

ASTM E1527-21 PHASE I STANDARD SUMMARY OF CHANGES

Minnesota State Bar Association - Environmental Law Update

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Jeri Massengill, Historical Information Gatherers



DISCLAIMERS AND CONFESSIONS

- ▶ I am not an attorney!
- ▶ I was the ASTM E50.02 subcommittee chair for 6 years, until early 2022.
- ▶ I am a former Environmental Consultant (a “Producer”), a former “User” and now a “Producer” again.
- ▶ I worked extensively on the E1527-21 Historical Records Review section (8.3) as a part of the Historical Focus Group.

End User: Entity that will use and rely on the Phase I ESA Report.

Producer: Person or entity that creates the product or service that is the subject of the standard.

Attorneys are typically classified as Users for ASTM voting purposes.



ASTM STANDARD LIFE – 8 YEARS

- ▶ ASTM Standards must be reviewed and re-balloted on an 8 year cycle.
- ▶ The ASTM process requires consensus among Users and Producers to agree on a consistent process that is expected to result in a consistent deliverable.
- ▶ Current E1527-21 version was published in December 2021 after 3 years of work by the Task Group.



EI 527 TASK GROUP RESPONSIBILITIES AND GOAL

Federal law requires that All Appropriate Inquiries be conducted “*consistent with good commercial and customary practice*”. US EPA recognizes EI527 as a process that is consistent with meeting the goals of AAI.

Goal - Clarify the Standard and Strengthen the Deliverable

- Attorneys on the Task Group reviewed litigation and claims to provide insight for areas where the standard can be improved.
- Through discussions and Task Group polls, we identified inconsistencies in process and quality that inform us about sections of the standard that may need clarification or improvement.

NEW DEFINITION FOR CREC

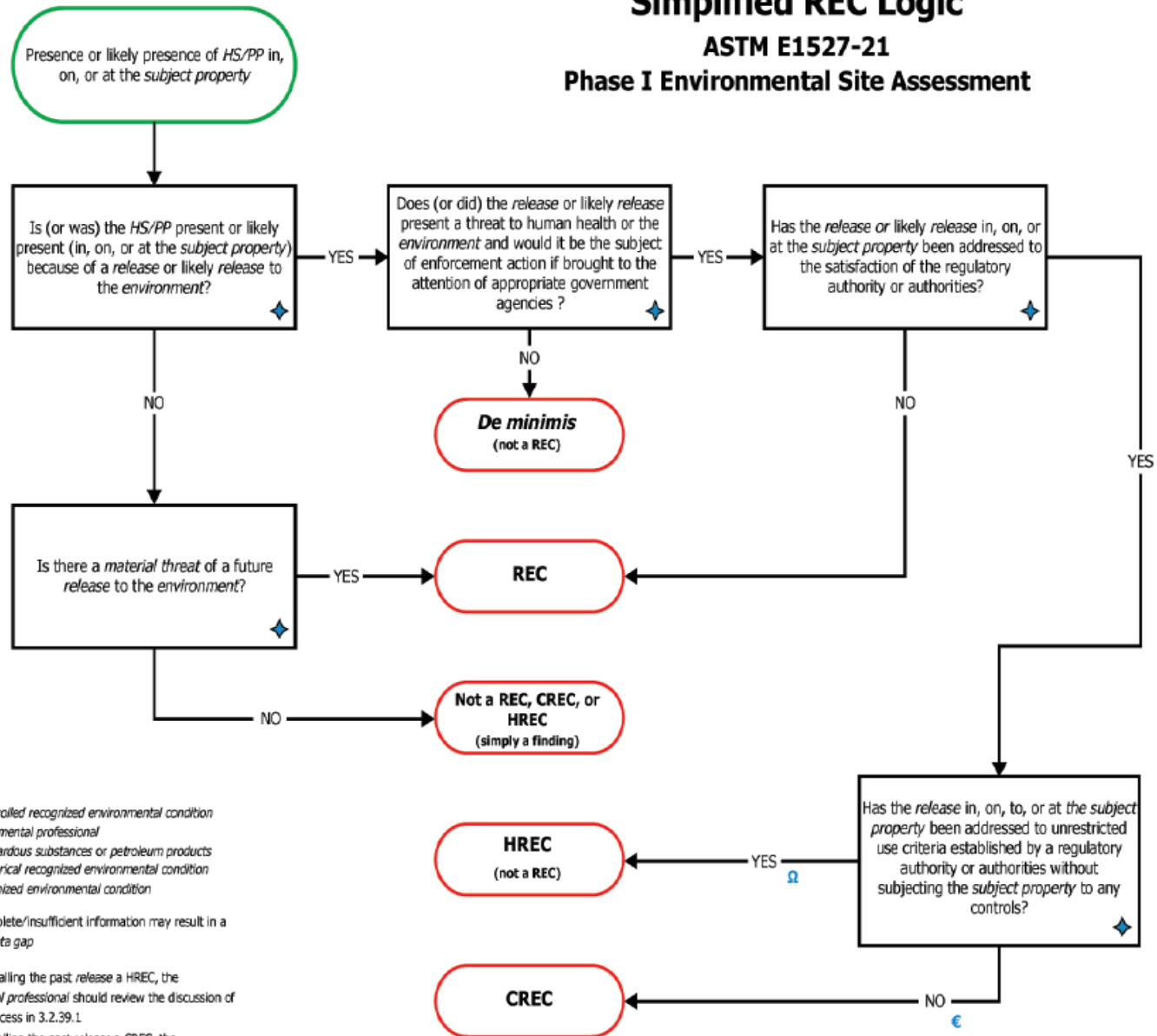
- ▶ 3.2.17 *controlled recognized environmental condition, n—recognized environmental condition affecting the subject property that has been addressed to the satisfaction of the applicable regulatory authority or authorities with *hazardous substances* or *petroleum products* allowed to remain in place subject to implementation of required controls (for example, *activity and use limitations* or *other property use limitations*). For examples of *controlled recognized environmental conditions*, see Appendix X4.*

