Core Due Diligence:
Phase I Assessment and Transaction Screen

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I. CORE DUE DILIGENCE: PHASE I ASSESSMENT AND "TRANSACTION SCREEN"

The threshold issue of whether there is something to be concerned about is frequently addressed using ASTM Standard Practice E1527-13 for Phase I environmental site assessments. The transaction screen process defined by ASTM E1528-14e1 can be a streamlined and inexpensive alternative for environmental review employing a detailed plan of inquiry that many users can follow themselves.

A. E1527-13: Phase I Environmental A. Site Assessment

In corporate or real estate transactions, ASTM Standard Practice E1527-13 for Phase I Environmental Site Assessments is widely known and familiar to buyers, sellers and financing sources alike, and universally familiar to the environmental engineers and consulting firms who provide assessment services. Its general use and acceptance mean that the term "Phase I" should have the same meaning to all transaction parties. But its very familiarity also leads to some persistent misunderstandings about crucial elements of the assessment process, perhaps most importantly as to the active engagement required of the "User" for whom the assessment is done. Classification of assessment findings can also be a source of confusion. And finally, any Phase I report must be read with due regard for the reality that conclusions often involve some degree of professional technical judgment and therefore must be read critically.

The major objective of an E1527 Phase I is to identify "recognized environmental conditions" – that is, "the presence or likely presence of any hazardous substances or petroleum products in, on, 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."[6] The assessment proceeds under the supervision of an "Environmental Professional" who possesses relevant qualifications and experience.[7]

User Responsibilities: "All Appropriate Inquiry" and Constructive Knowledge

User engagement is crucial to the success of a Phase I assessment, and a significant topic of E1527.

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[6] E1527-13, section 3.2.78. See also ASTM Standard E2247-16, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property," which adapts the basic framework of E1527-13 for use with large tracts of property in the title categories as well as managed forestland or agricultural property. "Recognized Environmental Conditions" is abbreviated "REC." Note that in ASTM style, italics denote terms defined within a standard. This paper does not observe this convention either in text or in quotations from ASTM standards. The terms "User" and "Producer" are capitalized because of their structural significance in the ASTM consensus-based standards development system. Defined terms are discussed, as appropriate, in the text.

[7] E1527-13, section 3.2.32 ("a person meeting the education, training, and experience requirements as set forth in 40 C.F.R. §312.10(b)." The C.F.R. cross reference is to the parallel definition of the same term in the federal All Appropriate Inquiry final rule, 40 C.F.R. Part 312, reproduced as Appendix X2 to E1527-13.

As has already been noted, the Phase I assessment process under E1527 is a means of conducting the pre-purchase "all appropriate inquiry" ("AAI") into prior site use that is necessary to qualify for certain CERCLA liability protections.[8] The link to AAI is an important key to understanding the E1527-13 assessment process. For CERCLA purposes, the objective is to enable a prospective purchaser to show that it neither knew nor had reason to know of the presence of a release of hazardous substances (AAI)[9] or hazardous substances and petroleum products (E1527).[10] As such, AAI and E1527 are self-contained and closed-ended. Both expressly provide that they do not require sampling and analysis of environmental media.[11] In other words, while they may serve as predicates for further site assessment activities, they are not by terms meant to do so. Indeed, the ASTM standard expressly notes that the Phase I assessment process does not require recommendations.[12]

The idea that one "neither knew nor had reason to know" corresponds to the common-law concept of constructive notice or constructive knowledge: when knowledge of a fact or risk is a factor in a claim or defense, one may be charged not only with what one actually knows, but also with what one should have known. The "should" may come from inferences based on known facts, or from circumstances giving rise to a duty of inquiry.[13]

Conceptually, AAI is a statutory standard of inquiry necessary to validate lack of actual and constructive knowledge. A prospective purchaser must validate lack of "reason to know" by conducting "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial and customary practice."[14] The federal AAI rule declares an E1527 Phase I an equivalent "inquiry … consistent with good commercial and customary practice."[15] The concept of constructive knowledge is likewise embedded in the portions of the E1527 REC definition that refer to "the presence or likely presence of any hazardous substances

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[8] See above Part I.C.

[9] 42 U.S.C. § 9601(35)(B).

[10] E1527-13, section 1.1.

