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# Comparison of ASTM and VAP Phase I Assessments

# What is a Phase I Assessment?

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- First step in the process of environmental due diligence
- Identifies potential or existing environmental liabilities
- Phase I report documents these liabilities and identifies areas that require further investigation (i.e. Phase II Assessment)
- Government regulations and industry standard practices dictate how a Phase I Assessment is conducted and then documented in a report



# Standards and Regulations for Phase I Assessments

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- ASTM E1527-05 – *“Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process”*
- All Appropriate Inquiry (AAI) – In 2002 Congress passed *“Small Business Liability Relief and Brownfields Revitalization Act”*
  - Provides legal liability protection under CERCLA (aka, Superfund)
- Voluntary Action Program (VAP) – *“Rule 3745-300-06: Phase I Property Assessment”*



# ASTM and VAP Phase I Some Similarities

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- Historical environmental assessment
- Review of historical information and government databases/files
- Interview with persons familiar with operations on the property
- Site inspection/walk over
- Describe areas/issues of concern for hazardous substances or petroleum
- Phase I Assessment Report



# ASTM and VAP Phase I

## Difference is in the Details

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- Overall purpose of assessment
- Who conducts the assessment?
- General requirements
- Records review
- Interviews
- Site visit
- RECs vs IAs
- Report content



# What is a Targeted Brownfield Assessment (TBA)?

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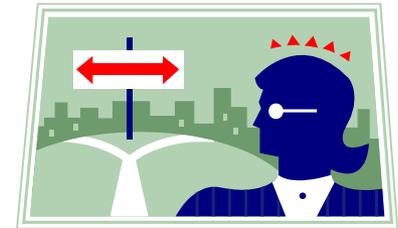
- Assessment work provided at no cost to local governments
- Applicant must be a unit of local government
- Non-competitive
  - Projects funded as they come to Ohio EPA
  - Federal and State funding sources (renewed annually)
- TBA Phase I will be both ASTM E1527-05 (AAI) and VAP compliant



# ASTM and VAP Phase I Different Purposes

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- The ASTM E1527-05 Phase I
  - Standard practice for U.S. EPA's All Appropriate Inquiry (AAI) liability protection under CERCLA
  - Intended to facilitate commercial real estate transactions
  - Work product stands on its own



- The VAP Phase I
  - First step in a voluntary action
  - Identify areas that need further investigation for VAP Phase II and possible remediation
  - NFA letter will be issued at some point in future

# ASTM and VAP Phase I Requirements for Phase I Update

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## **ASTM E 1527-05**

- Valid for 1 year prior to acquisition of property
  - Certain items must be conducted or updated within 180 days of property acquisition
    - Interviews
    - Environmental lien search
    - Records search
    - Site visit
    - Declarations by EP

## **VAP Phase I**

- Conducted 180 days prior to issuance of NFA letter
  - Never invalid but must be updated prior to issuance of NFA letter
  - If older than 180 days, must demonstrate conditions have not changed
  - VAP has a TGC document discussing this topic – see VA30007.09.007

# ASTM and VAP Phase I

## Who Conducts/Oversees Phase I

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- For ASTM, an Environmental Professional, as defined in the AAI rule and ASTM E1527-05

- For the VAP Phase I

- Rule written as if Volunteer is responsible
- Certified Professional, as defined in VAP Rule OAC 3745-300-05, is only required to issue NFA letter
  - CP required to do certain activities
  - CP performance is monitored by Ohio EPA
  - CP Initial Training Course is required





# ASTM Phase I User Responsibilities

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- Determine relationship of purchase price to property value
- Review records for environmental liens or activity and use limitations
- Provide specialized knowledge, experience, actual knowledge, or commonly known or reasonably ascertainable information
  - Includes relevant documents and proceedings involving property
- User and EP can modify scope of services conducted due to site-specific circumstances

# ASTM and VAP Phase I *de minimis* Evaluation

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## ASTM E 1527-05

- Subjective professional opinion

“Conditions that generally do 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 government agencies.”

