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The many faces of environmental due diligence reports: ASTM to release 1527-13 standards

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As the American Society of Testing Materials (ASTM) gets ready to release the 1527-13 standards in September (enacting the new standard will take place in November), this is a good opportunity to look back over the past 19 years since the 1527-94 (the last 2 digits represent the year) standard was released. Prior to 1994, there was no central body that outlined what should be included in a phase one environmental site assessment (ESA). The release of the first standard helped pull consultants and their clients towards a streamlined process. Along with that standard, ASTM released the transaction screen assessment (TSA) that year. Originally designed for non-environmental professionals, the TSA was more of a checklist for the lending community. Should an area of concern (AOC) be noted during a site inspection, then a phase one report would be ordered by a consultant on the bank's approved list. Somehow over the years, the TSA has morphed into a standalone report. Typically ordered to keep the price down for smaller sized loans, many lenders requested recommendations and costs to cure within the TSA report. The TSA report is still utilized today but not recognized as meeting the all appropriate inquiry (AAI) rule issued by congress in 2006. Many Small Business Administration (SBA) loans originated today only require TSA screens.

In 1997, ASTM released their second version of the standard (1527-97) which clarified some sections of the original report but did not have too many material changes. The next version was issued in 2000 and affectionately known as the millennium standard. The biggest change in that version was a requirement by the consultant to issue an opinion at the end of the report. A recognized environmental condition or REC (which has specific description outlined in the ASTM standard) is how most consultants communicate within the report whether or not additional investigation or inquiry is warranted. What was not part of any of these ASTM standards were any requirements of the consultant preparing the reports. This kept the barriers of entry into the environmental consulting industry low. The 1527-05 standards included four categories of education/experience in defining an environmental professional (EP) who is required to sign the report. The standard also provided some protections to the end user of the report as long as the new AAI sections were adhered to.

The version of the standard to be released in November has several new sections which address the need for a consultant to conduct file reviews when information is available at a regulatory agency or explain why they feel such an exercise is not warranted. The controlled environmental recognized condition (CREC) is a new section that helps a consultant communicate with their client that an environmental impact is present; however the appropriate remediation or monitoring of the condition is being conducted under the supervision of the governing regulatory body. Finally the new standard puts more emphasis on identifying potential vapor encroachment/vapor intrusion sites that

may impact the target property. The federal Environmental Protection Agency just released a statement that both the ASTM 1527-05/13 standard meets the definition of the AAI rule.

Now that the industry has almost two decades of ASTM due diligence standards and several versions which one is right for you? The purchaser of a piece of real estate should have a standard that meets the AAI rule. New York is a strict liability law state. So if you buy it you own it and subject to the liability of remediation if an impact is present. There are protections from liability in that standard if contamination is found later and the phase one was conducted in the appropriate manner. No other standard offers that so it is worth the extra money prior to purchasing a site. Since this is the most comprehensive product available, most lenders will accept a buyer's report with the condition of a reliance letter and review by one of their approved vendors.

Lenders have a different liability and risk management to consider and may decide on a product like the 1527-00 millennium standard. This provides an insight into the properties past and current usage without including some of the sections that apply more to the buyers risk and liability. When a lender is considering a re-finance of a property, they may elect a less comprehensive report like a TSA screen especially if the site has been previously vetted. However, each lending institution has an environmental policy which will dictate which style report is required.

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