[11] The AAI rule contains no requirement for field investigation. In promulgating the rule, EPA made clear that the omission was deliberate, expressly stating that the rule "does not require sampling and analysis as part of the all appropriate inquiries investigation." At the same time, EPA hedged by observing that a court could employ one of the statutory criteria – the "degree of obviousness" of contamination – to conclude that a party claiming to have conducted AAI should have undertaken some sampling and analysis. 70 Fed. Reg. 66,070 (AAI Rule preamble), at 66,101 (Nov. 1, 2005); 42 U.S.C. §9601(35)(B)(iii)(X). The ASTM standard expressly and unqualifiedly disclaims any field investigation requirement. E1527-13, section 7.4.

[12] E1527-13, section 12.15. The same section also notes that the User may desire to ask for recommendations as an additional service or out-of-scope task to assist in evaluating liability exposure, defenses, or business environmental risk.

[13] Restatement (Second) Torts (1965) §12.

[14] 42 U.S.C. §9601(35)(B).

[15] 40 C.F.R. §312.11. EPA's endorsement of E1527 as an AAI alternative originated with the promulgation of the original AAI rule in 2005, at which time the reference in the federal regulation was to the 2005 revision of the ASTM standard then in effect. Following issuance of E1527-13, EPA first added it to the regulation and then, after a one-year transition period, deleted the 2005 version. See 78 Fed. Reg. 79,319 (Dec. 30, 2013) at 79,324 (adding reference to E1527-13); 79 Fed. Reg. 60,087 (Oct. 6, 2014), at 60,090 (deleting reference to E1527-13).

or petroleum products in, on, or at a property … under conditions indicative of a release to the environment." Identification of a REC means available information provides constructive notice of ("likely," "indicative of") a release. E1527-13 is a relatively specific set of instructions as to how to go about the required inquiry, whereas the AAI rule tends more in the direction of listing topics of inquiry and judging compliance by open-ended "performance standards" about information gathering and review of information to evaluate completeness and reliability. Nevertheless, the current version of the ASTM standard, as revised in 2013, integrates more of the general AAI concepts and makes it less of a "cookbook" or checklist.

It is also important to understand the limitations of making inquiries that meet this standard. Investigation sufficient to satisfy AAI may identify no "reason to know" in the sense that it reveals no REC within the E1527 definition. But that does not mean all possibility of a release has been ruled out.[16] It only means available information does not rise to the level of constructive notice.

The concept of constructive notice explains why the E1527 Phase I assessment process focuses largely on information gathering, including record review, site reconnaissance, and interviews with past and present owners, operators and occupants, followed by evaluation and a written report.[17] The concept of constructive notice is also crucial to understanding the responsibility of the User in the assessment process. Although environmental consultants are essential, the User must take an active role. Failing to do so can compromise eligibility for CERCLA liability protections, and even if CERCLA liability concerns are not the primary focus of an assessment, the User's participation is important in assuring that assessment conclusions are sound and the assessment process delivers the desired due diligence value.

The User's responsibilities are detailed in Section 6 of E1527, and expressly track "tasks [the AAI Rule requires] to be performed by or on behalf of a party seeking to qualify for" CERCLA liability protections.[18] These responsibilities fall into three principal areas:

- **Review of Title and Judicial Records for Environmental Liens and Activity and Use Limitations (AULs).** Liens and AULs are frequently recorded[19] but may not be revealed in a "chain of title" search, so the standard cautions the User to obtain a title report.[20] In jurisdictions where liens and AULs are only filed in judicial

[16] The standard makes this explicit: "No environmental site assessment can wholly eliminate uncertainty regarding the potential for [RECs] in connection with a property." E1527-13, section 4.5.1.

[17] E1527-13, section 7.2 (enumerating components of assessment process).

[18] E1527-13, section 6.1. In the 2013 revision of E1527, Section 6 was extensively amended to parallel the requirements of the AAI rule, 40 C.F.R. Part 312.

[19] For example, under the Uniform Environmental Covenants Act ("UECA") promulgated by the Uniform Law Commission (ULC) and adopted by twenty-five states and the U.S. Virgin Islands. See the ULC website for information on UECA (visited December 26, 2018).

