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How environmental due diligence continues to change over the years

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In the 18 years since the first release of the ASTM 1527 guidelines for conducting a Phase I Environmental Site Assessments (ESA) much has changed. The standards have been revised several times and are currently undergoing a five year review which will surely provide some new considerations once finalized. The original goal of the Phase 1 ESA was to determine if a property met the definition of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and if it should be included on a State Hazardous Waste Site (SHWS) list. The current All Appropriate Inquiry (AAI) rule and now the vapor encroachment/intrusion (VE/I) standards recently released take many more factors into consideration and have changed how a consultant approaches the marketplace.

When conducting a Phase 1 ESA, different parties relying on the report will have different needs and different risk tolerances. What is acceptable to the purchaser of the property may not meet the risk tolerance of the bank providing the financing. For example: a scheduled re-development of a property with soil contamination may not concern the developer so much as he plans on removing the impacted soil during construction. However, the lender may be concerned if the project goes into default that they will inherit the contamination and have regulatory exposure plus the reduced value of the property when trying to sell it. This scenario has played out again and again pre 2009 as development sites were in great demand and financing plentiful. Then the "great recession" hit and development sites stalled, financing dried up, and borrowers defaulted on their obligations. What was left were partially constructed buildings on "tainted" sites. Much of the impact was not uncovered during this time frame for a variety of reasons. Less than adequate reports prepared by inexperienced personnel, a haste to make loans by lenders, as well as securitize & bundle loans to be sold on a secondary market, flipping of contacts, etc. etc.

Now that there has been a reset in the real estate world, where are we in regards to environmental due diligence? The answer should be: what does my client need? Is the report being conducted for a re-finance of debt coming due or a better rate at a different bank? In this scenario, the lender will usually have an approved list of consultants that they rely on to provide the report for their use. Is the client purchasing the site and needs the protection afforded in the AAI style report? Is there Small Business Administration (SBA) financing being obtained as they have their own nuances of how the report should be worded. Is the property located in a "flagged" regulatory zone such as the New York City Department of Environmental Protection (NYCDEP) E-designation program that requires studies above and beyond the Phase 1?

Now that the vapor encroachment/intrusion is working its way to the forefront of the environmental consulting industry, things are about to change again. This issue stems from the fact that for many years, the primary thought of contamination migration was from the soil and groundwater. However, we are learning more and more that vapor migration through cracks in building foundations must also be considered. The vapors come from the volatilization or breakdown of contaminants into a gaseous state. These vapors can travel with different dynamics than the soil or groundwater including against gravity. Based on these factors, not only does the subject site need to be assessed but adjacent properties housing operations such as gasoline stations and dry-cleaners need to be understood. This can be done with a variety of techniques. Starting with an understanding of how the vapors migrate, what distances can be traveled by the vapors and what other mitigating factors exist (large roadways in urban settings with utility lines underground can aid in re-directing vapors away from the target property).

The American Society of Testing Materials (ASTM) released the E2600-10 guidelines to help consultants make these determinations. When a potential VEC condition has been identified, soil and groundwater testing (typically referred to as the Phase II investigation) can be implemented to determine if any impacts exist and finally air testing in a building. These tools available are to help the client understand this issue. More and more phase I reports are starting to point this issue out as the definition of a Recognized Environmental Condition (REC) needs to consider vapor migration as a pathway for contamination as much as soil and groundwater.

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