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Phase I Site Assessments After EPA U-Turn On 2021 Standard

By **Heather Richardson** (May 19, 2022)

On March 14, the U.S. Environmental Protection Agency issued a direct final rule that approved the 2021 revised standard practice for Phase I environmental site assessments, or ESAs, developed by ASTM International's Environmental Assessment, Risk Management and Corrective Action Committee — the standard otherwise known as ASTM E1527.



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Prior to 2021, the ASTM standard had not been revised since 2013. On May 2, in response to public comments, the EPA withdrew its approval of the 2021 ASTM standard.

The Phase I ASTM standard is crucial to many property transactions, as it facilitates the applicability of the EPA's all appropriate inquiries, or AAI, rule — which, when followed, provides certain innocent purchaser or lessee defenses from Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, liability.

If adverse comments had not been received, the direct rule would have been finalized on or about May 13. The EPA stated that it issued a direct final rule because it viewed the action as noncontroversial, and did not expect adverse comments. However, adverse comments were submitted by the U.S. Chamber of Commerce and legal, consulting, brownfield redevelopment and lending interests.

The EPA's final rule, which is not subject to a second public comment period, will address the adverse comments submitted, including whether the 2013 standard should terminate upon approval of the 2021 standard, and whether per- and polyfluoroalkyl substances, or PFAS, should be included in a Phase I scope.

The risks associated with PFAS contamination, while not formalized as part of the AAI process in the new ASTM standard, should be considered — and could lead to additional recommendations for Phase II sampling or additional investigation.

In order to attempt to satisfy the AAI rule, users of a Phase I report should request that, until the EPA issues a final rule, consultants comply with the 2013 standard. But users can also request that consultants incorporate new procedures prescribed in the 2021 standard, to the extent they are not already included in the 2013 standard.

At minimum, users should comply with the 2013 standard until the 2021 standard is approved by the EPA. Changes to the 2021 ASTM standard include revised terminology, appendix updates, clarification regarding shelf-life issues, updates to the historical record and site reconnaissance requirements, improved reporting requirements, and references to emerging contaminants.

Potential Conflicts Between Standards

In its March 14 proposed rule, the EPA indicated that, in addition to complying with the new 2021 standard, consultants could also continue to use the 2013 standard to satisfy the AAI rule.

As pointed out in many of the adverse comments submitted to the agency, complying with both the 2013 and 2021 standards creates confusion — and likely would lead to future litigation and, potentially, future risk of liability relating to AAI defenses. Brownfield redevelopment interests argued in their comments that complying with both standards could create chaos, which would be inconsistent with the "good and customary practice" required by ASTM.

Many of the comments urged the EPA to rescind the 2013 standard upon approval of the 2021 standard. The 2021 standard is intended to clarify what is required to satisfy the AAI rule, and many of the public comments submitted argued the 2013 standard is no longer relevant and should be rescinded.

A comment from a banking association pointed out that if consultants are allowed to continue to use the 2013 standard, a consultant could potentially fail to identify conditions relating to historic releases of hazardous substances that would result in deficient and inadequate reports that do not include some of the more stringent 2021 requirements — and that would therefore potentially jeopardize future AAI defense claims.

Other commenters went further, to point out that allowing users to pick and choose between standards would result in a two-tier system — whereby some users would comply with the older standard to save costs, and others would have higher-quality assessments that would create complications and delays for lending institutions reviewing the reports.

Treatment of PFAS

PFAS are addressed for the first time in the ASTM E1527-21 standard, though not fully incorporated into the scope of a Phase I ESA. The standard would treat PFAS as a nonscope consideration rather than a recognized environmental condition.

This would follow the trend of other nonscope considerations, like the review of asbestos-containing materials, which has become a common practice over the last decade.

Some of the comments requested that PFAS be excluded completely from the rule until the EPA lists PFAS as a CERCLA hazardous substance. The Chamber of Commerce noted that the business community supports cleanups, but urged the EPA to wait to include PFAS in the ASTM standard — even as a nonscope consideration — until PFAS are formally adopted as a CERCLA hazardous substance, in order to avoid additional, potentially premature, CERCLA liability for landowners and potential buyers.

PFAS — sometimes called "forever chemicals," because of their strong chemical makeup and persistence in the environment — will remain front and center for the EPA, the U.S. Department of Defense, citizens groups and nearly every state, and therefore need to be considered in any real property transaction. PFAS have been phased out of production in the U.S., but they are still imported in consumer products.

PFAS compounds impact many transactions because they are ubiquitous in the environment, and found in products including stain- and water-repellent fabric; nonstick products like cookware; certain cosmetics, shampoo, conditioners, hand creams, sunscreen, toothpaste and dental floss; polishes, waxes and paints; cleaning products; firefighting foams; aerospace and aviation products; photographic anti-reflective coatings; mist-suppressant foams for electroplating; car wax; popcorn bags; waterproof/breathable clothing; architectural composite resins; and paper and cardboard coatings.

Given the increasing regulatory emphasis on PFAS, purchasers and lessees clearly face a liability risk associated with acquiring or leasing a property with PFAS contamination. Those who want to understand the liability risk associated with purchasing or leasing a particular property should consider evaluating whether PFAS contamination may be present on a subject property, regardless of how the revised ASTM Phase I standard addresses PFAS.

Recent legislative and regulatory trends at the state and federal levels suggest that PFAS may be included within CERCLA's definition of "hazardous substance" in the not-too-distant future. Additionally, this new approach to PFAS in the ASTM standard will likely aid in compliance with state PFAS programs, which appear to be another continuing regulatory trend that is moving quickly across the country.

While the likely presence of PFAS at a property is not currently considered a recognized environmental condition, its addition as a nonscope consideration signals a major expansion in cleanup liability if and when PFAS are added to the EPA's list of hazardous substances.

Next Steps

Users of a Phase I report should request that consultants at minimum comply with the 2013 standard — but can also request that the consultants incorporate new procedures prescribed in the 2021 standard, to the extent they are not already included in the 2013 standard.

Parties should allow for additional time in the process to account for these changes, and be on the lookout for formal EPA adoption of ASTM E1527-21 into the AAI rule in the coming months.

The changes to the ASTM standard add additional rigor and formality to the process of generating a Phase I report — likely resulting in a longer timeline to complete due diligence and prepare a Phase I report, as environmental professionals get up to speed and implement the revised standard.

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