

common ground community chatter:

Is This A REC?

Every month, the commonground chatter column focuses on a late-breaking topic drawn from discussions on commonground, the global community for property due diligence professionals. For this month's edition, the staff of ESA Report reached out to leading environmental consultants to get their insight into this controversial question posted recently as a commonground discussion thread:

"I'm working on a site in Connecticut that had a 10,000-gallon tank removed in 2005. Building department records indicate that a groundwater sample taken during a Phase I environmental site assessment in 2005 had a low level of volatile organic compounds (i.e., below RSR values). A database search did not reveal any Department of Environmental Protection records for the site, and I have not yet received a response directly from the state DEP. The client wants the report as soon as possible. Is this a recognized environmental condition (REC)?"



The experts say:

"It is certainly an undelineated detection (one sample) of an unnatural substance (VOC), which is a release in Connecticut (above background), which is an area of concern (AOC) with VOC as the constituent of concern (COC). In my opinion, this is absolutely a REC. Detections of non-natural constituents, or natural constituents above background levels, require release area

delineation in Connecticut until non-detect or background is reached. Of course, [the combination of] no tank closure report, post-excavation samples and a water sample collected during a 2005 Phase I ESA make the site suspect right off the bat."

~Peter Chiarizio, LEP, senior project manager, ATC Associates Inc.

"Based on the limited information provided, I would call this a REC. Here's why:

1. Although the release to groundwater is reported to be below enforcement action, the detect shows that a release occurred, and from the information provided, it is based on one sample. It is reasonable to assume that the contamination to groundwater originated from a release that is also in the soil.
2. There is no indication that the release was reported to the appropriate governing agency, and as such, the release was not remediated and accepted by a governing agency. (If it was reported and remediated or granted "no further action" status, it is at best a historic REC.)
3. Is the release currently a material risk and subject to enforcement action? Perhaps the information presented does not support whether the release is currently a material risk; however, it may still be subject to enforcement action in Connecticut since the release should have been reported (and was not)."

~Jodie M. Peotter, P.G., project manager, Ramaker & Associates, Inc.

"There is too little information to make a REC determination. At a minimum, you need answers to the following questions:

1. How deep is the groundwater?
2. What method was used to collect and analyze the groundwater sample?

3. Where was the groundwater sample taken with respect to the tank and groundwater flow direction?
4. Is the concentration of the VOC in the groundwater below the groundwater volatilization criteria?
5. When the tank was removed, was there any evidence of a release?
6. Why weren't soil samples taken when the tank was removed?

If information is not available to answer these simple questions, I would be very suspect."

~Anthony Buonicore, P.E., DEE, chairman, The Buonicore Group

"I think it's a REC based on ASTM's definition, which states that REC means 'the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, groundwater, or surface water of the property.'"

~Neil Chandler, senior environmental scientist, Golder Associates

"More information is needed [to make a REC determination]. If the client had a complete closure report and/or NFA letter from the DEP, a more definitive conclusion could be reached (possibly an historic REC, for a past release that has been addressed). Given the advent of vapor intrusion and the new ASTM standard, a tank closure in 2005 may not have addressed VI. Since the DEP is increasingly re-opening sites, it is best to be cautious."

~Elizabeth Sherwood Krol, P.G., client program manager, Shaw Environmental & Infrastructure Group

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"The query does not specifically state that the tank was an underground tank, so it is possible that no closure soil sampling was conducted because it was not required for an aboveground tank. If it was an AST with no visible staining, I'd say that it is not a REC because it is de minimis: The known contamination would not be subject to regulatory enforcement and there is no indication of further contamination. That is assuming I understand Connecticut practices and RSR values correctly, which I may not, because I do not practice there. If it is a UST, I would call it a REC because the extent of the release cannot be determined during a Phase I, but some contamination is known to exist. The rest of the ASTM definition of a REC is important, beyond what was posted on commonground: *'The term includes hazardous substances or petroleum products even under conditions in compliance with laws. The term is not intended to include de minimis conditions that generally do not present a material risk of harm to public 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.'*

It is interesting to see how we all interpret the guidance differently." ■

~Anonymous

NOTE TO READERS:

To follow the latest and weigh in on this dynamic discussion, visit <http://commonground.edrnet.com!>



Are you an environmental due diligence expert who would like to be considered for a future column? Please e-mail your contact information to: arhourigan@gmail.com

As a companion piece to this month's *cg Chatter*, ESA Report is pleased to publish this related article on the topic of REC determinations written by Kevin Kennedy, president, Kevin Kennedy Consulting, LLC.

A REC is a REC, Right? Wrong!

A recognized environmental condition, or REC for short, is a term everyone involved in a commercial property transaction is familiar with. It is a potential problem area for the prospective commercial property buyer, a red flag to the lender, and often a headache for the seller and buyer both. Officially defined by ASTM International (ASTM, E-1527-05) as *"the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, groundwater, or surface water of the property. The term includes hazardous substances or petroleum products even under conditions in compliance with laws."*

RECs are most commonly identified by an environmental professional during a Phase I environmental site assessment, or ESA, of a property prior to a sale or transfer. The ESA, and the identification of RECs, is an integral part of the buyer's due diligence efforts and is generally conducted with an eye toward providing the buyer with the innocent landowner, contiguous property owner, or bona fide prospective purchaser liability limitations under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly known as Superfund.

While it seems obvious that any well-qualified environmental professional would identify a potential environmental problem area, or REC, on a property (for example leaking oil drums, oil-stained soil, old leaking fuel tank), not all environmental professionals see things the same way. One person's REC is another's "other issue" or, in some cases, no issue at all! While the ASTM E-1527-05 guidance document and the All Appropriate Inquiry rule put forward by the EPA (40CFR 312.10) are the generally accepted standards for conducting an ESA, both documents make it clear that decisions regarding the identification of RECs are left up to the sound, professional judgment of the environmental professional conducting the Phase I ESA.

Over the last several years, I have conducted hundreds of Phase I ESAs and have reviewed hundreds more prepared by environmental professionals around the globe. During this time, I have often been surprised at what some environmental professionals identify (or do not) as RECs-and what some identify as "other issues" or don't bother mentioning at all! The most common example of the discrepancy in REC identification occurs with underground storage tanks, or USTs. Is a legally installed, double-walled UST, outfitted with interstitial monitoring, overfill sensors, spill devices and a state-of-the-art continuous leak detection monitor installed at a properly licensed gas station a REC? Does this UST present a "material threat of a release?" Many environmental professionals will say yes, but many other equally qualified and experienced environmental professionals would say no. Who is right?

I would make that the argument that a UST is a REC. In my opinion, a material threat of release does indeed exist when thousands of gallons of petroleum product or other chemicals are stored on a property, either underground, above ground, in a single-walled tank, a double-walled tank, in a bunker, in drums...whatever.

I don't mean to diminish the importance of a qualified environmental professional's ability to use experience, training and professional judgment to make the REC call, but in the interest of industry standardization and clarity for users of the ESA, I would suggest that a UST is REC is a REC is a REC!