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The Top 5 New Environmental Issues for Commercial Property Owners or Managers

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The Biden-Harris administration is quickly establishing new federal environment requirements affecting commercial property owners and managers. These requirements, along with changes occasioned by the COVID-19 pandemic, raise a host of new practical and legal considerations for landlords and property managers.

Chief among them are the five issues below:

1. Microbial Contamination Resulting from Property Vacancy and Underutilization

Teleworking has increased dramatically during the pandemic as the result of public health measures to increase social distancing and stem the spread of COVID-19. As a result, many commercial buildings and offices have lain vacant or underutilized.

As workers increasingly return to the workplace, landlords and property managers must be vigilant about the increased possibility of contamination resulting from underuse of key building systems like HVAC and plumbing. Without workers to use these systems, pockets of stagnant water can arise, creating ideal conditions for growth of pathogenic organisms like *Legionella spp*. at levels that may be harmful to the health of occupants and customers alike. *Legionella spp*. cause a severe form of pneumonia that may lead to hospitalization or death.

While most jurisdictions and localities require property owners to conduct regular HVAC inspections and maintenance, few impose analogous requirements for plumbing systems. Even so, landlords and

property managers should consider plumbing inspection and maintenance activities prior to workers returning to the office. In carrying out these activities, property owners without specialized expertise in-house should consider engaging consultants that utilize scientifically sound, best practices for monitoring and disinfection.

Failure to properly address residual contamination may result in not only adverse health outcomes but also in loss of income and litigation. Property owners and managers should consult with counsel when developing communications and remediation plans and may want to review their pollution legal liability coverage to ensure it includes contamination with microorganisms.

2. ASTM's Revised Phase 1 Environmental Site Assessment Standard

The American Society for Testing and Materials (ASTM) recently revised its widely used E1527 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, now denominated as E1527-21. This standard has long been part of EPA's "all appropriate inquiries" (AAI) rule (40 C.F.R. Part 312) that provides a foundation for parties who may wish to qualify for the bona fide/innocent purchaser defenses to CERCLA/Superfund liability.

The revised standard includes some noteworthy changes in emphasis. For example, "discussions" has been added to key definitions that might increase reliance on the environmental professional's subjective experience or "logic" rather than data in identifying "recognized environmental conditions" (REC), and the new and lengthy "guidance" in an appendix on what constitutes a REC may be mistakenly read as binding mandates. The determination of whether hazardous substances are "likely" to be present on a property should not be transformed into the question of whether one "can exclude the possibility" that hazardous substances "may be present"; doing so could lead to a "prove the negative" approach rather than one based on concrete evidence that contamination is "likely." The revised minimum information source review requirements may also lead to more in-depth assessments. The revised standard also raises the possibility of including materials not yet defined as "hazardous substances" under Federal law, such as per- and polyfluoroalkyl substances (PFAS) in the optional "Non-Scope" portion of a Phase 1.

The bottom line is that the revised ASTM standard may result in more RECs being identified by Phase 1 assessments. Users or consumers of Phase 1 assessments should not hesitate to raise questions about the reports' conclusions, particularly where the conclusions cannot be traced to concrete evidence of releases or contamination.

The existing limitations and cautions about Phase 1 assessments continue to apply, including that typically there is no legal requirement to conduct Phase 1s, and neither the ASTM standard nor EPA's AAI rule require that RECs be corrected or that Phase 2 subsurface investigations be conducted. Phase 1s also have a relatively limited scope, focusing primarily on the risk of soil and groundwater contamination, and are not a comprehensive review of all environmental or related compliance risks. Lastly, there appear relatively few instances where the innocent/bona fide purchaser defenses are actually invoked.

