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National due diligence updated

January 30, 2014 - Green Buildings

After months of waiting for the "big announcement," the U.S. E.P.A. (EPA) issued its decision, effective December 30, 2013, to recognize the updated ASTM International Standard Practice for Environmental Site Assessments, E1527-13, as suitable to comply with the All Appropriate Inquiry rule (the "Rule") associated with the CERCLA (federal Superfund) liability protections.

Further, to the extent that the ASTM E1527-05 and now 1527-13 are considered the "industry standard" for reviewing potentially contaminated commercial property, there are now a few more issues to be included in the Phase I review. Currently, EPA has stated that property purchasers may use either standard; although in the coming months it is likely that the 1527-05 will be dropped from the Rule.

Although much of the new standard is a repetition of the earlier standard, there are nine specific revisions to be aware of: (1) standard for delineation of historical releases or recognized environmental conditions (known as RECs) is enhanced; (2) assessment of real or potential occurrence of vapor migration and vapor releases on, at, in or to the property; (3) and (4) updated definitions of a REC and an HREC; (5) new definition for "Controlled REC," which refers to a condition where clean-up has occurred but where certain controls must be maintained, e.g. an AUL; (6) clarification of the definition of "de minimis condition;" (7) new definition of "migrate/migration" to specifically include vapor migrations; (8) revision of the definition of a "release" to be the same as that in CERCLA; and (9) additional guidance for file and record reviews and verifying agency information obtained from key databases.

Prudent purchasers will want to be certain their attorneys and environmental consultants are versed in these revised standards. No doubt lenders and financial institutions will still be asking for Phase I Reviews, likely with the expanded criteria in the ASTM E1527-13.

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