



THE CUBICAL

January 11, 2022

Custom Service for Dry Cleaners in ASTM's Revised Phase I Standard



On November 1, 2021, ASTM issued its long-awaited revision to ASTM E1527-13 - Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process. There are a number of changes in the revised standard - now designated as E1527-21 - that will be of particular interest to environmental professionals and those involved in commercial real estate transactions. Among these changes, a focus on dry cleaning

facilities is particularly noteworthy. This focus is important because of the ubiquity of dry cleaning facilities on the commercial real estate landscape.

The revised standard's focus on dry cleaning facilities manifests itself in two separate sets of changes. First, prior retail uses of commercial property are now included among the types of former uses for which consultation of additional historical resources is required. As is made clear in an accompanying note, this change was primarily driven by concerns regarding the potential for contamination associated with dry cleaning facilities, and the fact that such facilities are commonly located in commercial retail spaces.

Second, the revised standard pays a fair amount of attention to the "likely" prong of the definition for the term "recognized environmental condition," or "REC." According to this prong of the definition, a REC includes "the *likely* presence of hazardous

substances or petroleum products in, on, or at the subject property due to a release or *likely* release to the environment." The revised standard also includes a new appendix - Appendix A.4 - which thoroughly analyzes the definition of REC and other related terms. According to this analysis, a dry cleaning facility "operating at [a] subject property for a significant period of time prior to regulatory controls ... may be [an example] of [a REC] if the environmental professional believes that there has likely been a release of hazardous substances or petroleum products associated with those uses and features."

The special attention given to dry cleaning facilities in the revised standard appears to be warranted. Julie Kilgore and Paul Zovic - two members of the ASTM task force that developed the revised standard - noted in a webinar sponsored by ASTM International on November 17th that dry cleaning facilities are the number one source of new Superfund sites in the country. Given this fact, it may very well be the case that the particular attention paid to dry cleaning facilities is as much a reflection of current practices and concerns, as it is a likely driver of future practices and concerns.

Vapor Intrusion vs. Vapor Encroachment: A Primer

ASTM's revised standard for Phase I ESAs has been garnering quite a bit of attention lately. This attention is certainly warranted, given this standard's unique regulatory role. According to EPA, "all appropriate inquiry" can be achieved by conforming to this standard. The performance of "all appropriate inquiry" is a necessary step to qualify for certain landowner liability protections under CERCLA.

While ASTM's Phase I standard is singularly important, it is by no means the only ASTM standard that environmental professionals are likely to encounter in real estate or business transactions. Another ASTM standard that may take on a greater role in real estate and business transactions in the coming years is ASTM E2600-15: Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions. Vapor intrusion, the seepage of hydrocarbon or solvent vapors from underlying groundwater formations into buildings and other enclosed structures has emerged as a significant concern in recent years. Because of this concern, prospective buyers of commercial real estate or their lenders may want to assess the vapor intrusion potential of a target property.

ASTM E2600-15 establishes standards and practices for conducting a "vapor encroachment screen" (VES). The purpose of a VES is to determine if a "vapor encroachment condition" (VEC) exists. A VEC is "the presence or likely presence of vapors [associated with certain chemicals of concern] in the [unsaturated groundwater] zone of the target property caused by the release of vapors from contaminated soil and/or groundwater on or near the [target property.]"

While the terms "vapor intrusion" and "vapor encroachment" are related, they are distinct. Vapor intrusion typically refers to organic or solvent vapors which either have seeped, or are likely to seep, into a building or structure on a target property from underlying soil or groundwater. In contrast, a finding of a VEC does not necessarily require a finding that vapors are actually seeping into a building. All that is required is the presence of organic or solvent vapors in the soil or groundwater of a target property, regardless of whether such vapors are actually seeping into a

building or structure on the property.

A useful analogy for understanding the distinction between "vapor intrusion" and "vapor encroachment" is the distinction between tornado watches and tornado warnings in weather forecasting. A tornado watch means that existing weather conditions are favorable for the formation of a tornado, whereas a tornado warning means that a tornado has been sighted or indicated by weather radar. Similarly, vapor encroachment, or a vapor encroachment condition means that the conditions for possible vapor intrusion exist, whereas vapor intrusion typically means that vapors either already are, or are likely to, seep into an existing building or structure on the subject property.

ASTM E2600-15 is careful to point out that the finding of a VEC does not, in and of itself, mean that a "recognized environmental condition" (REC) exists on the target property. According to this standard, the determination of whether a REC exists at a target property as the result of the impact of possible vapor encroachment is a separate determination that is to be made pursuant to ASTM E1527-21. Having said that, ASTM's VES standard also notes that a VES is often conducted in conjunction with a Phase I ESA. If a VES results in the finding of a VEC, it is entirely possible, and perhaps even likely, that the Phase I ESA will result in a corresponding finding of a REC.

EPA Seeks to Expand Scope of TRI Reporting for Commercial Sterilization Operations

The dominant environmental story in the State of Georgia in 2019 was the controversy surrounding emissions of ethylene oxide from two commercial medical device sterilization operations located in the metro Atlanta area. In reality, this controversy was just one part of a larger national story that arose out of a shift in EPA's assessment of cancer risk associated with ambient concentrations of ethylene oxide. (See *Comply First, Challenge Later: The Sterigenics Affair and Facility Shutdown Orders* which can be accessed by clicking [here](#).) While the controversy surrounding these operations no longer dominates the headlines, the saga nonetheless continues.

The latest development concerns EPA's effort to require a number of commercial medical device sterilization operations - including the Sterigenics facility in Smyrna, Georgia - to comply with EPA's TRI reporting requirements for both ethylene oxide (EtO) and ethylene glycol (EG). EPA announced this intention in notice letters issued to the individual facilities in question on October 1, 2021, and in a Federal Register notice dated December 28, 2021. According to the individual letters and the notice, EPA intends to require these facilities to comply with the TRI reporting requirements pursuant to its authority under EPCRA § 313(b)(2). Under EPCRA § 313(b)(2), EPA may compel a facility that is not otherwise covered by the regulation to submit a TRI report for any listed chemical that is manufactured, processed, or otherwise used above the chemical's respective threshold.

EPA's planned action is based largely on concerns about impacts to sensitive populations and environmental justice (EJ). In the letters to the individual facilities, EPA took note of the proximity of children and schools to the respective facilities in question. Currently, EPA appears to be somewhat more circumspect about the potential EJ impacts of EtO and EG emissions from these facilities. However, EPA

did assess each of the facilities on the basis of a number of air emissions-related EJ factors, and communicated these assessments to the facilities. According to the individual letters, EPA will consider whether its analyses of air emissions-related EJ factors support a requirement to comply with the TRI reporting program.

Commercial medical device sterilization operations have been the focus of intense scrutiny from federal and state environmental regulators for several years now. For this reason, it is perhaps a bit early to assess whether all of this is a sign of things to come. However, EPA's focus on sensitive receptors and EJ factors is interesting. It may be a signal that other facilities whose operations are not explicitly covered by EPCRA § 313(b)(2) may nevertheless be required to comply with TRI if such compliance is, in EPA's view, justified by concerns about impacts to sensitive populations and EJ communities.

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