

Proposed Changes to ASTM Standard for Phase I Environmental Site Assessments to Include PFAS as a Non-Scope Consideration

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For close to two years, a task force of due diligence consultants, lenders, attorneys, and other professionals have been working to revise the American Society for Testing and Materials (ASTM) International Phase I Environmental Site Assessment (Phase I) Standard E1527-13 to account for per- and polyfluoroalkyl substances (PFAS). The ASTM Standard is used by purchasers of real property to meet the “all appropriate inquiries” requirement of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to establish the innocent landowner, contiguous property owner, or bona fide prospective purchaser defenses to CERCLA liability. These defenses are used to limit the buyer’s liability for historic contamination that pre-dates their ownership. Phase Is are also often used in corporate transactions as a part of environmental due diligence, including in transactions where these CERCLA defenses would not apply.

The purpose of the ASTM E1527-13 Standard is “to define good commercial and customary practice in the United States of America for conducting an environmental site assessment of a parcel of commercial real estate with respect to the range of contaminants within the scope of the [CERCLA] and petroleum products.” Given this scope, the ASTM standard only requires consideration of compounds that are regulated as “hazardous substances” under CERCLA and petroleum products. PFAS do not fall in either category and therefore are not currently within the scope of a Phase I; however, PFAS have come under intense regulatory scrutiny over the past few years, and several states have begun to regulate PFAS as hazardous substances under their state mini-CERCLA laws. Meanwhile, it appears PFAS could be designated as hazardous substances under CERCLA within the next few years, given the recent trend toward regulation under other federal laws, such as the Safe Drinking Water Act, and recent activity in Congress with regard to the [PFAS Action Act of 2021](#).

In the interim, the ASTM E1527-13 Standard is planned to be amended to identify PFAS as a “non-scope consideration,” meaning it would not require PFAS to be considered as part of a Phase I to meet the “all appropriate inquiries” standard. As a non-scope consideration, the user of the Phase I could request that PFAS be considered and discussed in the report, but ultimately, a Phase I report would not need to consider PFAS in order to constitute an “all appropriate inquiry” for purposes of establishing the statutory CERCLA defenses listed above.

The changes to the ASTM E1527-13 Standard are expected to be published in December 2021.

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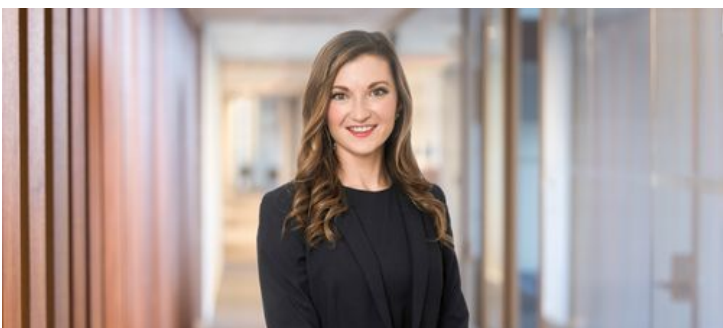
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