

EPA Withdraws its Direct Final Rule to Adopt the New ASTM E1527-21 Phase I ESA Standard

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In what was a surprise to many, the Environmental Protection Agency (EPA) has withdrawn its Direct Final Rule that would have recognized the new ASTM E1527-21 Phase I Environmental Site Assessment (ESA) Standard as what is required to obtain protection from liability under CERCLA. As discussed in our recent Legal Update, the EPA issued a request for comments regarding its proposed intention to adopt the new ASTM E1527-21 Phase I Standard into its "All Appropriate Inquiry" (AAI) rules and issued a Direct Final Rule indicating that unless it received adverse comments, the new standard would be effective on May 13, 2022. The ASTM E1527 Standard defines what constitutes "good commercial and customary practice for conducting an environmental site assessment of a parcel of commercial real estate in the United States of America with respect to the range of contaminants within the scope of the Comprehensive Environmental Response, Compensation & Liability (CERCLA) Act (42 U.S.C. 9601) and petroleum products." The previous standard (adopted by ASTM in 2013) was incorporated into the AAI rule promulgated by the EPA to identify what specifically is required to obtain protection from liability for contamination under CERCLA. The new standard added due diligence protocols for environmental consultants to utilize in conducting Phase I ESAs that makes the process more thorough and effective in achieving liability protection under CERCLA.

In issuing its Direct Final Rule, the EPA did not expect that it would receive adverse comments. Noteworthy, is that the Direct Final Rule did not automatically extinguish the use of the previous E1527-13 Standard and environmental consultants could continue to utilize the previous standard or use the new standard. This created confusion within the environmental community, and was in large part, the reason for the adverse comments.

The two-tier approach in allowing use of two different ASTM Standards is not the first time that EPA has attempted such an approach. In 2013, the EPA issued a Direct Final Rule and proposed recognition of the E1527-13 Standard, and did not rescind the previous E1527-05 Phase I ESA Standard. However, after receiving negative comments, the EPA rescinded its Direct Final Rule, then finalized adoption of the E1527-13 Standard, and through a separate rule rescinded the E1527-05 rule. In light of the recent developments regarding the new E1527-21 Standard, it is expected that the EPA will proceed with a rulemaking to finalize adoption of the E1527-21 Phase I Standard and then rescind the E1527-13 Standard through a separate rule.

Until that occurs, prospective purchasers of real estate, lenders or other entities that are commissioning environmental consultants to conduct Phase I ESAs should, at a minimum, request that consultants comply with the E1527-13 Standard. However, in addition, such parties should also consider requesting that environmental consultants incorporate the new elements of the E1527-21 Standard into the due diligence process as the new standard clearly has heightened levels of environmental due diligence that will be beneficial in identifying environmental issues associated with a property.

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