

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## EnvironmentalLAW

# ASTM revises environmental site assessment standard

The American Society for Testing and Materials (ASTM) developed the initial Phase I Environmental Site Assessment (ESA) standard in 1993 to address the scope of environmental due diligence required prior to acquisition of real estate in light of environmental liability concerns under federal and state Superfund statutes.

The Phase I is part of the purchaser's and lender's due diligence in assessing whether to acquire or lend on a parcel of property. The Phase I report is a document prepared by an environmental consultant that summarizes available site reports, witness information and environmental regulatory database information to determine whether or not there are recognized environmental conditions (REC) on a subject property.

If so, based on the status of the transaction, the parcel may require further investigation through soil, groundwater and possibly soil vapor testing.

The ASTM Phase I standard was updated in 1997 and 2000. Statutory changes to the federal Superfund statute in 2002 added new defenses and led to the issuance of US EPA regulations on All Appropriate Inquiry (AAI) standards. In coordination with EPA's final AAI regulations, the ASTM issued its last substantial update to the Phase I standard, captioned ASTM E 1527-05, in 2005.

The Phase I standard was heightened by additional investigation requirements in exchange for potential liability protection under the federal Superfund statute. By performing a Phase I meeting the E 1527-05 standard, a property purchaser may be able to avail itself of one of the three Superfund defenses, namely the innocent purchaser, bona fide prospective purchaser or contiguous property owner defense.

Environmental consultants, banks, property owners, developers and attorneys have worked with the current Phase I standard since 2005. However, ASTM updates its standards every eight years, and ASTM voted on a series of proposed changes in January 2013. The revisions are currently subject to EPA review, public comment and approval, which is slated to take approximately five months. It is expected that the new Phase I standard, captioned E 1527-13, will be finalized in the next several months.

The proposed changes to the Phase I standard include both major and minor revisions. In the major revision area are the following items: simplification of the definition of "Recognized Environmental Conditions," vapor migration and establishing when regulatory file review is appropriate. The minor revisions to the Phase I standard include user responsibilities and industrial/manufacturing properties.

Initially, the REC definition addresses instances in which hazardous substances or petroleum products exist on the property in a manner to indicate a past, present or potential release. The new ASTM Phase I definition has been streamlined as "the presence or likely presence of any hazardous substances or petroleum products in, 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."

The new definition is simplified and tracks the definitions of release and environment under CERCLA. In addition, the new Phase I standard includes a revised definition of historic REC and a new definition of controlled REC, known as CREC.

The definition of CREC encompasses a REC from "a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority ..." such as through a no further action letter or a brownfield site with institutional and engineering controls to address remaining hazardous substances.

Another significant change to the Phase I standard is the inclusion of vapor migration as part of the Phase I. Vapor migration is the potential for contamination in soil and groundwater to cause vapor to infiltrate adjoining buildings. Vapor intrusion is being addressed at numerous sites under the oversight of DEC and the NYS Department of Health.

With the addition of vapor intrusion as a Phase I consideration, this media will now need to be considered on the same basis as contaminated soil or groundwater. The new Phase I standard

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also incorporates E2600-10, which is a national method for assessing vapor intrusion.

In addition, a definition of migration has been added to the Phase I standard and the definition of activity and use limitation (AUL) has been revised to include soil vapor.

Finally, a few minor revisions have been made to the Phase I standard. The standard now sets out circumstances in which regulatory file review and records review is necessary. The user responsibility section has also been revised. Environmental liens and AULs are generally found in recorded land title records, but in some jurisdictions these are recorded or filed in judicial records.

If environmental liens and AULs are only recorded in judicial records, the Phase I standard requires the records to be searched. Under the current Phase I standard, the client or user is required to provide the environmental professional with known environmental lien and AUL information, unless the consultant is engaged to perform that work.

However, under the new standard the environmental professional may conduct a search of institutional and engineering

control registries in conjunction with the government records search. The standard requires the user to provide commonly known and reasonably ascertainable information within the community, which could be material to the REC determination, to the environmental professional.

Further, if the user does not provide the required information under this Phase I section, the environmental professional needs to consider the information shortfall as they would similar to any other data gap.

Although it is impossible to predict with certainty when the final Phase I standard will be issued by ASTM, it is expected to occur over the next several months. To the extent that the E-1527-13 Phase I standard is finalized it will require additional time, money and effort on the part of the prospective property purchasers, banks and environmental professionals. The exact cost and time impact will depend on geographic and market-particular property factors.

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