

December 22, 2021

Changes Coming to Phase I Environmental Site Assessments

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Commercial real estate (CRE) professionals are well aware that a Phase I Environmental Site Assessment (ESA) is required when acquiring commercial property. Originally intended to demonstrate that the buyer had undertaken “All Appropriate Inquiries” necessary to establish certain defenses against CERCLA liability, Phase I ESAs have become an integral part of commercial real estate, required by lenders, insurers, and as a matter of standard practice.

ASTM Standard E1527-13, which was adopted in 2013, is the current “roadmap” with which environmental professionals must comply when they perform a Phase I ESA for commercial properties. ASTM standards are regularly updated and this one was just updated in November 2021. In the nomenclature used by ASTM, the updated standard is E1527-21. However, E1527-21 is not considered “All Appropriate Inquiries” until it is adopted as such by the U.S. Environmental Protection Agency (EPA), which is expected in 2022. In the interim until EPA adopts the newer standard, environmental professionals are required to continue to meet E1527-13, but CRE professionals should be aware of the coming changes and what they may mean for future transactions.

The biggest question for most CRE professionals is whether the changes will increase the cost and time required to do a Phase I ESA. The likely answer is yes, but the degree may vary from property to property. The 2021 version of the standard will require more historical review than the 2013 version, which will increase costs for some properties. E1527-21 requires review of all four core historical records—airial photos, topographic maps, city directories, fire insurance maps—for the subject property. If the property has been used for manufacturing, industrial, or retail, additional historical records should be reviewed. The 2013 version allowed the reviewer discretion to only review historical records they felt were “necessary”, so this presents an increase in workload and vendor costs.

The 2021 standard also requires increased historical review of adjoining properties, not just the subject property. At a minimum, the core historical records will need to be reviewed for adjoining properties, regardless of the results of the review of the subject property. For an isolated commercial property with no adjacent commercial, industrial, or retail properties, the increased time and cost should be minimal, but for an industrial property located in the center of an industrial zone with a long history, the increases could be significant. Note that a big reason for the increased focus on historical research and adjoining properties is due to instances when dry cleaners that have gone out of business were not identified in a Phase I ESA.

E1527-21 has revised or included definitions of a number of terms, such as Recognized Environmental Condition (REC), and provided an appendix in an effort to bring some consistency to determinations of what is a REC. This should not increase the cost or time, and will hopefully eventually eliminate the maddening situation where one consultant looks at a set of facts and determines they do not constitute a REC but a second consultant (usually hired by a potential buyer) looks at the same facts and calls it a REC, requiring additional investigation.

The 2021 revision requires that a title search be reviewed back to 1980 for environmental liens and deed restrictions, whereas the prior revision did not have a set date, so this is another area that may increase cost and time. Other changes, such as what must be included in the report, will likely not have much impact, as most consultants have already moved towards including everything they reviewed as appendices (as evidenced by the size of the reports).

The ASTM Committee resisted the push to include the presence or likely presence of emerging contaminants that are not yet listed as hazardous substances under CERCLA as the basis for a REC. This has become a point of contention recently with PFAS compounds, a large group of long-lasting chemicals used in many products, such as non-stick cookware and fire-fighting foam. The presence of PFAS on a property can be identified as a business risk, like mold or asbestos in buildings, but it is not part of the core scope of the ESA until it is added to the list of CERCLA hazardous substances.

What should a CRE professional expect or require in the interim period until EPA adopts the new standard? The 2013 standard is in effect until replaced, so the environmental professional needs to confirm that their Phase I ESA complies with E1527-13. If an environmental consultant decides to implement the new standard prior to its adoption by EPA, they need to state in their report that their assessment also complies with E1527-13. The new standard encompasses everything that is in the 2013 standard, but it should be clear in the report that the Phase I ESA complies with the standard in effect at the time.

Buchalter has experienced attorneys who have assisted CRE professionals on environmental, health and safety matters, including environmental due diligence and review of Phase I and Phase II ESA reports. If you have questions or need assistance, please contact one of the attorneys listed below.



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