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Managing RECs in the Dawn of the New ASTM Phase I Standard

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Dennis Martin wrote a book titled *The Best Way to Manage Change is to Help Create It*, and Peter Drucker wrote at length about managerial change and controls in business. So when ASTM was tasked with changing and updating the E1527 standard practice for conducting Phase I Environmental Site Assessments (ESAs), I think they borrowed concepts from Martin and Drucker. Environmental due diligence professionals and the community of users of Phase I reports were called upon to come up with proposed changes to the standard.

Now we await the final approval of the proposed updates to ASTM E1527. Expected to be issued by end of this year, the updated E1527-13 standard practice will include several definitional changes, a requirement to consider the potential for vapors emanating from hazardous substance or petroleum releases on or near a property, clarifications on the regulatory file review process, and other minor improvements.

The key definitional changes that have been proposed should assist preparers and users of Phase I reports in better framing up environmental conditions and risks on a property. For one, the definition of a Recognized Environmental Condition (REC) will be revised to say:

“...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.”

If for nothing else, the proposed updated definition of a REC is simpler than the current version, and should be easier to understand and administer. It also better connects E1527 with CERCLA and the intent of All Appropriate Inquiry. For instance, the key terms “release” and “environment” will now be defined and consistent with CERCLA.

Also, an overhauled definition of Historical REC (HREC) is proposed. The revised version, albeit longer, is a much needed change and will read (in part) as follows:

“A past release of any hazardous substances or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted use criteria established by a regulatory authority, without subjecting the property to any required controls...”

Finally, as mentioned above, a new proposed term is the Controlled Recognized Environmental Condition (CREC). This will be defined (in part) as:

“A recognized environmental condition resulting from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority...with hazardous substances and petroleum products allowed to remain in place subject to the implementation of required controls...”

Note that the wording of these and other terms are proposed at this time, and that the final revised standard will reflect the final definition changes.

Implications

Unfortunately, only seasoned professionals and lawyers will be able to fully grasp the meaning and implication of these new definitions and terms, and only after much exercise in the real world.

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I jest – sort of. While defining certain key terms such as “release” and “environment” is a welcomed change, the lack of definition of other key terms may still give rise to ambiguity or misapplication. For example, what is an “applicable regulatory authority”? What exactly are “required controls”, or what does “Controlled” mean? How will we apply the new definition of REC and Historical REC in practice?

Most can relate to a typical situation where, say, a release from an underground storage tank occurred at a commercial property sometime in the past. Let's say that some, but not all, of the impacted soil was excavated following the tank closure. Residual soil impacts and possibly minor groundwater impacts were allowed to remain in place, being below the regulatory cleanup standards in effect at the time. As such, the regulatory agency required no further action.

Most environmental professionals would agree that the above situation would be considered a Historical REC today – a release that occurred in the past, and has been remediated to the satisfaction of the regulatory agency. A rather easy analysis.

However, at the dawn of the new Phase I standard, seasoned environmental professionals and users will now find themselves asking a number of questions:

- Are the residual impacts considered de minimis?
- Has the property use changed?
- Have the regulatory cleanup standards or even the assessment protocols (e.g., analytical parameters) changed?
- Was the vapor migration pathway adequately addressed?
- Were “controls” a factor in the regulatory closure, and are those controls still in place?
- What is the likelihood that the matter will be re-opened by the regulatory agency?

Under the updated E1527-13 standard practice, these and other questions will need to be answered before we can reach a conclusion regarding whether the situation is a Historical REC, a Controlled REC, or a REC, as will be defined in the new standard.

In our scenario above, let's assume that the property use has not and is not intended to change, and that residual impacts meet the regulatory cleanup criteria for unrestricted use (i.e., residential cleanup standards). Considering this and the closed regulatory status, one would presumably conclude that this is a Historical REC.

Now let's assume that the residual impacts do not meet the current residential cleanup standards. Although the case was closed by the regulatory agency, the closure may have been conditioned on the implementation of certain activity and use limitations (AULs), such as an engineered cap over the impacted area. Such “controls” represent continuing obligations that the user must perform to maintain the closed status of the case (and CERCLA liability protections). It is situations like these that brought about the new term “Controlled REC”.

Finally, let's assume that the user failed to maintain the AULs (e.g., the engineered cap has deteriorated), the regulatory closure did not address the vapor migration potential, and the property use is slated to change. In this scenario, most environmental professionals would be hard-pressed not to conclude that the situation is now a REC.

The changes proposed to the ASTM E1527 standard practice are the first since the EPA All Appropriate Inquiry rule went into effect in 2006. While not monumental, the proposed changes do represent improvements over the current standard, and should help environmental professionals and users of Phase I reports better assess and convey the environmental conditions and liabilities associated with a property.

I welcome the changes, and thank my environmental professional colleagues and other stakeholders for their contributions. Martin was correct: the best way to manage change is to help create it. ■

*continued from front cover**Tariff Solar Program*

“flip the switch” on the first solar panel installation to be interconnected to the city's power grid. Located on the rooftop of Oxnard Plaza Apartments, a multi-family apartment building in North Hollywood, the solar photovoltaic system will generate 142,000 kilowatt-hours of clean, renewable solar energy annually.

“Today, we took a major step forward in creating a clean energy future for Los Angeles by flipping the switch on the first installation to be completed through the LADWP Feed-in Tariff Program – the largest offered by any city in the nation,” said Mayor Villaraigosa. “The FiT program takes advantage of LA's abundant sunshine to spur new private sector investment that will create jobs and decrease our city's reliance on dirty fossil fuels.”

LADWP General Manager Ronald O. Nichols said the FiT program is an important step forward in completely transforming the city's power supply and meeting the state-mandated renewable energy level of 33% by 2020.

“This first completed FiT solar installation is physical proof that our FiT program is moving forward as we planned and we could not be more pleased to be here today to celebrate this milestone,” Nichols said. “It's just the beginning of what we expect to be a long and beneficial public-private partnership. Within the next few years, Angelenos can expect to see thousands of solar panels installed on apartment buildings, warehouses, parking structures and other rooftops throughout the city.”

The FiT program also rounds out opportunities for solar development in Los Angeles. Up until now, most solar projects in Los Angeles are built through the traditional net-metered Solar Incentive Program (SIP), where customers install solar panels that generate power for their own home or business and receive rebates

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