

# New Standard for Phase I Environmental Site Assessments

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First established back in 1993, Phase I Environmental Site Assessments have become a ubiquitous component of environmental due diligence supporting most commercial and industrial real estate transactions in the United States. Users of such Phase I assessments rely on these reports to provide a relatively inexpensive and standardized environmental snapshot of the real property under evaluation. Prospective purchasers and lessees usually obtain these reports not only to flag important and practical considerations as to whether and how real property might be used and managed, but also for important liability protections under federal and certain state laws.

ASTM International (ASTM), the creator of the standard for Phase I assessments, revisits the standard every eight years. And, perhaps not surprisingly, each revision seems to get more complex than the one before it. The new standard adopted by ASTM in November 2021 is no exception.

Below are six key issues concerning the new Phase I Environmental Site Assessment standard.

## 1. EPA Approval Pending.

The new standard, numbered E1527-21, is not yet approved by the U.S. Environmental Protection Agency (EPA) as meeting the aforementioned federal liability protections. While we expect EPA to approve E1527-21 later this year, in part because EPA participated in the ASTM committee meetings leading up to enactment of the standard, there is no formal approval yet. In this interim period, Phase I ESAs prepared in compliance with either E1527-13 or E1527-21 should satisfy the “all appropriate inquiries” requirement to establish landowner liability protections available under CERCLA and related state law, and users may wish to assure compliance with both standards. This dualcompliance is not problematic because the new standard adds to the older standard, making compliance with the prior standard largely automatic.

## 2. New “REC”koning.

A key part of the Phase I assessment involves the identification of “Recognized Environmental Conditions” often short-handed to “RECs.” We want to emphasize here that many “non-scope” issues are often identified in Phase I assessments that are not RECs and users of the reports should pay close attention to those. RECs are not necessarily the only important issues addressed in Phase Is. But, as to RECs, the revised definition in the standard provides more latitude for an environmental

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consultant to specify when a REC exists due to the “likely” but not certain presence of a release of contamination. The new REC definition provides this discussion on the meaning of “likely” in this context: “likely” is that 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 therein. The new standard also revises the definitions of the key terms “historical recognized environmental condition” and “controlled recognized environmental condition.” Though the revisions are mostly technical in nature, there is now very specific guidance to environmental consultants as to what regulatory factors must exist to support designating a controlled recognized environmental condition.

### **3. Expanded Historical Records Review.**

The prior E1527-13 standard vested the environmental professional (consultant) with a significant judgment call as to when sufficient historical records had been reviewed to determine whether past uses of the subject or adjacent properties would help identify RECs. In evaluating prior Phase Is, the committee advising ASTM had found that environmental consultants would sometimes be less thorough in reviewing historical records, perhaps due to pressing timelines from clients or other reasons. In enacting the new standard, ASTM now mandates a minimal level of records to be reviewed, including aerial photos, fire insurance maps, city directories, and topographic maps. For industrial, manufacturing, and now retail (see next point below) properties, four additional sources must be reviewed including building department, property tax, and zoning records, along with interviews with persons familiar with historic uses of the subject and adjacent properties. Importantly, the new standard requires that the mandated records information sources be reviewed not only for the subject property, but also for adjacent properties. These mandates will likely increase, particularly in denser areas, the cost and length of time to complete Phase I assessments in denser areas.

### **4. User’s Review of Title Records.**

Both the new and former Phase I standards impose upon the user of the assessment the obligation to search title records for environmental liens and activity and use limitations. The user of the assessment, in our experience, often directs real estate or environmental counsel to provide its review of title records to the environmental consultant. Under the new standard, it is now clarified that, when records other than preliminary title reports or title commitments are reviewed by the user to satisfy this requirement, such review must involve records (including potentially title abstracts, “conditions of title” reports, or specialized environmental lien reports) going back in time to at least 1980.

### **5. Retail As An Environmental Risk.**

The new standard now expressly recognizes that prior historical retail use of both subject and adjacent properties may be just as revealing of contamination issues as prior industrial or manufacturing uses. This addition is primarily driven by pervasive contamination caused by establishments that dry-cleaned materials on site. Remediating such contamination has been, in some instances, just as expensive and time-consuming as the cleanup of contamination from industrial and manufacturing properties, in part because dry-cleaning solvents very easily move through solid substrates like concrete, dive quickly through many soil types, and are not easily removed from tainted groundwater. In states with stringent standards like California, dry cleaning-related contamination is also a source of concern for human health (and accordingly potential toxic tort liability) due to intrusion into buildings of vapors off-gassing from soil and water contaminated

with dry cleaning solvents. Through the expanded historical records research now required for retail properties (discussed under #3 above), implementation of the new standard will more likely reveal former dry cleaning uses in the subject and adjacent properties.

## 6. Two PFAS Compounds To Enter Phase I Territory.

As indicated in the PFAS update [New State and Federal PFAS Regulation](#), EPA has formally submitted to the White House Office of Management and Budget its plan to designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The effect of a final rule to make PFOA and PFOS CERCLA hazardous substances would have the effect of including their presence or likely presence at a property as potential RECs. Currently, without this designation under CERCLA, the presence of PFOA and PFOS are technically outside the ambit of a Phase I assessment. Depending on the the current and historical uses and location of property, prospective purchasers or lessees may want to ask their environmental consultants to add evaluation of PFAS to its scope when ordering a Phase I assessment.

In addition to these fundamental changes to the standard, there are numerous that we do not address in detail here. For instance, recognizing that some readers of Phase I assessments do not read the entire report from cover to cover, the new standard now requires additional information in the report's section on findings and opinions. Another practical and useful improvement requires an assessment to more clearly set out its expiration date.

Looking forward in 2022, we can expect that Phase I assessments will become more costly and more time-consuming. With the additional complexity of the new standard, especially for users seeking federal and state liability protections, it is now even more to have a competent environmental lawyer review Phase I assessments for buyers and lessees prior to the close of the transaction to ensure that the Phase I assessment qualifies that party for legal protections.

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