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ASTM revising Phase 1 ESA standard and the NYC Brownfield Program keeps rolling

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When the American Society of Testing Materials (ASTM) released the 1527-05 All Appropriate Inquiry (AAI) standards in 2006, as with all ASTM standards the standard is valid for eight years, after which it either must be sunset or re-issued. As part of the planned re-issue process, over the past several months, subcommittees have met, revisions have been discussed, and draft ballots issued to obtain comment. The ASTM task Group responsible for the standard hopes that the revision process will effectively be completed in October of this year. Since the standard has been referenced by EPA as meeting its AAI rule requirements, the standard will then be forwarded to EPA for their approval. The final revised standard is expected to be released by the end of 2013.

Two notable changes will include clarification that vapor migration is to be treated no differently than contaminated groundwater migration in the scope of a Phase I environmental site assessment (ESA) and additional agency file review requirements. The vapor issue has been debated by consultants and attorneys for several years. Once thought to be beyond the scope of a Phase 1 ESA (or treated as an additional scope item under the indoor air quality exclusion), the recent revision makes it clear that consultants must address this issue. Under the definition of a Recognized Environmental Conditions (REC), a consultant must now consider the vapor pathway the same way the traditional soil and groundwater pathways have been evaluated. When contamination is present in sub-surface soil and groundwater, volatile contaminants may be released and migrate. When that occurs, the vapor contaminants may migrate to buildings and rise into the structures through cracks and openings in the floor slab and exterior foundations.

However, there are now more tools available to assist consultants in evaluating the potential for vapor migration impacting a property. ASTM released a vapor migration standard in 2010 which was published as ASTM E2600-10. In addition, database companies have introduced targeted products to assist consultants with evaluating if a potential vapor migration problem exists. Where the subsurface contamination is with respect to the subject site, what the contamination type is, what the subsurface soil composition is and the direction of groundwater flow are all part of the evaluation. As purchasers of real estate with liability protections assuming an AAI-compliant Phase I, vapor migration evaluation is required in order for the Phase I report to comply with AAI requirements. Lenders will also have the need to understand this change as they rely on consultant's reports to assist them in evaluating the potential environmental risk prior to closing on a commercial real estate loan.

The agency file review clarification is long overdue. Whether consultants were required to do this within the scope of the ESA, and whether or not they are entitled to charge for this service has initiated many heated conversations over the years. In addition, whether the subject site alone should be part of this additional review or adjacent properties as well can be misinterpreted by consultants and clients alike. Many lenders have written into their master contracts what is expected of their consultants regarding agency file reviews. However, when working for a purchaser directly, consultants typically draft the contract. Unless it is reviewed by an attorney, the client may not be aware of the extent of the consultant's obligation in this matter. Many consultants who are advocates for their clients will write in the contract that obtaining this information will be billed out a flat fee or hourly rate and include photocopying

charges that most regulatory agencies require for obtaining the information. This is usually a better method than ignoring information that may be helpful to the purchaser. With the advent of the vapor issue discussed above, greater importance will be levied on the ability to obtain this information to help evaluate the risk.

As many people working in the real estate industry of the five boroughs have learned over the past few years, New York City has its own Voluntary Cleanup Program (VCP) for brownfields. Typically run at the state level, NYC is the first municipality in the nation to have supervision over the remediation of contaminated sites within its boundaries. Working closely with the New York State Department of Environmental Conservation (NYSDEC) all but the most severe properties, have a chance of being accepted in the city program. The program which has approved cleanup plans for over 40 sites to date is aimed at assisting developers and property owners that have contamination or perceived contamination. In the past, many of these sites would have been passed over due to uncertainty regarding the cost for investigation and remediation. A recent seminar hosted by the Office of Environmental Remediation (OER), which manages the VCP, was designed to assist consultants in developing cleanup plans. As government agencies can be viewed as an obstacle in development, OER brings a 'can do' attitude. From providing templates for consultants to utilize, to being available to answer technical questions and assistance, the team at OER is at the ready. OER currently has several options available including enrollment into the VCP and assisting in the removal of an E-designation which currently exists on over 5,500 sites throughout the boroughs. Investigations are comprehensive and will require an assessment of soil, groundwater and vapors but there is grant money at every step to aid developers. OER typically can provide an approval within 45-60 days if the initial submittal adheres to their requirements. To find out more about the NYC VCP program, visit their website at www.nyc.gov/nycbcp

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