NEW DEFINITION FOR HREC

3.2.39 *historical recognized environmental condition, n*—a previous release of hazardous substances or petroleum products affecting the subject property that has been addressed to the satisfaction of the applicable regulatory authority or authorities and meeting unrestricted use criteria established by the applicable regulatory authority or authorities without subjecting the *subject property* to any controls (for example, *activity and use limitations* or other *property use limitations*). A *historical recognized environmental condition* is not a *recognized environmental condition*. For examples of *historical recognized environmental conditions*, see Appendix X4.

Appendix X4.2 REC Logic Diagram

Simplified REC Logic ASTM E1527-21 Phase I Environmental Site Assessment



NOTES:

CREC – controlled recognized environmental condition
 EP – environmental professional
 HS/PP – hazardous substances or petroleum products
 HREC – historical recognized environmental condition
 REC – recognized environmental condition

◆ – incomplete/insufficient information may result in a significant data gap

Ω – Before calling the past release a HREC, the environmental professional should review the discussion of the HREC process in 3.2.39.1

€ – Before calling the past release a CREC, the environmental professional should review the discussion of the CREC, process in 3.2.17.1

SIGNIFICANT DATA GAP – NEW DEFINITION

This new definition is intended to clarify if data failure during historic research impedes the EP's ability to complete and achieve the objective of identifying RECs.

- ▶ 3.2.78 *significant data gap, n*—a *data gap* that affects the ability of the *environmental professional* to identify a *recognized environmental condition*. See 12.6.2.
- ▶ 12.6.2 If a *significant data gap* is identified, the *environmental professional* shall comment in the Opinion section of the *report* how the missing information that caused the *significant data gap* affects the *environmental professional's* ability to provide an opinion as to whether the inquiry has identified conditions indicative of *releases* or threatened *releases* in, on, or at the *subject property*. If there is a *significant data gap*, then the *environmental professional* should discuss whether additional information would likely assist the *environmental professional* in determining whether a *recognized environmental condition* or *controlled recognized environmental condition* exists (see 12.8). This comment is not intended to constitute a requirement that the *environmental professional* include any recommendations for additional inquiries or other services.

HISTORICAL RESEARCH CHANGES

- ▶ The prior versions of E1527 discussed historical research for the “surrounding area,” but there was no specific instruction or guidance about researching adjoining properties. A big challenge for the Task Group was reaching consensus on what is “good commercial and customary practice” for researching historical sources for adjoining properties.
- ▶ The revised standard now requires review of the “Big 4” historical resources for the subject property and adjoining properties. The Big 4 are historical aerial photographs, fire insurance maps, city directories and topographic maps. Other resources that may be needed to complete the historical picture include interviews, local building records, internet search, etc.

