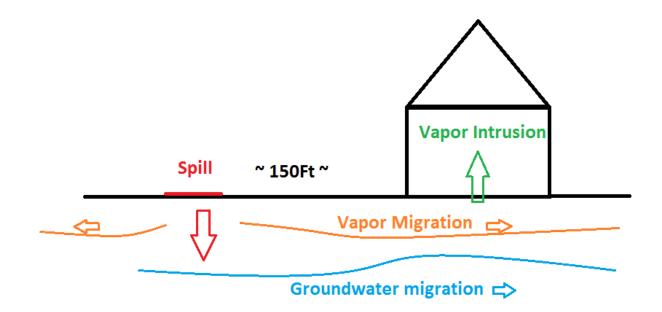
Phase I Assessments: RECs, HRECs, and CRECs

Practical Impacts:

- RECs and CRECs must be listed in the Phase I report conclusions.
- HRECs must be listed in Phase I report findings, but not in conclusions.
- REC will likely require further investigation, a CREC will need to be considered (i.e., are controls being maintained), and a HREC will become invisible.

Phase I Assessments: Vapor

 Update clarifies that vapor migration should be included in a Phase I Investigation.



Source: Farallon Consulting 2013

Phase I Assessments: Vapor

- Previously, Vapor Migration was not expressly addressed and there was a wide variety in ways in which it was addressed, if at all.
- Vapor migration moving on the radars of state regulatory agencies. See e.g. draft guidance in Alaska.
- New standard adds definition for "Migrate/Migration" which includes the movement of "vapor in the subsurface."
- Phase I standard now references the ASTM standard for vapor encroachment screening (ASTM E2600-10).

Phase I Assessments: Vapor

- Under current standard, vapor should be considered in the same way as contaminated groundwater migration.
- Revision brings consistency to the way the vapor risk is addressed under Phase I assessments.

Phase I Assessments: File Review

- New language has been added to the standard: "[P]ertinent regulatory files and or records associated with the listing should be reviewed."
- Not a mandatory requirement. BUT, the Phase I report must include justification if the consultant does not conduct a review.
- The report shall include a summary of the agency file review and an opinion as to the sufficiency of information obtained.
- Benefits: Provides specific information about a release.
- Drawbacks: Cost more.

Phase I Assessments: What Should I Look For?

- Is your client indemnified for consultant liability?
- Is the consultant adequately insured?
- Does the Phase I purport to be in compliance with the 2013 standard?
- Is the Phase I being performed by or under the supervision of a qualified environmental professional?
- Did the consultant physically visit local agencies and governmental offices to review records?
- Does the Phase I provide a thorough discussion of the history of previous uses on and around the property?
- Does the Phase I include discussion of a site visit?
- Has someone familiar with the property been interviewed regarding past activities?
- Does the Phase I rule our the presence of any RECs?
- Does the Phase I include an evaluation of vapor migration?

• QUESTIONS?

scottbroadwell@dwt.com