

The ASTM Phase I Update – Why You Should Care

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TO
STEP
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How it all began

- ▶ Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund) 42 USC §9601 et seq.
 - Current Owners
 - Current Operators
 - Past Owners
 - Past Operators
 - ~ Lenders

Relief - Due Diligence

- ▶ Why Due Diligence?
 - 1986 - Innocent Landowner Defense (§9601(35(A)))
 - 2002 - Bona Fide Purchaser Defense (§9601(40))
 - 2002 - Adjacent Landowner Defense (§9607(q))
 - Establish a Baseline
 - Required by Lenders

- ▶ Due Diligence Must Include “All Appropriate Inquiries” (40 CFR part 312)

- ▶ ASTM E 1527 Satisfies AAI

Innocent Owner Defense

- ▶ Purchaser Unknowingly Buys Contaminated Property
- ▶ Threshold Criteria
 - “All Appropriate Inquiry” Made Before Purchase and *No Knowledge of or Reason to Know* of Contamination
 - No Affiliation with Liable Party

Bona Fide Prospective Purchaser

- ▶ Prospective Purchaser (or Tenant) Knows About the Contamination
- ▶ Threshold Criteria
 - “All Appropriate Inquiry” Before Purchase
 - Property Purchased After January 11, 2002
 - No Affiliation with Liable Party
 - All Contamination Occurs Prior To Purchase

Contiguous Property Owner

- ▶ Contamination Migrated Onto Property
- ▶ Threshold Criteria
 - “All Appropriate Inquiry” Made Before Purchase and *No Knowledge of or Reason to Know* of Migration
 - Not Affiliated with a Liable Party
- ▶ A Note About Texas

Due Care Obligations

- ▶ Comply with Land Use Restrictions and Institutional Controls, *even if not in place when purchased*
- ▶ Cooperation, Access, and Assistance to Responders
- ▶ Supply Requested Information
- ▶ Comply with Legally Required Notices Regarding Releases of Hazardous Substances at the Property
- ▶ **Take “Reasonable Steps” to Stop Continuing Releases, Prevent Threatened Releases, and Prevent or Limit Exposure to Releases**



All Appropriate Inquiry A Texas Perspective

▶ Texas Health & Safety Code § 361.275

To demonstrate that at the time the defendant acquired the facility the defendant did not know and had no reason to know that a hazardous substance that is the subject of the release or threatened release was disposed of on, in, or at the facility, the defendant must have made, at the time of acquisition, appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. In deciding whether the defendant meets this condition, the court shall consider:

- ▶ (1) any specialized knowledge or experience of the defendant;
- ▶ (2) the relationship of the purchase price to the value of the property if the property were uncontaminated;
- ▶ (3) commonly known or reasonably ascertainable information about the property;
- ▶ (4) the obvious presence or likely presence of contamination of the property; and
- ▶ (5) the defendant's ability to detect the contamination by appropriate inspection.

All Appropriate Inquiry (Phase I Environmental Site Assessment)

- ▶ Pre-May 31, 1997 – industry standard
- ▶ ASTM E1527 – for properties purchased after May 31, 1997
- ▶ ASTM E1527-05
- ▶ ASTM E1527-13
 - EPA adopted Dec. 30, 2013 (40 CFR §312.11)

ASTM Update

- ▶ ASTM E1527-21 (approved by ASTM Nov. 1, 2021)
 - EPA approval Dec. 15, 2022 – 40 CFR 312.11

OR

- Can use the old standard until Feb. 13, 2024
- ▶ So why do we care?

- ▶ Side note: ASTM E2247-16 for Forestland or Rural Property

ASTM 1527-21

Purpose for Revision

- Clarify and Improve Existing Language
- Update the standard to reflect current customary practice
- Strengthen deliverable

ASTM 1527-21

- Clearer Definition of REC
- Definition of “likely”
 - “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”

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- “Subject Property”
- “Significant Data Gap”
 - Need to include a discussion of how the Significant Data Gap affected the EP’s ability to make conclusions.

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- Historical Sources (minimum requirement)
 1. Aerials
 2. Fire insurance maps
 3. Local street directories
 4. Topo maps

- Subject property and adjoining properties

- If any of these is not available, EP shall indicate in the report why not.

Subject Property Map ???



X5.12.1 Figures—Subject property figures should encompass the entire subject property. The site plan should include a **north arrow, approximate scale, all major structures, and occupants/business names or land uses** on the subject property **and** adjoining properties. The site plan should include locations of features, activities, uses, and conditions such as above underground storage tanks, sumps, clarifiers, floordrains/trenches, wells, chemical storage areas, disposal areas, marked pipelines, significant staining, and other features of potential environmental concern.

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- Expiration date
 - 180 days prior to the date of acquisition (counting from completion of the first of each component); or
 - Up to one year if updated (interviews, lien search, records review, site visit, new signature /declaration)
 - Need to include date each component was completed.

