



Revisions to Environmental Site Assessment Requirements to Impact Real Property Transactions

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Andrew Cooper and Robert Conrad

In a long-awaited development that will have a significant impact on owners, buyers, sellers, lenders, borrowers, and others involved with real property, ASTM International's Environmental Assessment, Risk Management and Corrective Action Committee has revised its standard practice for Phase I Environmental Site Assessments (ESAs). The Phase I is the cornerstone of the environmental due diligence process related to properties and is part of the "all appropriate inquiries" process that must be conducted in order to obtain certain protections from liability under the federal Superfund law (aka CERCLA). See [40 CFR Part 312](#).

Overview

The original ASTM standard in this area was published in 1993 to define "good commercial and customary practice" for conducting ESAs. This latest revision was approved on November 1, and reportedly "represents over three years of ongoing collaboration and consensus-building by more than 150 industry professionals."

Environmental consultants are not required to use the revised standard for "all appropriate inquiries" purposes until the United States Environmental Protection Agency adopts it through a formal rulemaking process that could take significant time.

The most important changes to the standard all involve clarifications to areas of potential or ongoing confusion in performing and drafting Phase I ESAs, with an aim toward providing greater consistency of results. These changes include:

- Improving the explanations for the key terms "Recognized Environmental Condition" (REC), "Controlled Recognized Environmental Condition" (CREC), and "Historical Recognized Environmental Condition" (HREC). The aim of doing so is to reduce misclassifications of known or likely releases. A new appendix provides guidance on how to distinguish between and among RECs/CRECs/HRECs and provides a flow chart and examples.
- Providing formal definitions for "Property Use Limitation" (PUL) and "Significant data gap," two terms that have been seeing use (albeit without agreed-upon consistent meaning) in Phase I ESAs. "Property Use Restrictions" had seen use in Phase I reports; as an undefined term, it was giving rise to some confusion and inconsistency.
- Providing a new standard for review of historical records for a property, which is meant to reflect good commercial and customary practice in this area, including how to use standard historical sources.
- Standardizing site reconnaissance requirements, with more details provided in the new standard.
- Updating appendices to address business environmental risks, including the important topic of emerging contaminants.

Implications

As to the treatment of emerging contaminants on site (or threatened), the most significant concern raised by the new revisions is likely to be a change in the way the presence of PFAS, or "Forever Chemicals" will be considered. As an emerging contaminant that has not yet been subjected to the looming federal

regulations, PFAS has been something of a wild card in Phase I ESAs; the updated standard will change that.

While the aim of the new revisions is to produce a stronger, more detailed, and more consistent deliverable, they may come with a higher price tag for reports. In order to mitigate these costs and make sure that the Phase I ESA meets all necessary requirements for all stakeholders of a piece of property, it is imperative to engage a trusted environmental attorney and consultant, who is up to date on these changes and can ensure that Phase I reports are prepared correctly the first time.

“The latest revisions reflect a remarkable compilation of inputs from across industry, including a diverse group of users, providers, and other interests,” said Julie Kilgore, Chair of the standard’s task group. “This input reflects professional insights, project experiences, and challenges with previous versions of the standard.”

For More Information

Involving an experienced environmental transactional attorney can save time and money. Our team is available to provide you with strategic advice about how the new ASTM requirements may impact your business. Please contact [Andrew Cooper](#) for more information.

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