[20] E1527-13, section 6.2. Appropriate reports, typically provided by title insurers, include Preliminary Title Reports, Title Commitments, Condition of Title or Title Abstract.

records, those records must be searched directly.[21] The User is advised to engage a title company, real estate attorney or title professional or incorporate such an engagement in the environmental consultant's scope of work.[22] (These requirements dovetail with another provision requiring the environmental professional to search engineered control registries.[23])

- **User's Sophistication and Knowledge.** The Standard expressly requires the User to contribute information based on its specialized knowledge and experience[24] and actual knowledge.[25] These factors clearly reflect the constructive-notice roots of the assessment process: a User with specialized knowledge or experience material to possible RECs, or with actual knowledge of liens or AULs, obviously will be charged with possession of such information, and therefore is responsible for conveying it to the environmental professional conducting the assessment. Similarly, the Standard requires the User to advise the professional if the User believes the purchase price is lower than fair market value due to known or suspected contamination.[26]

- **Commonly Known or Reasonably Ascertainable Information.** Perhaps the most amorphous and open-ended category relates to information about the property that is "commonly known or reasonably ascertainable within the local community" and material to the possible existence of RECs.[27] The Standard requires the User to "gather such information to the extent necessary to identify" RECs. [28] A related concept is that the User is charged with considering the "degree of obviousness" of possible RECs.[29]

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[21] E1527-13, section 6.2. As a general proposition, searches of judicial records are problematic. The standard specifies in Section 6.2.1 that liens and AULs filed in locations other than land records are considered not "reasonably ascertainable" unless local statutes or regulations designate a specific location for recording or filing. This distinction might or might not be viable on a constructive-notice analysis since judicial records are technically public. But judicially-endorsed use liens or restrictions are unlikely to have been imposed without some proceeding, so other materials disclosed by the assessment process would almost certainly provide clear clues as to their existence and where they would be found.

[22] E1527-13, section 6.2.

[23] E1527-13, section 8.2.

[24] E1527-13, section 6.3. By statute, this factor is an element of AAI. See 42 U.S.C. §9601(35)(b)(iii)(VII).

[25] E1527-13, section 6.4.

[26] E1527-13, section 6.5. Again a statutory element of AAI. See 42 U.S.C. §9601(35)(b)(iii)(VIII).

[27] E1527-13, section 6.6. Again a statutory element of AAI. See 42 U.S.C. §9601(35)(b)(iii)(X).

[28] E1527-13, section 6.6. In the parallel provision of the AAI rule, this responsibility is shared with the environmental professional and calls for inquiry of sources as varied as current owners and occupants of neighboring properties, local and state government officials, others with knowledge, and "other sources of information" including newspapers, web sites, community organizations local libraries and historical societies. 40 C.F.R. § 312.30(c). These requirements are plainly rooted in the concept of constructive notice.

[29] E1527-1527-13 Section 6.7. Again a statutory element of AAI. See 42 U.S.C. §9601(35)(b)(iii)(X).

Getting Users to engage with these responsibilities can be a challenge in Phase I assessment practice. Even when the assessment is performed for a current owner who has knowledge and access to information about the property, the owner may simply be uncooperative; it then falls to the environmental professional or attorney to reinforce the importance of participation and the risk to the integrity of the assessment (and CERCLA liability protections) if the owner's actual knowledge is not taken into account. A more common challenge arises when the User is a lender or purchaser new to the property. In that situation, it is crucial to keep in mind that the required inquiries are to be made "by or on behalf of" the User. The lender or prospective purchaser commissioning a Phase I assessment must therefore specify in the engagement that the environmental professional's scope of work includes developing the information required by Section 6 from sources other than the User.

As the noted cross-references to the AAI rule reflect, many of these topics correspond to the statutory list of ten categories of information and evaluation that constitute "appropriate inquiry."[30] The ASTM standard is explicit that active engagement is required of the "User." The AAI rule more pointedly states that it is required of the "defendant" for the liability protections to prevail.

Classification of Assessment Findings: REC, HREC, CREC and "de minimis" conditions.

While the overall objective of Phase I assessment under E1527-13 is to identify RECs, as defined above, a Phase I report may also assign releases to one of three other categories – "historical recognized environmental condition" (HREC), "controlled recognized environmental condition" (CREC), or "de minimis" condition. The assessment "findings" must list conditions falling within any of these categories.[31] It is important to understand the distinctions among them, which are still often misunderstood, but which convey important information about the risk posed by known contamination conditions at a property.

