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BLOGS

Environmental Protection Agency (EPA)

Timing and Form of EPA's Promulgation of the New ASTM Phase I Environmental Site Assessment Standard in Question

EPA's recent rulemaking to promulgate the new ASTM E1527-21 standard received substantive adverse public comments that will likely require EPA to go through a full notice and comment rulemaking instead. Because EPA received adverse comments, it withdrew the proposed direct-to-final rule before the effective date, and will likely have to go through conventional rulemaking to promulgate the new ASTM E1527-21 standard.

Phase I Environmental Site Assessments (ESAs) are an integral part of environmental due diligence for real estate transactions because sellers, lenders, and purchasers rely on ESAs to provide information about a property's past uses, to evaluate risks, and to secure liability protections for new owners. Phase I ESAs are required in order to conduct the all appropriate inquiry necessary to secure liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). These include the bona fide prospective purchaser, contiguous property owner, and innocent landowner defenses.

Among other changes in the ASTM E1527-21 standard, PFAS are referenced for the first time under non-scope items, suggesting that ESA users consider assessing PFAS for properties in states that define PFAS as "hazardous substances."

Adverse Public Comment

In March 2022, EPA published a direct-to-final rule in the Federal Register in order to adopt ASTM's revised November 2021 standard for Phase I ESAs. A direct-to-final rule becomes final after a set amount of time if no adverse comments are received during the comment period. Here, adverse public comments were submitted by over a dozen parties, including the U.S. Chamber of Commerce, which objected to the inclusion of PFAS in the new ASTM standard (though its comments appear to have been submitted after the deadline).

Numerous commenters also objected to the new ESA standard because it allowed for the continued use of the 2013 standard alongside the new standard. The commenters said that EPA should instead supersede the 2013 standard completely.

Current Phase I ESA Standard

Recently, EPA withdrew its proposed rulemaking and ASTM E1527-13 is still the current standard for AAI. However, it is likely that the new standard will take effect in the somewhat near future.

AAI and PFAS

Entities such as the U.S. Department of Housing and Urban Development and lenders often require non-scope items to be included in the Phase I ESAs for their projects, so the addition of PFAS to the list of non-scope items is significant in that ESAs for those entities will not include PFAS.



EPA listing of Certain PFAS as CERCLA “Hazardous Substances”

EPA submitted its proposed hazardous substance designation for PFOA and PFOS for review by the Office of Management and Budget. EPA’s final rule designating PFOA and PFOS as CERCLA “hazardous substances” is expected by summer of 2023. If and when PFOA and PFOS are designated, AAI will automatically require that those substances be assessed during a Phase I ESA, regardless of the standard in effect. In the meantime, purchasers, lenders, and others may consider including those and other PFAS in the scope of their Phase I ESAs.