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Environmental Law Alert

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EPA proposes approval of the update to the national standard for Phase I Environmental Site Assessments

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The EPA proposes to update the federal ASTM standard for Phase I Environmental Site Assessments, a vital tool for environmental due diligence for commercial real estate transactions, on May 13, 2022.



What's the Impact?

- / EPA's approval allows purchasers, developers, lenders, and others involved in commercial real estate transactions to rely on Phase I Environmental Site Assessments conducted in accordance with either the new standard ASTM E1527-21 published in 2021 or the previous standard ASTM E1527-13 rolled out in 2013
- / Public comments will be accepted through April 13, 2022

Obtaining or relying on a viable Phase I Environmental Site Assessment is instrumental in establishing certain "innocent" defenses to strict liability under environmental law—including the innocent landowner, contiguous property owner, and/or bona fide prospective purchaser defenses under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and state-based CERCLA equivalents—in connection with the acquisition of commercial real property. To qualify for these defenses, a party must demonstrate that they

conducted “all appropriate inquiries” into the previous ownership and use of the commercial real property. For Phase I Environmental Site Assessments, commercial real estate is defined as any real property, except a dwelling, or property with no more than four dwelling units used exclusively for residential use. Therefore, the standard applies beyond the traditional zoning definition of “commercial” to multi-family, live/workspaces, and more.

Revised standard for Phase I Environmental Site Assessments

The requirements for “all appropriate inquiries” are set forth in 40 CFR Part 312. To ensure the quality and consistency of the preparation of Phase I Environmental Site Assessments by environmental professionals, ASTM International develops standards and practices for Phase I Environmental Site Assessments, with updates required every eight years. Following each update, the Environmental Protection Agency (EPA) reviews the new standard to determine if it is compliant with the requirements for “all appropriate inquiries.” Upon approval by EPA, 40 CFR Part 312 is amended to include a reference to the new standard, which is then used to demonstrate the completion of “all appropriate inquiries.”

In November 2021, ASTM International published the update to the E1527-13 standard, entitled *E1527–21 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, updating and refining the practices for conducting Phase I Environmental Site Assessments.

EPA recognition

Effective May 13, 2022, EPA amends 40 CFR Part 312 to recognize the 2021 standard as compliant with the “all appropriate inquiries” requirements. Notably, in the draft publication, EPA proposes it will not delete the 2013 standard, in a moment of déjà vu for many environmental practitioners, as this mirrors the original proposal when EPA moved from the 2005 standard to the 2013 standard. By adding the new standard without deleting the 2013 standard, EPA proposes to permit the use of either the 2021 or the 2013 standard. However, as occurred back in 2014, it is anticipated that EPA is already getting adverse comments on this dual-acceptable standard and will instead amend Part 312 to recognize only the 2021 standard, phasing out the 2013 standard by a set date sometime later in 2022.

Key changes to the 2021 standard

The key updates to the 2021 standard aim to improve the overall quality and consistency of Phase I Environmental Site Assessments. The 2021 standard provides:

- / Enhanced definitions
- / Protocols for emerging contaminants
- / Enhanced requirements for the report
- / Clarified expiration date for the report

Each of these key changes is discussed in turn.

Enhanced definitions

A key element of Phase I Environmental Site Assessments is the identification of recognized environmental conditions (RECs), controlled RECs (CRECs), and historic RECs (HRECs). The 2021 standard clarifies the definitions of these terms for better consistency categorizing various environmental conditions. The 2021 standard includes a logic diagram in the appendix to help environmental professionals correctly classify RECs, CRECs, and HRECs and twelve example scenarios.

REC

Under the 2021 standard, the enhanced definition of a REC focuses on:

- / The presence of hazardous substances or petroleum due to a past release to the environment
- / The likely presence of hazardous substances or petroleum due to a release or likely release to the environment
- / The presence of hazardous substances or petroleum under conditions that pose a material threat of a future release to the environment

In contrast, under the 2013 standard, a REC was defined as “the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: (1) due to release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment.” The 2021 standard explains that “likely” means something that is neither certain nor proved, but can be expected or believed based on available evidence and/or the logic and/or experience of the environmental professional.

