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A Change Is on the Horizon: A Revised ASTM Standard for Phase I Environmental Site Assessments

After a lengthy committee process, ASTM International revised its standard practice for Phase I environmental site assessments (ASTM E1527) for the first time since 2013. Phase I environmental site assessments facilitate commercial property transfers that satisfy EPA's All Appropriate Inquiries (AAI) Rule, as defined by federal Superfund law (CERCLA). Revised on November 2, 2021, "ASTM E1527-21" is slated to be published late November or early December 2021. As such, we expect EPA will promulgate an updated AAI Rule incorporating the revised ASTM standard (ASTM E1527-21) in the coming months.

All Appropriate Inquiries and Defending Against Environmental Liabilities

CERCLA allows the government and private parties to recover their appropriate cleanup costs from any one of four categories of "covered persons:" (1) current owners and operators of a facility with contamination, (2) former owners and operators of a facility at the time that hazardous substances were disposed of at the facility, (3) parties that arranged for the disposal or treatment of hazardous substances to a contaminated facility, and (4) parties that accepted hazardous substances for transport to disposal or treatment facilities from which there is a release of hazardous substances.

CERCLA is a strict liability statute and three of its very limited available defenses—for innocent purchasers, bona fide prospective purchasers, and contiguous property owners—require real property owners to prove that they complied with the AAI Rule prior to purchase. In 2005, EPA adopted standards and procedures for meeting the AAI requirement—namely, by complying with the ASTM standard in place at the time.

Phase I Environmental ASTM Standard

The current ASTM standard, E1527-13, was released in 2013, and subsequently adopted by the EPA for purposes of the AAI Rule. In general, the current standard requires: (1) the review of information, including historical documents concerning the property and government regulatory records; (2) interviews with present and prior owners and operators; (3) a visual inspection of the subject property and adjacent properties; (4) the preparation of a Phase I environmental site assessment report, which is to identify specific conditions or business environmental risks, as defined under the standards; and (5) a general assessment of vapor intrusion risks.

Important Changes to the Standard

With the adoption of the revised standard, ASTM reports that it made several changes to the standard practice for Phase I environmental site assessments, including:

- **Key Terminology Revisions:** The terms "Recognized Environmental Condition" (REC); "Controlled Recognized Environmental Condition" (CREC); and "Historical Recognized Environmental Condition" (HREC) are key in the evaluation of property risks, but even with the definitions added to the current standard, the terms were subject to varying interpretations by environmental professionals. The definitions of those three terms have been tightened and clarified to reduce misclassifications of known or likely hazardous material and petroleum product releases affecting subject properties. The revisions are further supported by a new appendix that provides guidance on the REC/HREC/CREC decision process, a flow

chart, and representative examples of each.

- **New Definitions:** The terms "Property Use Limitation" (PUL); and "Significant Data Gap," currently undefined by ASTM, have been formally defined to clarify the meaning and use of these terms in a Phase I report.
- The historical records review section has been restructured and updated to reflect good commercial and customary practice. The revisions clarify subject and adjoining property identification, use, and research objectives (i.e., the depth of inquiry required for both the subject and adjoining properties), and new parameters have been established for the use of standard historical sources.
- Detailed site reconnaissance requirements have been added to reinforce existing good commercial and customary practice.
- Revised report requirements have been added to strengthen the deliverable, including consistent use of the term "subject property"; identification of RECs, CRECs, and significant data gaps in the Conclusion section; photos of site reconnaissance items; and a site map.
- Updated Appendices: Include an extensively revised legal appendix; new REC/HREC/CREC guidance; revised report outline; and updated discussion of business environmental risks, including emerging contaminants.
- Addition of per- and polyfluoroalkyl substances (PFAS), an emerging contaminant for which EPA recently released a detailed regulatory strategy, to the existing non-scope issues portion of the Phase I environmental site assessment standard. (Note: non-scope items are those that may present environmental business risks associated with a property, such as lead based paint and asbestos containing materials, but which are not required to be assessed under the AAI Rule in order for the purchaser to claim CERCLA defenses).

Potential Impact of the New Standard

The aim of the revisions is to produce a more rigorous, detailed, and consistent Phase I report. The revisions will likely result in longer timelines to complete due diligence and prepare a Phase I report as environmental professionals digest and implement the revised standard. Parties to a transaction should further anticipate an increase in cost. A potentially significant change comes from the addition of PFAS to the non-scope portion of the standard. While the presence or likely presence of PFAS at a property is not currently considered a REC, its addition as a non-scope item nevertheless signals a major expansion in cleanup liability once PFAS are added to EPA's list of CERCLA hazardous substances (as anticipated).

The revised ASTM standard is not expected to be published by ASTM until late November or early December 2021. Currently, EPA's rules refer to the 2013 version of the standard, E1527-13, and it is likely that the agency will allow for a transition period in formally adopting the new ASTM E1527-21 version as it has done in the past. Thus, although the revised standard is expected to become a legal requirement of the AAI Rule sometime in the future, it is not currently legally binding. Nevertheless, we anticipate that environmental consultants will begin to incorporate these new requirements into their Phase 1 reviews before EPA issues its rule, so parties should become familiar with the new standard.

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