## VAP Phase I

- Very prescriptive requirements
  - Only applies to surficial soil (9ft<sup>2</sup> and 1ft depth)
  - Might need samples to show residential standards are met
  - Affidavit from Volunteer may be used in lieu of sampling
  - Limit of 3 *de minimis* areas per property

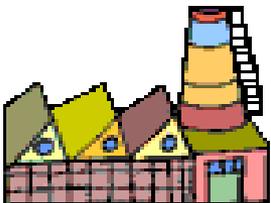
# Records Review

## Historical Use of Property

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### ASTM E 1527-05

- Determine history to the first developed use or 1940, whichever is earlier
  - Review interval of less than 5 years is not required
  - Optional chain of title investigation
    - One of several standard historical sources that could be used



### VAP Phase I

- Determine a continuous history of use back to the first commercial or industrial use
  - May need to consider interval less than 5 years to establish a continuous history
  - Requires chain of title investigation to establish historical use

# Records Review

## Document Review and Retrieval

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### ASTM E 1527-05

- Reasonably ascertainable
  - Provided within 20 calendar days
  - Provided at nominal cost
  - Must yield information without the need for extraordinary analysis of irrelevant data

### VAP Phase I

- Reasonably available
  - Provided within 90 calendar days
  - No limits on the cost of retrieval or the amount of time or effort needed to analyze information



# Records Review

## Records Search & Search Distance

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- Many similarities/overlap in the type of records included in search; however...
  - VAP requires review of state and local records/files
  - These records are optional under ASTM
- Search distances vary for some sources
  - ASTM – 1.0 miles, 0.5 miles, property and adjoining property, or property only
  - VAP – 0.5 miles or property only



# Interviews

## Who Should Be Interviewed?

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### ASTM E 1527-05

- Tends to be a bit more specific about who to interview and when
  - Key site manager
  - Occupants
  - Past interviewees
  - Past owners, operators or occupants
  - State and local government officials
  - Owners or occupants of adjacent properties for abandoned sites

### VAP Phase I

- Requirements are more general, but reasonable attempts to locate and conduct interviews are required for all persons
  - Key property personnel
  - Persons who reside or have resided on or within areas surrounding the property
  - Persons who are or where employed at or within areas surrounding the property

# Interviews

## Who Should Conduct Interview?

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### **ASTM E 1527-05**

- EP, unless a person with sufficient training and experience does and is supervised by EP
- EP must, at a minimum, help plan interviews



### **VAP Phase I**

- CP, unless a sufficient number and quality of interviews conducted by others are adequately documented
- If others conduct interview, CP must demonstrate information from interview is reliable and complete

# Site Visit

## Who Should Conduct Site Visit?

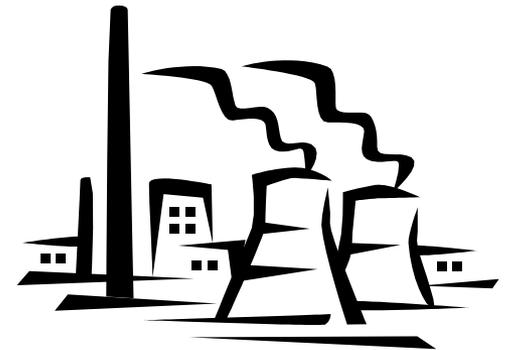
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### **ASTM E 1527-05**

- EP, unless a person with sufficient training and experience does and is supervised by EP
- EP must, at a minimum, help plan site visit

### **VAP Phase I**

- VAP rules are silent on this
- CP must conduct site walk-over prior to issuing NFA letter



# Site Visit

## Requirements Prior to Site Visit

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### **ASTM E 1527-05**

- EP requests User identify Key Site Manager
- Request that Key Site Manager, Property Owner, and User provide relevant documents and any proceedings relevant to property
- EP must review information prior to or at the beginning of the site visit

### **VAP Phase I**

- Volunteer is responsible for Phase I, so similar requirements are moot
- VAP rules are silent on when Volunteer must provide information to CP for NFA letter
- Requirement for VAP eligibility determination is similar to disclosure about proceedings relevant to property

# Site Visit

## Property and Building Inspection

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### ASTM E 1527-05

- Inspect all exterior areas of the property, including all buildings and structures
- Inspect all interior accessible common areas used by public and occupants, maintenance and repair areas, and representative sample of occupant spaces

### VAP Phase I

- Physical inspection of all areas of the property, including interior and exterior of all buildings and structures



# RECs vs IAs

## Some Differences

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### ASTM E 1527-05

- Releases to structures are included in definition of REC
- Historical REC – Condition that would have been a REC historically but is not a REC today
- Material Threat of a Release
  - Observable threat likely to lead to release that might result in impact to public health or environment
  - Based on opinion of EP



### VAP Phase I

- Releases to structures are not included in definition of IA
  - Must demonstrate release to environment, which means soil, water, etc.
- Concept of historical IA not in VAP – All past and present IAs are IAs
- Threatening conditions are not considered VAP IAs unless an actual release is suspected
  - Definition of release does include abandoned drums, containers, etc.

