



The American Society of Testing Materials to publish new Phase I ESA standards

March 11, 2013 - Long Island

The American Society of Testing Materials (ASTM) is expected to release this summer the final version of the new ASTM 1527 Phase One Environmental Site Assessment (ESA) standards.

The last major revision was in 2005 to mirror the All Appropriate Inquiry (AAI) standard which was established by the Federal Environmental Protection Agency (EPA). Over the past three years, the process of revising the standard and introducing new sections while eliminating others has occurred. The "newly revised" standard will officially take effect as soon as it receives approval from the EPA that it continues to be consistent with AAI. This is expected to occur this summer and the standard will be published as ASTM E1527-13

Two notable changes will include clarification that vapor migration is to be treated no differently than soil or groundwater migration as a potential source of contamination within the scope of a Phase I environmental site assessment (ESA). 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 potential 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. Vapor Intrusion is the process of contamination that's present in the sub-surface soil and groundwater which can volatile and potentially reach human receptors. Vapor contaminants may eventually migrate into buildings (vapor intrusion) through cracks and openings in the floor slab and exterior foundations.

This revision will be a game changer to all users and providers of Phase 1 ESA reports. Purchasers of real estate should be versed in the liability protections afforded when ordering a 1527-13 AAI-compliant Phase I report. The vapor migration evaluation being required can also lead to the loss of this protection if not included in the report. Most of the vapor problem scenarios have involved present and former gasoline stations and dry-cleaners. The need to understand their potential impact at the subject site and adjacent properties has become even more important. In addition, regulators have gone back to many previously "closed" sites that received a no further action (NFA) or other regulatory sign off and conducting additional investigation as the vapor migration question was not part of the initial investigation prior to receiving the sign off. Owners of real estate have a strict liability clause in most states forcing them to pay for all investigations and remediation deemed appropriate by the governing regulatory agency.

Lenders will also need to understand this change as they rely on consultant's reports to assist them in evaluating the potential environmental risk prior to closing a commercial real estate loan. Although not held to the standard of strict liability like a real estate owner (allowing lenders to manage

environmental issues without paying for the remediation), lenders need to understand this new component as it will effect real estate values if discovered during a foreclosure of an asset.

Today, 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. The evaluation may take into account 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. Most experts in the field do expect the cost of ESA reports to rise in order for consultants to adequately address this potential issue.

The second notable change involves regulatory agency file reviews. Whether or not consultants should have been doing this within the scope of the prior ESA standard was not entirely clear. By neglecting this scope of service, many times bids obtained from multiple firms would vary without the client knowing why. More time and cost are associated with visiting the regulatory agency office, obtaining and paying for information available and deciphering the content for the client to understand. This has now been outlined in the new standard as something that should be done, if the environmental professional believes it can help in making a REC determination. What has not been addressed is who should pay for the additional costs?

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 and therefore 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. The advent of the vapor migration issue within the new standard also puts a greater importance on the ability to obtain this information to help evaluate the risk.

Chuck Merritt is a LEED AP and the president of Merritt Environmental Consulting Corp., Hauppauge, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540