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- HREC vs CREC vs REC
 - EP must look at closure documents

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PFAS – non-scope for now

Check if outside Texas

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- Title Search for Environmental Liens and AULs
 - **USER** does this – not the EP
 - Unless AULs are reasonably ascertainable in records search (varies by state)
- The EP only needs to identify whether they received land title records from the user and whether the user identified AULs or environmental liens

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Recommendations?

- A “recommendation that provides a specific course of action is outside the scope” of a Phase I.
- Better - Additional Investigation Section: “A statement that additional investigation may be appropriate”
- This is NOT a recommendation.

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Other

Site plan/photographs required

- Photos of RECs and *de minimis* conditions

Follow the report format (Sections 7.2 & 12 and

Appendix X5)

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- Appendix with REC flow chart and examples

Simplified REC Logic

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Phase I Environmental Site Assessment

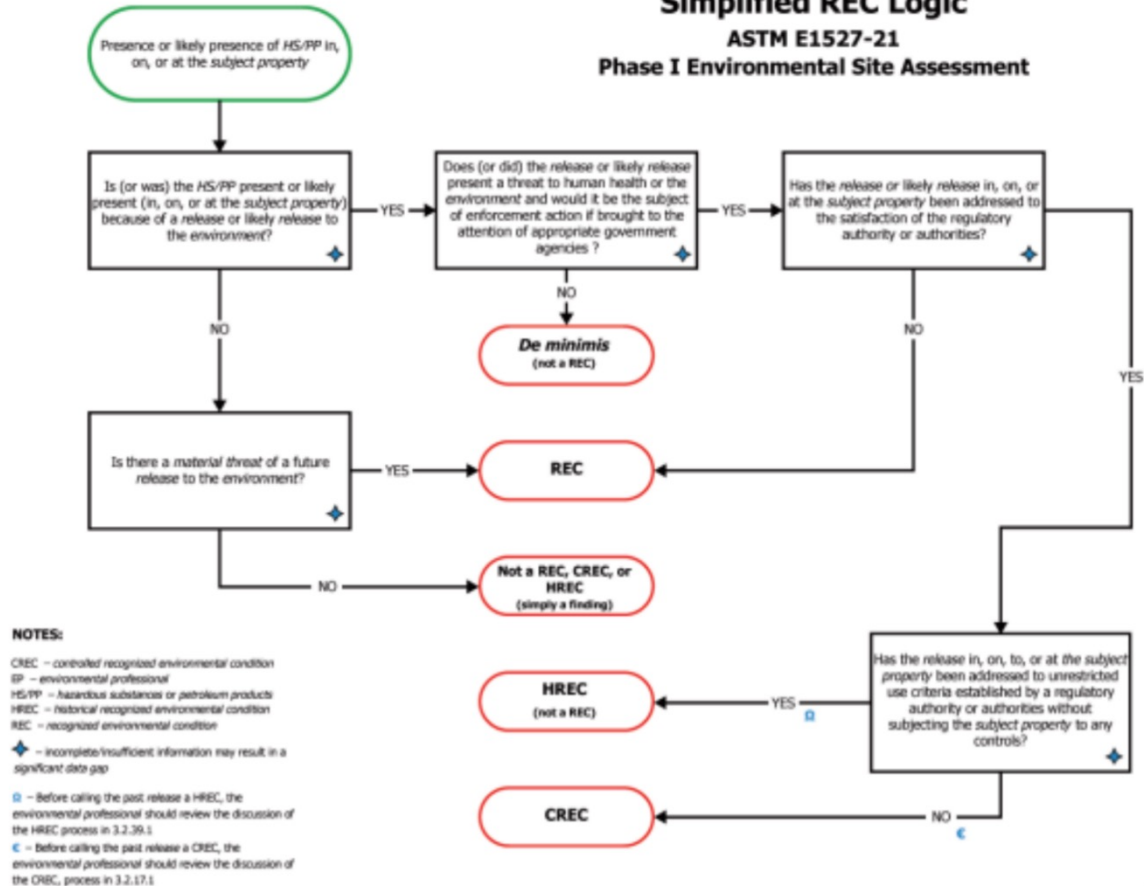


FIG. X4.1 Simplified REC Logic

August 30, 2021

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REC flow chart

“Does (or did) the release or likely release present a threat to human health or the environment and would it be the subject of enforcement action if brought to the attention of appropriate government agencies?”

Hypothetical

- LPST Closed in 2010 on Subject Property (NFA)
 - Surface Soil = EB at 100 ppm
 - 2010 TCEQ Action Level = 160 ppm
 - 2021 TCEQ Action Level = 36.8 ppm

REC or HREC?

Due Diligence Issues



Problem Area

- ▶ Not properly signed by Environmental Professional.
 - *“[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in §312.10 of this part.” “[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.”*

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Biggest Takeaway?

Read it!!!!

Questions?

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