# When is a Release Not a Release?

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- ASTM – Includes all releases even those in compliance with law
- VAP – Excludes some releases from the definition of a VAP release
  - Regulated by OSHA
  - Originates from engine exhaust
  - Nuclear material regulated under the Atomic Energy Act, as long as it is not mixed with hazardous substances or petroleum
  - Federally permitted release
  - Normal application of fertilizer

# Contaminants of Concern

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## ASTM E 1527-05

- Hazardous substances
  - CERCLA 42 USC 9601 (14)
  - Larger universe than VAP
- Petroleum products
  - Contaminants included within the petroleum exclusion of CERCLA
- Controlled substances
  - Applies only for U.S. EPA Brownfield Grants
  - Federal Controlled Substances Act

## VAP Phase I

- Hazardous substances
  - Listed in 40 CFR 302.4
  - VAP has a narrower universe than CERCLA
- Petroleum
  - Oil or petroleum of any kind or in any form
  - VAP definition includes some examples

# ASTM and VAP Phase I Report Differences

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- Map requirements
- Identification of deviations and limitations
- Findings and Opinions
- RECs vs IAS (previously discussed)
- Written statements and signatures
- Miscellaneous



# ASTM and VAP Phase I Report Map Requirements

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- ASTM has no specific map requirements
  - Suggested table of contents includes a site location map and a site plan
- VAP has prescriptive map requirements
  - Property location map (7.5 min USGS topo)
  - Property map with boundary determined by professional surveyor
  - Identified area map
  - Map showing off-property sites that may be impacting property



# ASTM and VAP Phase I Report Deviations and Limitations

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- The ASTM allows for additions, deletions, or deviations from standard practice, as long as it is documented in report
- VAP does not allow for deviations from rule requirements
  - Cannot exclude information due to confidentiality agreements
  - Identification of limitations is required



# ASTM and VAP Phase I Report Findings and Opinions

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## ASTM E 1527-05

- Identify known or suspected RECs, historical RECs, and *de minimus* conditions
- List RECs in conclusions section of report

## VAP Phase I

- Identify known or suspected IAs and *de minimus* areas
- If IAs are present, must identify the hazardous substance or petroleum that must be assessed during Phase II

# ASTM and VAP Phase I Report Written Statements and Signatures

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## ASTM E 1527-05

- Required concluding statements
  - See 12.8.1 or 12.8.2 of ASTM standard
- Required professional statements
  - See 12.13.1 and 12.13.2 of ASTM standard
- Signature of EPs

## VAP Phase I

- Required statement recommending either:
  - A NFA letter can be issued, or
  - A Phase II is required to obtain a NFA letter.
- CP does not sign Phase I report but will sign affidavit when issuing NFA letter

# ASTM and VAP Phase I Report

## Other Miscellaneous Requirements

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### ASTM E 1527-05

- List qualifications of EP and other personnel conducting site interviews and visit
- Identify current and past uses of property
- Legal description of property is optional
- Photographs are often included as part of documentation in report but are not required

### VAP Phase I

- Identify name and job title of each person conducting investigation
- Identify past, current, and intended use of property
- Legal description of property is required
- Color photos of property with date are required



# Information Resources

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U.S. EPA's All Appropriate Inquiry Rule, Fact Sheet and other pertinent information concerning the AAI Rule

<http://www.epa.gov/brownfields/aai>

VAP Web Page (contains Phase I rule language along with other information for performing a voluntary cleanup under the VAP)

<http://www.epa.state.oh.us/derr/volunt/volunt.aspx>

ASTM E 1527-05 (Copyrighted material available for purchase from ASTM)

<http://www.astm.org/Standards/E1527.htm>



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# Questions?



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