The easiest distinction is between the REC and the "de minimis" condition. The hallmark of the latter has always been, and remains, that it applies to any condition too minor to present meaningful environmental danger or give rise to regulatory consequences – that is, that "generally does not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies." The two categories are expressly defined as mutually exclusive – a de minimis condition is not a REC.[32]

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[30] 42 USC §9601(35) (inquiry by environmental professional; interviews to gain information regarding potential for contamination; review of historical information re property use since development; search of recorded cleanup liens; review regulatory records re hazardous materials and waste, spills at/near facility; visual inspection, specialized knowledge of "defendant"; purchase price vs. value if uncontaminated; commonly known or reasonably ascertainable information; degree of obviousness of presence or likely presence of contamination, ability to detect with appropriate investigation).

[31] E1527-13, section 12.5.

[32] E1527-13, section 3.2.22. The de minimis definition appeared in E1527-05 as part of the REC definition; the 2013 revision made it a free standing definition.

The HREC category dates to the 2005 revision of E1527, which defined it as a condition "which in the past would have been considered a [REC] but which may or may not be considered a [REC] currently" depending on whether the condition had been "remediated, with such remediation accepted by the responsible regulatory agency."[33] This approach proved highly problematic in practice. Most significantly, not all environmental conditions that fall short of full remediation with regulatory approval require further action. Particularly with the widespread adoption of risk-based compliance strategies, contaminated soil or groundwater can often remain in place, often in conjunction with institutional and engineered controls or use limitations, and in many cases such closure strategies can be implemented without formal regulatory action. In many such scenarios, however, impacted media can remain in place only if property is used in accordance with restrictions (e.g. no residential use, no use of groundwater for human consumption) or if engineered controls are maintained (e.g. pavement or engineered barriers or active or passive vapor control measures).

With the emergence of such compliance alternatives, the 2005 HREC definition increasingly led to inconsistent treatment of situations where residual contamination was allowed to remain in place. For a site closed under an institutional control, for example, environmental professionals could literally apply any of the three available labels – "de minimis" because the condition would not attract regulatory attention, "HREC" because the condition used to be a REC but no longer is, and REC because hazardous substances are present … as a result of a release." The latter view also diluted the utility of the HREC definition, which should apply where a former REC had been fully remediated to a "no further action" level and therefore poses no ongoing concern.

The 2013 revision of E1527 sought to resolve this problem with the new term, "controlled recognized environmental condition" or "CREC," which applies to a REC that has been "addressed to the satisfaction of the applicable regulatory authority … with hazardous substances or petroleum products allowed to remain in place subject to the implementation of required controls."[34] In this situation, a release has occurred and residual contamination has been left in place, thus satisfying the "presence" element of the REC definition, but is subject to some form of control that obviates the need for further action *as long as* the control is maintained. The definition further makes clear that the "control" may result from formal administrative action such as a "no further action" notice, but may also be defined by regulatory risk-based criteria.[35]

This definition provides a clear pigeonhole for appropriate sites and minimizes the potential for confusion about the REC, HREC and de minimis categories. Most importantly, however, it highlights situations where "compliance" depends on future observance of controls or restrictions. A Phase I report that classifies a condition as a CREC should provide notice of the substances released and the criteria and ongoing obligations that justify leaving them in place. This in turn allows transaction parties to determine whether applicable restrictions or control

[33] E1527-05 Section 3.2.42.

[34] E1527-13, section 3.2.18.

[35] E1527-13, section 3.2.18. The definition also notes that "required controls" may include use restrictions, institutional controls or engineering controls.

measures will conflict with intended site use. In these respects, the CREC classification provides significant practical perspective.

It is equally crucial to understand that the "controlled" part of the CREC definition does not mean the residual contamination is "under control" in the sense that it is of no further concern. On the contrary: in the CREC category, the term "controlled" connotes an affirmative obligation or set of obligations that must be fulfilled on an ongoing basis in order to maintain the compliance status of the residual contamination. "Controlled" is an active transitive verb, not a passive adjective.