For those interested in the innocent landowner/bona fide purchaser defense, the 2013 version of the ASTM rule (E1527-13) is still the version referred to in EPA's AAI rule. Notwithstanding EPA's direct involved in the ASTM standard's revisions process and that it has the revised standard in-hand, it could be several months, even more, before the revised rule is formally incorporated into the AAI rule. Given that the revised ASTM standard is arguably "more stringent" than the 2013 version, it is

unclear whether EPA or a court evaluating an innocent landowner/bona fide purchaser would reject a Phase 1 conducted under the revised standard before EPA updates its rule. Therefore, in the near-term, consulting firms will likely be offering their clients three options: (1) use the 2013 version until EPA updates its rule; (2) use both standards under a blended approach, or (3) use the 2021 version now.

3. EPA Clarifies that the Lead Renovation, Repair, and Painting Rule Applies to Property Managers

The answers suggest that property managers need obtain lead certification only when their own employees are carrying out renovation, repair, and painting of lead surfaces and that the EPA would take enforcement only against the certified renovation firm retained by the PMC – not the PMC itself.With certain exceptions, EPA's Lead Renovation, Repair, and Painting Rule (RRP), 40 C.F.R. §§ 745.80 – 745.92, requires renovation, repair, or painting at residential properties built before 1978 (the year lead was banned in paint) to be carried out only by certified firms. For years, the EPA has maintained a guidance document called *EPA Lead-Based Paint Program Frequent Questions* ("Lead FAQs") (Lead RRP Frequent Questions 7 28 10.doc (epa.gov)). The current iteration of the Lead FAQs includes answers to two questions related to property management companies (PMCs).

Recently, the EPA published a Federal Register notice stating its plan to withdraw those property manager Q&As. Environmental Protection Agency, *Withdrawal of Two Answers to Frequent Questions About Property Management Companies and the Toxic Substances Control Act Lead-Based Paint Renovation, Repair, and Painting Rule*, 86 Fed. Reg. 60812 (Nov. 4, 2021). Instead, the EPA intends to clarify that it:

> would assess compliance by PMCs with the RRP rule, as it would for any other entity, according to the broadly applicable language of the RRP rule: That no firm may perform, offer, or claim to perform renovations without certification from EPA in target housing or child-occupied facilities (unless the renovation qualifies for a specified exception). See, e.g., 40 CFR 745.81(a)(2)(ii). Furthermore, the EPA will evaluate compliance and appropriate enforcement actions on the basis of each case's individual facts and circumstances, and the EPA may exercise its enforcement discretion regarding PMC obligations.

Id. at 60813.

While the Lead FAQs are guidance, not regulation, the EPA accepted comments through Dec. 6 on the proposed withdrawals. The handful of received comments was evenly split between those favoring the withdrawals and those against. It is unclear how the EPA will respond to comments, but absent an influx of comments disfavoring the withdrawals on substantive grounds, the withdrawals look likely – especially in light of the Biden-Harris administration's focus on children's health.

This means that PMCs soon may be required to obtain lead certification and to follow all of the RRP regulations, including recordkeeping, particularly where they are subcontracting the lead renovation work. Navigating the RRP can be tricky at first, as is establishing a recordkeeping system that helps to ensure compliance. Routinizing compliance and compliance documentation is critical to avoid winding up in the crosshairs of EPA enforcement.

4. Federal PFAS Regulatory Action May Create New Challenges for Property Owners and Managers

EPA plans to take the following PFAS actions relevant to property owners and managers: In October 2021, EPA updated its national strategy for addressing certain per- and polyfluoroalkyl substances (PFAS) under a number of federal statutory authorities, including the Safe Drinking Water Act (SDWA), the Toxic Substances Control Act (TSCA), the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). There are thousands of PFAS, with different applications, uses, toxicological profiles, and chemical properties. Regulatory action has focused primarily on PFOA (perfluorooctanoic acid) and PFOS (perfluorooctane sulfonic acid), but the list of PFAS under state and federal scrutiny is expanding.

EPA plans to take the following PFAS actions relevant to property owners and managers:

1. Final rulemaking for a federal drinking water standard for PFOA and PFOS by 2023. Some states already have state drinking water standards for PFOS, PFOS, and other types of PFAS.

