

## EPA Ushers in New ASTM Phase I ESA Standards



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April 27, 2022 | **CLIENT ALERTS**

On March 14, 2022, the U.S. Environmental Protection Agency [issued a direct final rule](#) approving the American Society for Testing and Materials (ASTM) International Standard E1527-21 for Phase I environmental site assessments (ESAs). The new set of standards replaced the ASTM E1527-13 requirements, established 8 years prior, and reshapes aspects of how Phase I ESAs are conducted and add clarity to the ambiguous aspects of Phase I ESAs. EPA's final rule incorporates the ASTM's proposed changes from November 2021; EPA indicated that it does not expect pushback around the rule and, barring any, the final rule will go into effect on May 13, 2022.

Used primarily in commercial real estate acquisitions, Phase I ESAs play a crucial role in satisfying the “[all](#)

appropriate inquiries” and securing potential liability protection under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. §9601). The ASTM is responsible for outlining the universal standards and requirements integrated into Phase I ESAs, which creates a system of efficiency and consistency for environmental assessments.

Below is a listing of the major changes in the new ASTM E1527-21 standards:

- **New definition of “Recognized Environmental Condition (REC)”.** The term “likely” in the REC definition has been modified for clarity; in the prior standards, the term “likely” applied to all three potential instances where a REC is found or otherwise occurs. The use of the term “likely” has been changed to apply to only one instance: *“the **likely** presence of hazardous substances or petroleum products in, on or at the subject property due to a release or likely release to the environment...”*.
- **Meaning of “likely”.** *The definition of the term “likely” was also clarified, now described as a condition “which is neither certain nor proved, but can be expected or believed by a reasonable observer based on the logic and/or experience of the environmental professional, and/or available evidence, as stated in the report to support the opinions given.”*
- **New Explanation of a Controlled Recognized Environmental Condition (CREC).** CREC is defined under the new standard as *“a recognized environmental condition affecting the subject property that has been addressed to the satisfaction of the applicable regulatory authority or authorities with hazardous substances or petroleum products allowed to remain in place subject to implementation of controls (for example, activity and use limitations or other property use limitations).”* The purpose is to create uniformity in classifying such CRECs among consultants in drafting Phase I ESAs.
- **Inclusion of Emerging Contaminants.** The new standard clarifies that environmental consultants and professionals are not required to include emerging contaminants, such as per- and polyfluoroalkyl substances (PFAS), in their scope of work with conducting a Phase I ESA until the emerging contaminant is regulated as a hazardous substance under CERCLA. However, [EPA indicated that it plans to regulate certain PFAS chemicals](#) as soon as summer 2023, so this standard may change yet again in the near future.
- **Phase I ESA Shelf Life.** The new standard states that a Phase I ESA must be completed no more than 180 days prior to the date of acquisition to remain viable. However, the Phase I ESA is viable for a year if certain components are updated, including interviews, review of governmental records, site reconnaissance of the subject property, and searched for recorded environmental cleanup liens. The dates of each of these components must also now be included in the reports.
- **Requirement to Use Standard Historical Sources.** Environmental consultants are now required to review a minimum of four historical sources in connection with the examination of the subject property along with examining the adjoining properties, including (i) properties with abutting property lines; and (ii) properties that are across the street/alley.
- **Significant Data Gap(s).** The prior ASTM E1527-13 standard required significant data gaps to be identified in the Phase I ESA but did not provide any guidance on what constituted a “significant data gap”. The new E1527-21 standard now define a “significant data gap” as *“a data gap that affects the ability of the environmental*

*professional to identify a recognized environmental condition.”* The new E1527-21 standard also requires a discussion of how significant data gaps affect the environmental consultant’s ability to make conclusions regarding any RECs.

- **Inclusion of Maps/Photographs.** The new standards require the Phase I ESA to include photographs of the subject property along with a map showing the boundaries of the property. These photographs should include major site features and locations of property conditions that are considered RECs, as well as any *de minimis conditions*.

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