With the addition of the CREC definition, the 2013 revisions to E1527 also refined the HREC definition. The hallmark of an HREC is that it involves a past release, which without more would be a REC, but that does not require current attention because it "has been addressed to the satisfaction of the applicable regulatory authority or meet[s] unrestricted use criteria ... without subjecting the property to any required controls."[36] This characteristic differentiates the HREC and CREC definitions and makes them mutually exclusive. Both involve a past release that would otherwise be a REC but no longer is – the HREC without ongoing restrictions, the CREC subject to ongoing obligations. The crucial distinction is the "as long as" element of a CREC.

Because both HREC and CREC exist in relation to regulatory standards, the Phase I assessment process must also take into account regulatory changes that may affect compliance status. For example, a regulatory closure based on compliance with cleanup criteria is an HREC if the same criteria are in effect, but a REC if lower criteria have since been adopted and data document exceedances of current criteria. The HREC definition expressly describes this scenario and requires the environmental professional to list a condition as a REC based on criteria in effect at the time of the assessment. The CREC definition does not expressly require this approach, but the same analysis may be in order if the regulatory bar on "adequate" protective measures has moved.

Professional Judgment

In Phase I assessments, it is also critical to understand the exercise of "professional judgment" by the Phase I Environmental Professional.

This issue implicates a subtle nuance of Phase I assessment practice: how much information is required to justify classification of a property condition as a REC, HREC, CREC or de minimis? The AAI rule provides that the "objective" of all appropriate inquiry is to "identify conditions indicative of releases and threatened releases on, at, in or to the subject property."[37] The ASTM standard elaborates on this general concept by stating that a "release" or "threat" may exist "(1) due to any release to the environment [i.e. a known or current release]; (2) under

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[36] E1527-13, section 3.2.42. The "required controls" are the same as those enumerated in the CREC definition (preceding note).

[37] 40 C.F.R. §312.20(e).

conditions indicative of a release to the environment [i.e. a suspected or past release]; or (3) under conditions that pose a material threat of a future release to the environment."

These concepts could be construed in terms of the burden of proof or quantum of evidence needed to justify a conclusion. But they send mixed signals. A focus on the first part of the E1527-13 REC definition suggests a need for tangible indications that hazardous substances are "present or likely present," whereas the "conditions indicative" clause suggests a lower threshold tending more in the direction of suspicion.

In two crucial respects, the standard clarifies these signals by specifying that professional judgment must be exercised in evaluating facts and drawing conclusions. The first is that the environmental professional "shall, based on professional judgment, evaluate the relevant lines of evidence obtained as a part of the Phase I ESA process [i.e. records review, site reconnaissance, interviews, etc.] to identify recognized environmental conditions in connection with the property."[38] The second relates specifically to review of historical property use information, and provides that the environmental professional "shall exercise professional judgment and consider the possible releases that might have occurred at a property in light of the historical uses and, in concert with other relevant information gathered as part of the Phase I process, use this information to assist in identifying recognized environmental concerns."[39]

Professional judgment is thus integral to the Phase I assessment process. While the standard does not define "professional judgment," it may be regarded as a matter of drawing inferences from known facts or connecting the dots among them.[40] The importance of this approach is apparent in light of the AAI roots of Phase I assessment and their relation to liability protections and constructive notice. In plain words, a fair implication of a release can't safely be ignored. In an adversarial context, a governmental regulator or private party has a powerful incentive to argue that available information pointed to a problem. The price of a "clean" Phase I could be loss of the very defense the Phase I process is intended to support.

Adequate exercise of professional judgment obviously depends on robust compliance with all the other information-gathering elements of a Phase I assessment. The intersection of the two is a classic "garbage in, garbage out" proposition: inferences and interpretations are no better than the information from which they are drawn. The file review element is especially vulnerable to the economic pressures of a marketplace that commoditizes Phase I assessments. Consultants and Users alike can be tempted to rely on database services in lieu of hands-on review of regulatory agency and other public files, but the databases can be wrong, not completely current, or even materially incomplete. Anyone tempted to save a few dollars should keep in mind that the User will be deemed to have constructive notice of the actual contents of public files. This will be most important to a User concerned with CERCLA liability

[38] E1527-13, section 7.3.1. The notion of professional judgment in assessment practice is also a feature of Phase II assessment activities under E1903-11. See below at note 86 and accompanying text.

[39] E1527-13, section 8.3.1.

[40] The connection between "professional judgment" and the notion of inferring release potential from historical property use is spelled out still more explicitly in the Phase II standard E1903-11. See below at note 86 and accompanying text.

protections, but no less important to one interested in making well-informed decisions about purchasing or lending on a piece of property.