2. Action under TSCA to increase data collection concerning certain PFAS. Such action includes enhancing reporting obligations under the Toxics Release Inventory (TRI) by proposing rulemaking in 2022 to categorize certain PFAS on the TRI list as “Chemicals of Special Concern” and to remove de minimis eligibility from supplier notifications. Additionally, EPA intends to expand its list of PFAS subject to the TRI.

3. Toxicity assessments for additional PFAS, including hexafluoropropylene oxide dimer acid and its ammonium salt, commonly called “GenX chemicals,” as well as PFBA, PFHxA, PFHxS, PFNA, and PFDA. EPA may decide to publish health advisories for GenX and PFBS based on the toxicity assessments.

4. Addressing PFAS discharges from industrial sources through data collection and rulemaking.

5. Plans to designate PFOA and PFOS as hazardous substances under CERCLA. It has been reported that EPA’s proposal is with the White House’s Office of Management and Budget for final interagency review prior to publication in the Federal Register. Under CERCLA, a site is contaminated if it is the location of a “release” of a “hazardous substance,” which causes the incurrence of response costs. As we have explained previously, this hazardous substance designation may expand sites under which a CERCLA cleanup may be conducted.

Accordingly, parties purchasing new property may wish to consider PFOA and PFOS during diligence activities, even before any final designation, depending on the site’s prior use, surrounding uses, and future intended use. Parties likewise may wish to consider PFOA and PFOS, as well as other PFAS when drafting environmental indemnification provisions in purchase and sale agreements or commercial leases.

5. Changing Incentives for Heating, Cooling, and Power in Commercial Properties

The Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-70, signed by President Biden Nov. 15, 2021, provides an example and may indicate where other regulatory change is in the works. As of this writing, the companion Build Back Better Act appears stalled.For decades, various tax and other incentives have sought to induce energy efficiency, fuel choice, or installation of energy systems in commercial buildings. With climate change mitigation now a prominent priority of the Biden-Harris administration, property managers may want to revisit their heating, cooling, and electric power systems.

Title V of the IIJA covers building energy efficiency generally. It authorizes several programs geared to building energy efficiency, for the most part dovetailing with existing measures under the Energy Policy and Conservation Act of 1975, so it is not entirely new. However, looking at what Congress funded may suggest priorities going forward.

IIJA authorizes grants to states to upgrade energy auditing. It also authorizes development of better model building codes to encourage, and in some cases to allow, efficiency and resiliency features in buildings. Then, it authorizes an effort to train tradesman to install those measures. Similarly, it authorizes funding a study of impediments to deployment of heating systems that also generate distributed power. Those sorts of co-generation efforts are not new, but Congress and the Biden administration evidently want to see more and at smaller scale. The statute also contains provisions funding or subsidizing/encouraging various energy efficiency modifications to buildings. Most of these programs run through states, so exact implementation will vary from place to place.

The data may be spotty on exactly how important energy efficiency in commercial buildings will turn out to be. The Energy Information Administration (EIA) only reports data on commercial building energy use through 2003. It has conducted a nationwide Commercial Buildings Energy Consumption Survey, but that was in 2018, and only preliminary results are available. Congress had to authorize information-sharing between the EIA and the EPA on commercial building energy efficiency. So, it is not clear whether the policies and incentives that one sees going forward will be driven by comprehensive data. If not, opportunities may exist to provide the anecdotal information that will lead to favorable incentives for particular projects.

But federal incentives are not the only game in town. States, tribes, and municipalities are increasingly providing incentives for energy efficiency and for the installation of community solar, whereby customers can buy or lease portions of a shared solar system. This is of particular benefit to customers who lack sufficient roof space or land to install solar systems themselves. And it may provide an even bigger benefit to commercial property owners and managers that can transform their rooftops and lands into solar farm locations. Typically, the sites where these solar resources are located can gain significant tax credits and membership fees, while building community goodwill.

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