REVISIONS TO CONCLUSIONS

12.7 *Conclusions*—The *report* shall include a Conclusions section that lists all *recognized environmental conditions* (including *controlled recognized environmental conditions*) and *significant data gaps* connected with the *subject property*. The *report* shall include a statement substantially similar to one of the following statements:

12.7.1 “We have performed a *Phase I Environmental Site Assessment* in conformance with the scope and limitations of ASTM Practice E1527-21 of [insert address or legal description], the *subject property*. Any exceptions to, or deletions from, this practice are described in Section [] of this *report*. This assessment has revealed no *recognized environmental conditions*, *controlled recognized environmental conditions*, or *significant data gaps* in connection with the *subject property*.” or

12.7.2 “We have performed a *Phase I Environmental Site Assessment* in conformance with the scope and limitations of ASTM Practice E1527-21 of [insert address or legal description], the *subject property*. Any exceptions to, or deletions from, this practice are described in Section [] of this *report*. This assessment has revealed the following *recognized environmental conditions*, *controlled recognized environmental conditions*, and/or *significant data gaps* in connection with the *subject property*.” (list).

CONCLUSION AND OPINIONS SECTION CHANGES

Must include rationale for HREC or CREC determination in “Opinions” section of the report.

Detailed discussion about how significant data gaps affect the EP’s opinion may be required.

ADDITIONAL CHANGES

- ▶ The term Subject Property now used consistently to refer to the property being assessed.
- ▶ User responsibility to search for Environmental Liens and Activity Use Limitations was clarified - title research must extend back to at least 1980.
- ▶ Site visit photographs are now required!



NON-SCOPE: PFAS AND OTHER EMERGING CONTAMINANTS

At the time of E1527-21 publication, PFAS/PFOS and other emerging contaminants were not CERCLA defined hazardous substances.

Once an emerging contaminant is defined to be a hazardous substance under CERCLA, as interpreted by EPA regulations and the courts, the substance must be evaluated within the scope of E1527. However, if state or local agencies regulate PFAS/PFOS, there may be state or local requirements that the user will want to include in the Phase I ESA scope.

Appendix X6.10: *Substances Not Defined as Hazardous Substances*—As defined in 3.2.36 of this practice, *hazardous substance* means “those substances defined as a *hazardous substance* pursuant to CERCLA 42 U.S.C. § 9601(14), as interpreted by EPA regulations and the courts.” There are some substances that non-*environmental professionals* and others may assume to be *hazardous substances* that are not defined (or not yet defined) as *hazardous substances* under CERCLA through interpretation by EPA regulations and the courts. These substances may include: (1) some substances that occur naturally or through biological digestion (for example, methane), and (2) substances about which human understanding is evolving (for example, per- and polyfluoroalkyl substances, also known as “PFAS”). These and any other “emerging contaminants,” where they are not identified as a *hazardous substance* by CERCLA, as interpreted by EPA regulations and the courts, are not included in the scope of this practice. Some of these substances may be considered a “*hazardous substance*” (or equivalent) under applicable state laws. In those instances, where a *Phase I Environmental Site Assessment* is performed to satisfy both federal and state requirements, or as directed by the *user* of the *report*, it is permissible to include analysis and/or discussion of these substances in the same manner as any other Non-Scope Consideration. If and when such emerging contaminants are defined to be a *hazardous substance* under CERCLA, as interpreted by EPA regulations and the courts, such substances shall be evaluated within the scope of this practice.

TIMELINE FOR US EPA CITATION OF EI527-21

- ▶ EI527-21 was approved by ASTM and published in December 2021.
- ▶ EPA issued a direct final rule proposing to recognize the 2021 version of EI527 as meeting the requirements of All Appropriate Inquiry (AAI). EPA had to withdraw it because they received negative comments requesting EPA recommend or require that only the most recent version of EI527 be used moving forward.

Questions Remain:

- ▶ Will the EPA revise the ruling to allow or recommend only the most recent version of EI527 to be compliant with AAI moving forward?
- ▶ How will the CRE industry respond if two versions of the EI527 standard are deemed compliant with AAI?



AN ASIDE...E1528-21 TRANSACTION SCREEN

- ▶ **Complete overhaul of the Transaction Screen questionnaire**

The features and uses from each previous question are now listed separately and presented in a checklist-style format to be clearer and more logical. The task group removed the option to answer “unknown” in order to arrive at more accurate responses.

- ▶ **Reformatting of the Guide to be more instructive**

The main ‘how-to’ guide portion of the Transaction Screen has been revised and expanded to include more description which closely follows the revised questionnaire. The changes are intended to help all parties better understand the requirements and correctly answer the questions.

- ▶ **New requirement for inclusion of supporting documentation**

THANK YOU FOR YOUR TIME!

Jeri Massengill

Historical Information Gatherers

jerim@historicalinfo.com

952-253-2004

www.historicalinfo.com