Even where liability protections do not provide the primary motivation for a Phase I assessment, this kind of professional judgment is important. A purchaser or lender should expect its environmental professional to draw appropriate inferences that fairly reflect environmental questions. An owner should be wary of pushing its environmental professional to downplay implications of available information. Any Phase I report should be read critically in terms of whether it evaluates information objectively or with rose-colored glasses.

Data Gaps

Inherent to the Phase I assessment process is that available information may simply not be adequate to support conclusions. It is therefore important to recognize situations where a Phase I assessment fails to identify RECs because of information insufficiency.

Under the AAI rule and E1527, the flag for such situations is the term "data gap," defined as "a lack of or inability to obtain information required by this practice despite good faith efforts by the environmental professional to gather such information." The ASTM standard elsewhere describes the concept in terms of "significant data gaps that affect the ability of the [environmental professional] to identify [RECs]." The report of the assessment must identify such matters and "the sources of information that were consulted to address" them.[41] This is in effect a two-part test: lack of information is not enough alone to justify lack of information unless good faith efforts have been made to obtain it.

The concept is perhaps better understood as a matter of "significant data gaps," significance being a function of how the missing information affects the assessor's ability to draw conclusions. For example, as the standard points out, historical site uses are supposed to be covered back to 1940,[42] but if available information does not go back that far yet the earliest evidence shows the property to be undeveloped, the lack of information extending all the way back to 1940 would not be "significant." Conversely, the lack of information is significant "if other information and/or professional experience raises reasonable concerns" – e.g. inability to inspect a building that housed activities associated with RECs.[43]

A party that requests a Phase I but fails to engage with User obligations concerning information-gathering should be prepared to have that failure identified as a data gap.

B. E1527 Revision: Issues Under Consideration

At this writing, the E1527 Task Group has begun consideration of possible further revisions. Some issues of interest under discussion, which may or may not lead to revisions,

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[41] See E1527-13, sections 3.2.21 (data gap definition); 40 C.F.R. §312.10(b) (same); see also E1527-13, section 2.7 (gaps affecting ability to draw conclusions; requirement to report).

[42] E1527-13, section 8.3.2.

[43] The examples are given in Section 12.7 of E1527-13 as part of the "Data Gap" discussion.

include the following:[44]

- REC/HREC/CREC Definitions: The need for revisions remains unclear. Issues in application of the existing definitions include variability in the quantum of evidence assessors view as warranting REC classification and the syntactical complexity of the HREC and CREC definitions. Consideration is being given to noting in the CREC definition that a condition must fit the definition both at the time of the cleanup and at the time of the Phase I,[45] and that the assessment should describe the "controls" that must be maintained to preserve compliance. There has also been discussion of creating a category of "suspect" or "potential" RECs, but that concept does not seem to have a significant following.

- Record Review and Historical Use Information: The existing standard goes into extensive detail about the record review element of the Phase I assessment process[46] but the listing of "standard" record sources[47] includes some that are out of date, and the listing itself creates the potential for assessors to limit inquiry to listed sources. This could be addressed by replacing the list with descriptions of types of sources and providing a list for illustration only – but that approach could also result in inconsistent practice. Similar issues are under discussion with respect to historical use information,[48] which has not been significantly revised since 1993, and as to which there is again a balance to be struck between specificity and prescriptiveness that may constrain inquiry, and defining the obligation as a general performance standard that may permit wide variation in practice.

- Searching for information about environmental liens and activity and use limitations: This subject is regarded as a challenge both because of the difficulties of searching land, judicial and regulatory records, and because of misunderstandings about the role of the User. Consideration is also being given to defining a look-back limitation on this kind of search, given that relevant restrictions did not exist before about 1980.

[44] The matters noted in the text reflect the author's observations of matters under discussion concerning E1527, including discussions at Committee Week in October 2018. This summary does not attempt to cover all issues discussed at the Task Group level or all perspectives on the issues noted. It is important to understand that these examples reflect matters under discussion in the revision process. Consensus concerning them will emerge from the standard-setting process overall, so neither the fact of their consideration at the Task Group level nor any preliminary conclusions or recommendations of the Task Group reflect anything more than an interim stage of the process

[45] As is already the case for HRECs. See E1527-13, section 3.2.42.

