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New PFAS Standards Coming to North Carolina

On June 7th, the North Carolina Department of Environmental Quality (DEQ) issued its Action Strategy for PFAS (the "Action Strategy"). In the Action Strategy, DEQ identifies three elements as priority action areas: (i) protecting communities; (ii) protecting drinking water; and (iii) cleaning up existing contamination. All three of these elements are integral to the Action Strategy. However, the protection of drinking water element is likely to have the most significant impact on regulated entities in North Carolina. The reason for this is that this element calls for DEQ to propose regulatory standards for PFAS in groundwater, surface water, and drinking water in 2022 and 2023. When they become final, these standards will inform DEQ's approach to the third element of the Action Strategy - cleaning up existing contamination.

DEQ has been more active than most states in addressing environmental and public health issues associated with exposure to PFAS. Up until now though, much of the Agency's PFAS-related activities have focused on particular resources and geographical areas of the State, such as the Cape Fear River. The development of regulatory standards for levels of PFAS in groundwater, surface water, and drinking water will allow DEQ to expand its efforts to address PFAS by driving a systematic approach to the investigation and remediation of these compounds on a statewide basis.

EPA's Withdrawal of Its Phase I Direct Final Rule: *What Happened? Why Did It Happen?*

What Does It Mean?

EPA created a few ripples in the commercial real estate world on May 2nd when it withdrew the direct final rule that had essentially incorporated ASTM's new Phase I standard - E1527-21 - into the Agency's All Appropriate Inquiries (AAI) Rule. This move was unexpected. Buyers, sellers, lenders, and environmental professionals were left struggling to understand what had happened, why it happened, and what it all meant.

The *what* and the *why* in this whole affair are both pretty straightforward. As for the *what*, on March 14th, EPA issued a direct final rule that explicitly allowed for the use of ASTM's new Phase I standard for conforming with the AAI Rule. Less than two months later, EPA withdrew this rule after it received adverse comments regarding the rule. As for the *why*, EPA took this action because in the March 14th notice, it said it would do so if it received any adverse comments. Some adverse comments were received by EPA, and when this happened, EPA acted on its promise and withdrew the rule.

So then, what does all of this mean? The reality is that it may not mean all that much. This is so for several reasons. First, the 2013 version of ASTM's Phase I standard remains a part of the AAI Rule. The 2013 ASTM standard can be, and is, still used by environmental professionals. Second, there really isn't anything of significance in the 2013 standard that has been omitted from the new standard. The new standard mostly expands upon the elements of previous standards, and clarifies key concepts and definitions. Thus, save for any exceptional circumstances, anyone conducting a Phase I ESA in conformance with the 2021 ASTM standard is very likely conforming to the 2013 standard as well.

Third, and finally, EPA had established a contingency plan in the event of such a withdrawal. At the same time that EPA issued the direct final rule, it also issued an identical companion proposed rule. Consideration of the companion proposed rule continues, and at the conclusion of the notice and comment process for this proposed rule, the new ASTM Phase I standard will likely finally be incorporated into the AAI Rule.

Evaluation of EPA Audit Policy Reaffirms Policy's Suitability to TRI Violations

On June 30th, EPA's Office of the Inspector General (OIG) issued a report on: (i) the Agency's use of its eDisclosure portal for receiving voluntary disclosures of noncompliance; (ii) how the Agency reviews such disclosures; and (iii) how the Agency determines whether the disclosing party is eligible for relief from monetary penalties under its 20-plus year-old Audit Policy. (This report collectively refers to these activities as EPA's Audit Policy Program.) This OIG Report claims that the Audit Policy Program lacks the internal controls necessary to ensure effective screening of noncompliance involving significant concerns such as criminal conduct or imminent hazards. The Report notes that the lack of such controls has led to inconsistencies in implementing the Audit Policy Program across EPA's ten regions. Among other things, the Report recommends that EPA develop national guidance for screening voluntary disclosures for significant concerns.

How EPA responds to the recommendations in the OIG Report remains to be seen. However, even in the absence of such a response, the OIG Report reveals one particularly important feature of the Audit Policy. This feature is the suitability of the Audit Policy for addressing voluntary disclosures of noncompliance of the Toxic Release Inventory (TRI) reporting program. (For more on this, see *EPA's Audit Policy: TRI Noncompliance as a Textbook Application* in the June 2, 2021 edition of The Cubical, which can be accessed by clicking here.)

According to the OIG Report, voluntary disclosures of TRI violations and other violations under the Emergency Protection and Community Right-to-Know Act (EPCRA) that meet all nine criteria under the Audit Policy are handled differently by EPA as compared to other types of voluntary disclosures. Disclosures of violations of TRI and other EPCRA provisions are granted a conditional determination of no assessment of civil penalties. EPA refers to these disclosures as Category 1 disclosures. In contrast, following receipt of all other types of voluntary disclosures (so-called Category 2 violations), EPA makes a determination regarding eligibility for penalty mitigation *after* a review of the individual details and circumstances surrounding the disclosed violations. It is these Category 2 violations that are the focus of the OIG Report.

One can certainly understand why the OIG chose to focus its attention on Category 2 violations. After all, it is unlikely (although not impossible) that a handful of voluntarily disclosed failures to submit TRI Form Rs would represent the tip of a much larger and systemic "noncompliance iceberg." What's important here though aren't the reasons, but rather the mere fact that OIG chose to exclude an entire category of violations for which facially complete voluntary disclosures under the Audit Policy essentially result in automatic (albeit conditional) grants of penalty relief.

Of course, the object of any EHS compliance and audit program should be to achieve 100 percent compliance. However, regulated entities that are, or may be, subject to the TRI reporting requirements should be mindful of the relief from penalties that can be achieved from timely and compliant disclosures of violations pursuant to EPA's Audit Policy.

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