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March 15, 2022

EPA Adopts New ASTM Standard for Phase I Environmental Site Assessments

The U.S. Environmental Protection Agency, on March 14, 2022, issued both a [final rule](#) incorporating revised ASTM International standard practices, ASTM International's E1527–21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," and a proposed rule soliciting comment on this action. As we reported in our [November 2021 update](#), this move was expected after ASTM revised its prior standard. The final rule incorporates the new ASTM standard as one of three different standards upon which prospective purchasers of real property may rely to satisfy CERCLA's All Appropriate Inquiries (AAI) Rule. Despite EPA's request for comment on the rule, the agency indicated that it does not anticipate adverse pushback. The rule is expected to go into effect on May 13, 2022, unless EPA receives significant negative comments.

All Appropriate Inquiries and Defending Against Environmental Liabilities

Phase I environmental site assessments (ESAs) are a form of environmental due diligence for property transactions involving a public records review, interviews with persons knowledgeable about the site, and a noninvasive survey of certain aspects of the site. With a focus on identifying past releases or threatened releases of hazardous substances at a site, Phase I ESAs facilitate property transfers that satisfy EPA's AAI Rule, as defined by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the federal Superfund law. 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—which include innocent purchasers, bona fide prospective purchasers, and contiguous property owners—require owners of contaminated real property 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, which was later updated via 2013 amendments and again in 2021.

Changes to the Phase I Environmental ASTM Standard

As noted in our previous update, one of the most notable revisions to the ASTM standard is the 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. Other key changes to the new standard include the following:

- Clarification of key terms "Recognized Environmental Condition" (REC), "Controlled Recognized Environmental Condition" (CREC), and "Historical Recognized Environmental Condition" (HREC).
- Addition of new definitions for "Property Use Limitation" (PUL) and "Significant Data Gap."
- Update and clarification of the historical records review section.
- Addition of detailed site reconnaissance requirements.
- Addition of revised report requirements to strengthen the deliverable.

- Inclusion of an extensively revised legal appendix, including among other things, an updated discussion of business environmental risks (which includes emerging contaminants).

Potential Impact of the New Standard

The aim of the revisions is to produce a more rigorous, detailed, and consistent Phase I report. Notably, however, EPA is not requiring entities to use the new ASTM E1527-21 standard to qualify under the AAI Rule. Parties may continue to follow the provisions of the AAI at 40 CFR Part 312, or continue to use either the prior ASTM E1527-13 standard, or use the ASTM E2247-16 standard (for rural or homestead properties). Given the option to choose one of multiple EPA-approved standards, this raises the question as to whether the new standard (E1527-21) will in fact replace the prior standard (E1527-13) for prospective purchasers who choose to obtain a Phase I ESA.

Entities that elect to follow the new standard will likely face longer timelines to complete due diligence and prepare a Phase I report, and they should also anticipate an increase in cost of report preparation. A potentially significant change comes from the addition of PFAS to the non-scope portion of the standard. 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 for the purchaser to claim CERCLA defenses. While the presence or likely presence of PFAS at a property is not currently considered a REC under the ASTM standard, its addition as a non-scope item nevertheless signals a significant future expansion in cleanup liability if/when PFAS are added to EPA's list of CERCLA hazardous substances. EPA is expecting to formulate a final rule designating PFAS as a hazardous substance by summer 2023, which we will continue tracking.

We anticipate that lenders, private equity, investors, insurers, and other parties with a financial interest may require a Phase I ESA to incorporate the new ASTM E1527-21 requirements and recommend that parties become familiar with the new standard.

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