Importantly and consistent with the former standard, the 2021 standard explains that a *de minimis* release of hazardous substances or petroleum is not considered a REC.

An example of a REC is evidence that the subject property was formerly used as a gasoline station with underground storage tanks, with no records indicating that the underground storage tanks were ever closed or otherwise addressed to the satisfaction of a regulatory agency. According to the ASTM standard, this scenario should be classified as a REC, as petroleum contamination is likely present.

CREC

The CREC definition was simplified to elucidate that a CREC is a REC addressed to the satisfaction of regulatory agencies, with residual contamination that was allowed to remain in place subject to the implementation of controls, such as activity and use limitations.

Previously, a CREC was defined as a REC “resulting from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority (for example, as evidenced by the issuance of a no further action letter or equivalent or meeting risk-based criteria established by a regulatory authority), with hazardous substances or petroleum products allowed to remain in place subject to the implementation of required

controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls).”

The 2021 standard explains that the identification of a CREC is a multi-step process, including reviewing relevant records from regulatory agencies, such as no further action letters, as well as comparing the levels of the residual contamination to the applicable and current unrestricted use criteria.

An example of a CREC is evidence of a release from former dry cleaning operations on the subject property that was subsequently remediated under the oversight of a regulatory agency; however, residual contamination was allowed to remain at the subject property at levels exceeding the applicable unrestricted use criteria, subject to an activity and use limitation prohibiting the use of the subject property for residential purposes.

HREC

In contrast to a CREC, an HREC is defined as a previous release addressed to the satisfaction of the applicable regulatory agency **and** meets the applicable unrestricted use criteria without subjecting the subject property to any activity and use limitations or other property use limitations.

An example of an HREC is the past excavation of contaminated soil to the satisfaction of regulatory agencies, where any remaining impacted soil meets the unrestricted use criteria.

Protocol for emerging contaminants

Contaminants of emerging concern, such as per- and polyfluoroalkyl substances (PFAS), were not discussed in the 2013 standard but are addressed in the 2021 standard. The 2021 standard added emerging contaminants to the list of non-scope considerations, which those ordering a Phase I Environmental Site Assessment have the option of adding to the assessment. However, once an emerging contaminant is defined as a hazardous substance under CERCLA, it must be evaluated the same as any other hazardous substance within the scope of the Phase I Environmental Site Assessment.

Enhanced report requirements

The 2021 standard requires heightened rigor for the environmental database search and the analysis of whether there are any significant data gaps. The conclusion section of the report must discuss any RECs, CRECs, and significant data gaps. The report must robustly describe the rationale for these determinations. Finally, the reports must include photographs and a site map.

Clarified expiration date

A key consideration is how long a Phase I Environmental Site Assessment remains viable; that is, how much time may elapse before it must be redone or updated prior to the intended acquisition or other transaction triggering the need for a Phase I Environmental Site Assessment.

As the 2021 standard makes clear, each of the following components must occur within 180 days of the acquisition or other transaction:

- / Interviews with owners, operators, and occupants
- / Environmental lien search
- / Review of government records
- / Site reconnaissance
- / Declaration by the environmental professional.

In addition, all other components must occur within one year prior to the date of acquisition or other transaction. Importantly, the date on the cover of the report generally does not represent the date the individual components of all appropriate inquiries were completed and should not be used when evaluating compliance with the 180-day or one-year deadlines. Instead, the dates of the individual components must be examined. Making this task easier, the 2021 standard requires the report to list the dates of each of the components subject to the 180-day requirement.

Public comments

EPA is accepting public comments on its decision to recognize the new standard through April 13, 2022.

Outlook

The 2021 standard for Phase I Environmental Site Assessments improves clarity and generally makes the 2013 standards more stringent. Therefore, a Phase I Environmental Site Assessment performed to the 2021 standard would also be compliant with the 2013 standard.

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