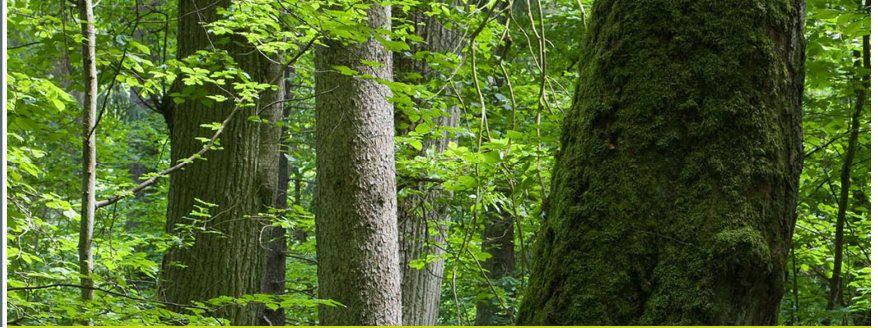


in the news

Environmental and Natural Resources



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Protect Your Investment: EPA Changes Standard to Qualify for Liability Safe-Harbors

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On December 30, 2013, the EPA approved the use of a new ASTM Phase I environmental site assessment standard, E1527-13 (“2013 Standard”), in order to satisfy the CERCLA “all appropriate inquires” rule and qualify for certain liability defenses, such as the contiguous property owner defense, and innocent and bona fide purchaser safe harbors. The EPA, however, did not rescind its endorsement of the previous standard, E1527-05 (“2005 Standard”).

The EPA indicated it would rescind its endorsement of the previous standard in the “near future”, but it is unclear exactly when the EPA will act. Until it does, investors, lenders, borrowers, developers and other prospective property purchasers will now have to select which standard to use in performing environmental due diligence in connection with real estate acquisitions.

In its approval, EPA encourages use of the 2013 Standard. The 2013 Standard is intended to provide users with more thorough and complete information about the presence of recognized environmental conditions than may be provided when using the 2005 Standard. This additional information provided by the 2013 Standard may well come at an increased cost and a lengthened time to complete.

The most significant differences between the 2013 Standard and the 2005 Standard pertain to the scope of investigative activities to be conducted.



All the investigations required by the 2005 Standard are retained in the 2013 Standard. However, the 2013 Standard also includes:

1. A revised definition of “migrate/migration” which specifically includes vapor migration. The revision clarifies that releases of contaminants which migrate via vapor in the subsurface or in soils are recognized environmental conditions;
2. Expanded requirements for conducting regulatory agency file and records review. Under the 2013 Standard, environmental professionals must now make efforts to review and to document the validity of information obtained from regulatory agencies or explain why this is unnecessary; and
3. Expanded requirements to examine historical sources to evaluate prior industrial and manufacturing property uses.

The 2013 Standard is intended to provide end users with more thorough and reliable information on potential recognized environmental conditions associated with the

target site. This additional analysis will likely require environmental professionals to invest more time completing Phase I assessments, leading to increased costs. The benefit of the new standard, however, is that this knowledge or increased certainty will assist prospective purchasers in better evaluating real estate.

In some instances, the additional cost or time may not be justified. Prospective property owners may want to minimize costs for what may be characterized as low risk, low benefit information and prefer to use the 2005 Standard.

What Should You Do?

Prospective property owners should familiarize themselves with the 2013 Standard, and its differences from the 2005 Standard, in order to make informed decisions on which standard to employ when investigating property and seeking to qualify for CERCLA liability defenses. If you are acquiring new property, the experienced attorneys at Polsinelli can assist you in properly investigating all environmental issues and enabling you to satisfy the “all appropriate inquiries” rule.

For More Information

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