Environmental Update

December 2022

USEPA Finally Approves ASTM 1527-21

On December 15, 2022, U.S. Environmental Protection Agency (USEPA) published a final rule approving the American Society for Testing and Materials (ASTM) 1527-21 Standard Practice for conducting Phase I environmental site assessments (ESAs). The rule takes effect February 13, 2023 (60 days after the final rule was published). The Phase I ASTM standard is crucial to many property transactions, as it facilitates the applicability of USEPA's all appropriate inquiries (AAI) rule, which, when followed, provides certain innocent purchaser or lessee defenses from Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) liability.

In response to adverse public comments received by USEPA, the 2013 standard will no longer be an appropriate means to comply with AAI, though USEPA provides a sunset period (until December 15, 2023) where the 1527-13 standard would still be AAI compliant. USEPA also stated that users of a Phase I are not limited to using ASTM standards to meet AAI, and though compliance with ASTM is an option to attempt to meet AAI, users can also follow the requirements of 40 CFR Part 312 to attempt to obtain innocent purchaser protections.

As outlined in a recent Thompson Hine Environmental Update, in May 2022, USEPA unexpectedly withdrew approval of its March 14, 2022 rule in order to address many adverse comments received regarding the 1527-21 standard.

Some of the changes to the 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. These changes to the ASTM standard and their potential impact on real estate transactions are outlined in a December 2021 article published by Thompson Hine.

Treatment of Emerging Contaminants

Emerging contaminants, including PFAS and PFOA (PFAS), are addressed for the first time in a footnote to the 1527-21 standard, though not fully incorporated into the scope of a Phase I ESA. The standard would treat PFAS as a non-scope consideration rather than a recognized environmental condition (REC). This would follow the trend of other non-scope considerations, like the review of asbestos-containing materials, which has become a common practice over the last decade.

USEPA did not respond to adverse comments received regarding PFAS because "… EPA clearly stated that it was not requesting comment on the ASTM Standard. The ASTM Standard is not an EPA regulation, and its use is not required to comply with the All Appropriate Inquiries Rule or any other EPA regulation."

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 a "hazardous substance" in the not-too-distant future, and therefore, would be included in the definition of an ASTM REC. On August 26 2022, USEPA proposed to designate certain PFAS, Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS), as hazardous substances under CERCLA. 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. Until PFAS is considered a CERLCA hazardous substance, its addition as a non-scope consideration signals a major expansion in cleanup liability when/if PFAS are added to USEPA's and/or any state list of hazardous substances.

Next Steps

Based on USEPA's approval of the new standard, until February 13, 2023, users of a Phase I report should request that consultants at minimum comply with the 2013 standard but should 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. After February 13, 2023, users should use the 2021 standard and no longer incorporate the 2013 standard. Additionally, until federal or state regulations include PFAS in the definition of a hazardous substance, PFAS should be considered as a non-scope item to any Phase I.

FOR MORE INFORMATION

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