

## The Phase I Standard Used for CERCLA Defenses Will Stay the Same – For Now

JUNE 9, 2022

On May 2, 2022, the U.S. Environmental Protection Agency (“EPA”) withdrew its direct final rule that would have amended 40 C.F.R. Part 312 to recognize ASTM’s updated E1527-21 standard (the “2021 Standard”) as satisfactory to fulfill the “all appropriate inquiries” requirement of certain defenses to liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). As we previously reported, purchasers of real property must fulfill the “all appropriate inquiries” requirement in order to assert the innocent landowner, contiguous property owner, or bona fide prospective purchaser defenses to CERCLA liability. These defenses limit a purchaser’s liability for historic contamination that predates their ownership. The regulations at 40 C.F.R. Part 312 currently specify that a Phase I Environmental Site Assessment (“Phase I”) prepared in compliance with the ASTM E1527-13 standard (the “2013 Standard”) can be used to satisfy the “all appropriate inquiries” requirement.

On March 14, 2022, the EPA issued a direct final rule that would have amended the “all appropriate inquiries” regulations to reference both the 2013 Standard and the 2021 Standard. The direct final rule indicated that unless the EPA received adverse comment by April 13, 2022, the direct final rule would take effect on May 13, 2022. If EPA received adverse comments, the EPA indicated that it would publish a timely withdrawal in the Federal Register.

Following the March 2022 publication of the direct final rule, the EPA received numerous adverse comments. The key adverse comments are summarized below:

- A majority of comments submitted to the EPA addressed the agency’s failure to remove reference to the 2013 Standard. The EPA reasoned that inclusion of both the 2013 and the 2021 Standards will allow for greater flexibility in the marketplace. However, commenters expressed that having two different standards for reaching the “all appropriate inquiries” requirement will cause confusion, inadequate reporting from low-cost developers, and unnecessary litigation. These commenters argued that the 2021 Standard currently reflects “good commercial and customary practice,” while the 2013 Standard falls short. Commenters requested that the EPA withdraw the direct final rule and issue a new one that removes reference to the 2013 Standard.
- Various commenters also addressed definition changes that may adversely affect brownfields by introducing uncertainty into the marketplace if both the 2013 and 2021 Standards are sufficient to meet “all appropriate inquiries” requirements. Commenters argued that environmental assessments completed under the 2013 Standard may result in characterizing environmental conditions differently from how they would be characterized under the 2021 Standard. These commenters further argued that Phase I completed to the 2013 Standard might

not identify potential liabilities that would be addressed under the 2021 Standard. The result, they argued, would be uncertainty in the brownfields marketplace, with the potential for future liability due to inadequacies in Phase I prepared under the 2013 Standard.

- Some commenters also addressed per- and polyfluoroalkyl substances (“PFAS”), which are identified as non-scope contaminants under the 2021 Standard. Under the 2021 Standard, the user of the Phase I report 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. Nevertheless, in its comment, the U.S. Chamber of Commerce insisted that mention of PFAS be eliminated from the 2021 Standard because PFAS have not been classified as hazardous substances under CERCLA. If PFAS and related substances are later found to be *nonhazardous*, the U.S. Chamber of Commerce asserted that the inclusion of these substances in the 2021 Standard may lead to premature liability.

As a result of these adverse comments, the EPA withdrew its direct final rule on May 2, 2022. The EPA indicated it would address the comments in a subsequent rulemaking.

As previously recommended, until the EPA confirms that the 2021 Standard meets the “all appropriate inquiries” requirement under CERCLA, Phase I reports should continue to contain language indicating that they were prepared in compliance with the existing standard, ASTM E1527-13. In the interim, users should also consider updating internal guidance or scopes of work with environmental professionals to confirm whether (1) reports should be completed to only the 2013 Standard or to both, and (2) emerging contaminants, including PFAS, should be included in the report as a “non-scope consideration.”

*Winston & Strawn Summer Associate Elisabeth Phillips also contributed to this blog post.*

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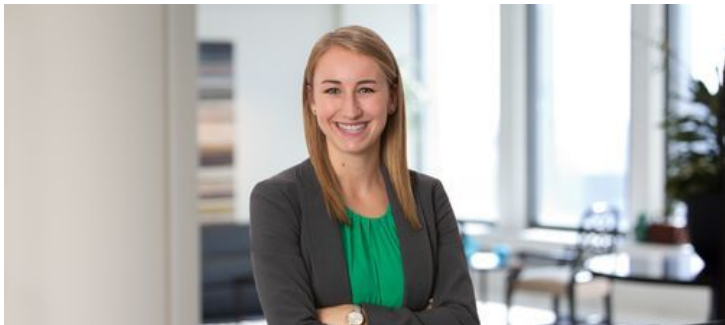
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