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## Update: EPA Takes Fast-track to Adopt New Phase I Environmental Site Assessment Standard

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*UPDATE: At the time Buchalter published its client alert regarding the new ASTM Standard for Phase I Environmental Site Assessments (Phase I ESAs), we noted that the new ASTM Standard would not be considered "All Appropriate Inquiries" for purposes of establishing defenses under CERCLA until the Environmental Protection Agency (EPA) amended its regulations to incorporate the new Standard. On March 14, 2022, EPA published its "direct final rule" in the Federal Register, stating that it had reviewed the standard and determined it to be equivalent to the agency's requirements. The rule adopting the new standard will take effect May 13, 2022 unless EPA receives adverse comments by April 13, 2022. EPA took this action because it felt the proposed rule was noncontroversial and it wanted to expedite the approval process. The original alert, modified to reflect the current situation, describes the changes and their impact below.*

Commercial real estate (CRE) professionals are well aware that a Phase I ESA is required when acquiring commercial property. Originally intended to demonstrate that the buyer had undertaken "All Appropriate Inquiries" necessary to establish certain defenses against CERCLA liability, Phase I ESAs have become an integral part of commercial real estate, required by lenders, insurers, and as a matter of standard practice.

Since ASTM Standard E1527-13 was adopted in 2013, it has been the "roadmap" which with environmental professionals must comply when they perform a Phase I ESA for commercial properties. ASTM standards are regularly updated and this one was just updated in November 2021. In the nomenclature used by ASTM, the updated standard is E1527-21.

The biggest question for most CRE professionals is whether the changes will increase the cost and time required to do a Phase I ESA. The likely answer is yes, but the degree may vary from property to property. The 2021 version of the standard will require more historical review than the 2013 version, which will increase costs for some properties. E1527-21 requires review of all four core historical records—aerial photos, topographic maps, city directories, fire insurance maps—for the subject property. If the property has been used for manufacturing, industrial, or retail, additional historical records will need to be reviewed. The 2013 version allowed the

reviewer discretion to review only those historical records they felt were necessary, so this presents an increase in workload and vendor costs.

The 2021 standard also requires increased historical review of adjoining properties, not just the subject property. At a minimum, the core historical records will need to be reviewed for adjoining properties, regardless of the results of the review of the subject property. For an isolated commercial property with no adjacent commercial, industrial, or retail properties, the increased time and cost should be minimal, but for an industrial property located in the center of an industrial zone with a long history, the additional time required could be significant. Note that a big reason for the increased focus on historical research and adjoining properties is due to instances when dry cleaners that have gone out of business were not identified in a Phase I ESA.

E1527-21 has revised or included definitions of a number of terms, such as Recognized Environmental Condition (REC), and provided an appendix in an effort to bring some consistency to determinations of what is a REC. This should not increase the cost or time, and will hopefully eventually eliminate the maddening situation where one consultant looks at a set of facts and determines they do not constitute a REC but a second consultant (usually hired by a potential buyer) looks at the same facts and calls it a REC, requiring additional investigation and potentially leverage a price adjustment from the seller.

The 2021 revision requires that a title search be reviewed back to 1980 for environmental liens and deed restrictions, whereas the 2013 version did not have a set date, so this is another area that may increase cost and time. Other changes, such as what must be included in the report, will likely not have much impact, as most consultants have already moved towards including everything they reviewed as appendices (as evidenced by the size of the reports).

The ASTM Committee resisted the push to include the presence or likely presence of emerging contaminants that are not yet listed as hazardous substances under CERCLA as the basis for a REC. This has become a point of contention recently with PFAS and related substances. The presence of PFAS on a property can be identified as a business risk, like mold or asbestos in buildings, but it is not part of the core scope of the ESA until it is added to the list of CERCLA hazardous substances.

As noted above, EPA's proposed rule incorporating the revised ASTM Standard E1527-21 will take effect May 13, 2022 unless EPA receives adverse comments by April 13, 2022. Phase I ESAs performed to the current E1527-13 Standard before the proposed rule actually takes effect will satisfy the relevant requirements of "All Appropriate Inquiries" for the purpose of establishing one of the "Landowner Liability Defenses" to CERCLA liability.

Buchalter has experienced attorneys who have assisted CRE professionals on environmental, health and safety matters, including environmental due diligence and review of Phase I and Phase II ESA reports. If you have questions or need assistance, please contact one of the attorneys listed below.



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