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Buyers Beware! New Environmental Due Diligence Standard Issued

The price of environmental due diligence for commercial real estate transactions just went up. On November 6, 2013, the ASTM International announced the issuance of E1527-13, which is the updated standard practice for Phase I environmental site assessments. This updated standard replaces the 2005 version. While new and improved ASTM standards are common, E1527-13 is unique because it currently requires more diligence than legally required to satisfy *All Appropriate Inquiry* (AAI) under CERCLA. For those new to the game, buyers of contaminated property risk being held liable for the cost of cleanup under CERCLA (a.k.a. the Superfund law) unless they meet certain criteria, including the AAI standard.

ASTM's E1527 historically served as the *de facto* standard for AAI, with buyers and lenders adjusting their practice when updates were issued. Then, EPA codified the AAI standard in 2006, expressly noting that E1527-05 complies with the requirements. Most expected that EPA would simply substitute E1527-13 as a replacement for the 2005 version. Defying industry expectations, however, EPA recently proposed a rule that would allow both E1527-05 and E1527-13 to satisfy AAI. Commenters have expressed concern over competing standards, but EPA reportedly will accept both standards in the final rule. A final rule has not yet been issued, suggesting that now is the time to become familiar with the new standard and to consider when it should be implemented.

In short, competing due diligence standards have arrived and are likely here to stay. Assuming EPA accepts both standards, then buyers can use the cheaper, outdated 2005 standard, but they risk future third party litigation – particularly if E1527-13 identifies contamination that might have gone undetected by E1527-05. Sensitive lenders will also likely require E1527-13 even when EPA does not mandate its use. With the new standard emerging as a best practice and preferred option for demonstrating AAI, buyers and lenders should familiarize themselves with the new requirements, particularly the following:

- **Vapor Migration**: The terms "migrate" and "migration" are now defined to include the movement of hazardous substances and petroleum products in any form, including vapor. Soil vapors are therefore more likely to be flagged as a recognized environmental condition (REC) warranting further investigation.
- **Agency File Review**: After performing a database search, consultants are advised to conduct follow-up file reviews for properties identified in the search, and must explain the justification for not performing a file review. Most state and local regulatory agencies have limited resources in responding to records requests. The file reviews are therefore likely to increase both the cost of a Phase I and the timeline for completion.
- **New Nomenclature**: Under the old standard, Phase I assessments were focused on identifying the presence of RECs, including any historical RECs (HRECs) that were also current RECs. Under the new standard, RECs and HRECs now appear to be mutually exclusive, and are not to be confused with the newly defined "controlled recognized environmental conditions" (CRECs). A CREC involves a past release addressed to the satisfaction of regulators where contamination remains in place with appropriate controls (cap, deed restrictions, etc.). Any CREC must specifically be listed as a REC in the conclusion of the Phase I Report. In contrast, HRECs involve a past release addressed to the satisfaction of regulators (or meeting appropriate unrestricted use criteria) without the

need for controls. These distinctions will likely confuse users confronted with multiple types of environmental conditions as they weigh the need for further investigation.

The above requirements are likely to cause confusion, and increase the time and cost of obtaining a Phase I. There are additional requirements in ASTM E1527-13, further complicating the environmental due diligence process. For more information concerning the new standard and any environmental due diligence issues, please contact a member of the Environmental Law Practice Group.

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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