

With the advent of EPA's "All Appropriate Inquiries" (AAI) rule and the updated ASTM E 1527-05 Standard Practice on November 18, 2005, environmental professionals (EPs) are now preparing to meet the new requirements. While there are many aspects of AAI to master, it may also be a good time to "go back to the basics" and ensure that all ESA participants understand the process for determining a Recognized Environmental Condition (REC), historical REC (HREC) or a de minimis condition. For this month's Training Update, ESA Report is fortunate to have guest author, Alan Agadoni, Senior Vice President, ATC Associates Inc. (ATC) in Marietta, GA ([www.atcassociates.com](http://www.atcassociates.com)). The following article is based on a REC decision tree tool developed for use at The Environmental Institute (TEI), a subsidiary of ATC, to help students reach report conclusions.

~Staff of ESA Report

Since the inception of the ASTM Standard Practice for Phase I ESAs, environmental professionals and their clients have struggled with how to consistently apply the REC criteria to "real-world" conditions. While this was often due to the inherent complexities and limitations of ESAs, ATC noted that attendees of training courses found the definitions for REC, HREC and de minimis condition confusing and cross-referential. However, there is a clear underlying logic behind evaluating the Phase I ESA findings and drawing conclusions.

To assist in the process of making REC determinations, ATC developed a training tool. The first step was to extract a logical sequence of "yes" and "no" questions based on the definitions within the E 1527 standard. Then, it was just a matter of applying a simple decision tree structure, and hence the "REC Tree" was born. The 2000 revision of the practice (E 1527-00) introduced the HREC definition, which required the addition of two steps to the REC Tree. Under the 2005 version of

E 1527, the REC Tree remains virtually unchanged, with the exception of the "de minimis" condition definition.

Perhaps the greatest advantage of using the REC Tree as a decision-making tool is that it outlines a fairly simple and intuitive process for anyone familiar with the ASTM Standard Phase I ESA Practice. You start with the facts and opinions from the findings of the ESA, and then evaluate any identified environmental conditions by answering the questions in each step until the appropriate conclusion is reached. Readers should be aware that the definitions in the REC Tree have been paraphrased from those in the E 1527-05 standard, so it is still necessary to have a complete understanding of the definitions. Sound professional judgment is also required. Below is a summary of key issues corresponding to each step of the REC Tree presented in Figure 1 on the next page.

### Step One - "Non-Scope Considerations"

First, you need to ask yourself whether or not an environmental condition is a "non-scope consideration." This is defined by ASTM as being beyond the scope of E 1527. While this may seem obvious, it is still common when peer reviewing reports to find a consultant referring to conditions such as mold, asbestos or wetlands as RECs. ASTM clearly states that conditions that do not present potential CERCLA liability cannot be properly referred to as RECs.

### Step Two - "Presence or likely presence on a property?"

If a condition involves a hazardous substance or petroleum product, your next challenge is to determine if the material is present or likely to be present on the property. In making this determination, the key considerations are:

- 1) The presence of a hazardous substance or petroleum product must either be known or likely. It is not uncommon for an assessor to get confused by considering

possibilities that are not likely. If, in the professional judgment of the EP, the presence of the substance is not likely, then the condition is not a REC, HREC or de minimis condition.

- 2) The condition must also be present or likely to be present on a property that is included within the scope of the ESA.

### Step Three - "Is there a release on the property?"

Now you are at a critical step that some overlook, overstate or simply confuse. Your next question is: Does the condition indicate a past, present or material threat of a release on the subject property? It is important to remember that both the "REC" and "material threat" definitions use the word "likely." Put another way, the assessor must consider whether the release is likely to be present on the subject property. For threatened releases, it is important to consider the fact that "material" in legal terms means relevant, significant or convincing. Good professional judgment based on sufficient education, training and experience is necessary to avoid the pitfalls of Step Three.

### Step Four - "The HREC Loop"

The 2000 version of the E 1527 standard introduced the HREC acronym into the ESA vocabulary. This new term required adding Step Four and Step Six to the REC Tree. Under Step Four, you must determine if a condition was, in the past, a HREC. Note that the ASTM criteria for a HREC are very specific. It is important to note that not all conditions that have been remediated in the past classify as HRECs. ASTM clearly states that a HREC is a condition which:

- 1) "in the past would have been considered an REC" (note: you may ask what this really means, but that would be the subject of another article);
- 2) it has been remediated; and
- 3) such remediation was accepted by the responsible regulatory agency. The definition also suggests that there must be

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evidence of agency acceptance, such as a “no further action” letter. The HREC determination also includes an additional process, which is covered later under Step Six of the REC Tree.

## Step Five - “De Minimis Exception”

Before you can conclude that a condition is a REC, HREC or de minimis condition, you must first consider whether it meets the “de minimis” exception. This is another critical step that requires the exercise of good professional judgment. Unlike other areas of the practice, this is a general criterion provided by ASTM with no specific definition of terms or examples. Some EPs have developed their own definitions for the terms “threat to human health or the environment” and “would not be the subject of an enforcement action” for use in their reports. Under Step 5, you begin to make REC determinations. If a condition proceeds through the other steps and is not subject to the de minimis exception, then you have a REC. This is true even for a condition that in the past was considered a HREC, but as a result of changes to the condition, regulatory interpretations, or other factors, is now considered a REC.

## Step Six – “Current HREC or De Minimis Condition?”

There are two possible outcomes for conditions that meet the de minimis exception. For past HRECs that are not currently RECs (by way of the de minimis exception), you would conclude that they continue to be HRECs and label them as such in the report. All other conditions that make it to Step Six are labeled de minimis conditions.

Give it a try! Take any condition, real or hypothetical, and plug it into the REC Tree. What’s more, this is not just a training tool. After more than a decade of project use, the REC Tree has survived many challenges. Why? Because all you are really doing is applying the logic and definitions of ASTM E 1527 to your decision-making process, and for environmental professionals making REC determinations, isn’t that the point? ■

**Figure 1. Phase I ESA Environmental Condition Decision Tree (per ASTM E 1527-05)**