[46] E1527-13, section 8.

[47] E1527-13, section 8.2.1.

[48] E1527-13, section 8.3.

C. E1528 Transaction Screen

The due diligence question of whether there's something to be concerned about can also be approached using the ASTM E1528-14e1 "Standard Practice for Limited Environmental Due Diligence: Transaction Screen Process."[49] The transaction screen is analogous to the E1527 Phase I process, and can be useful in the right circumstances, but the differences between the two are significant and affect the decision to use one versus the other.

The most important difference is that the transaction screen is specifically intended for situations "where the user wishes to conduct limited environmental due diligence," but is not doing so for the purpose of qualifying for the CERCLA LLPs.[50] The transaction screen may be – and in fact is designed to be – conducted by nontechnical Users such as owners, purchasers, lenders, brokers, appraisers, etc. It prescribes a self-directed information gathering process with detailed guidance for interpreting results. In keeping with its more limited scope, not least its intended use by nontechnical Users, its objective is only to identify "potential environmental concerns," defined as "the possible presence" of contaminants."

The standard is intended for use "where a Phase I Environmental Site Assessment is, at least initially, deemed unnecessary."[51]

The transaction screen process is built around a detailed questionnaire on objective property facts[52] followed by detailed guidance for conducting activities comprising the transaction screen[53] and for evaluating the results.[54] The standard requires that the questions be asked of owners and occupants likely to have significant knowledge of relevant facts, in conjunction with a site visit that enables the preparer to observe the property first-hand.[55] The standard has a bias toward identifying a "potential environmental concern" (PEC) wherever the responses to questions about potentially problematic site uses or conditions are affirmative or unknown.[56] A PEC is defined as "the possible presence of any hazardous substances or petroleum products on a property under conditions that indicate the possibility of an existing

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[49] The "e1" notation indicates that the standard published in 2014 was reissued in January 2017 with a minor editorial correction. In the text, the standard will be referenced as E1528-14.

[50] E1528-14, section 1.1.

[51] E1528-14, section 4.1.

[52] E1528-14, Section 6.

[53] E1528-14, Section 7.

[54] E1528-14, Sections 8-10.

[55] E1528-14, Section 6.1.

[56] E1528-14, Sections 5.6 (affirmative, unknown or "no response" presumed to be "potential environmental concern"), 5.7 (further inquiry rebuttably presumed necessary where answer is affirmative, unknown, "no response")..

release, a past release, or a threat of a future release … into structures on the property or into the ground, ground water, or surface water of the property." [57]

Notwithstanding its utility under proper circumstances, the transaction screen's limitations must be clearly understood as well. The standard expressly cautions that it "is not intended to permit a user to satisfy CERCLA LLPs, that is, the practices that constitute all appropriate inquiries,"[58] and "does not define a scope of assessment sufficient to identify recognized environmental conditions as defined in … Practice E1527."[59] The E1528 PEC, in other words, is nothing like the E1527 REC. The latter denotes a tangible probability of release in terms of "presence or likely presence;" the former denotes the mere possibility and guides the User to undertake further inquiry in the nature of Phase I assessment.

The transaction screen can be useful and cost-effective where the combination of the User's risk tolerance, the property profile, and the transaction structure justifies an intermediate level of due diligence. In practice, the transaction screen is generally appropriate – and can be both useful and efficient – for sophisticated Users capable of gathering information and following the standard's guidance for interpretation, and for properties where the use history lies on the benign end of the spectrum. Obviously this is a sliding scale: a User having greater technical sophistication could use the transaction screen for relatively more complex properties, whereas a User with more limited capabilities would be well served to use it only for properties that are unlikely on their face to present significant environmental problems, such as recently-developed office buildings or warehouses. It is a valuable tool for lenders in tiered due diligence programs for properties that present a more benign risk profile and therefore may not need a full Phase I assessment as a first step.

Having in mind that the transaction screen is limited to identifying "potential" concerns, it is a useful triage tool to help determine whether a full-scale Phase I assessment is in order.

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[57] E1528-14, Section 3.2.34.

[58] E1528-14, section 4.2.1.

[59] E1528-14, section 4.2.2. It should be noted that Producers engaged to perform transaction screens are sometimes asked to state conclusions in terms of RECs. An informed User would not make such a request; a conscientious Producer should not agree to it.