

BUILDER AND DEVELOPER

CHANGING CODES SIGNIFICANTLY IMPACT LANDOWNERS

New environmental due diligence standards and pending regulatory shifts complicate contaminated property acquisition and path to regulatory closure.

By Keith Walker

June 23, 2014



A new environmental due diligence standard will significantly impact the way landowners and prospective purchasers evaluate and address contamination. In addition, pending changes in the regulatory environment indicate that the bar for obtaining regulatory closure (i.e., a “No Further Action” [NFA] letter) is being raised.

The U.S. EPA recently published its final rule adopting ASTM E-1527-13 as the standard for satisfying the “all appropriate inquiries” (AAI) requirement for landowner liability defenses under the Comprehensive Environmental Response, Compensation and Liability Act. EPA’s next step will be publishing a proposed rule that references only ASTM E-1527- 13 as the acceptable standard, which will mean that the prior standard (ASTM E-1527-05) will no longer be acceptable.

The most significant change is the way soil vapor impacts are viewed. Under 1527-05, contaminants in soil vapor were typically considered an indoor air quality issue. ASTM E-1527- 13 changes that by requiring that soil vapor be evaluated like soil and groundwater. Consequently, many conditions not identified as “recognized environmental conditions” (RECs) under 1527-05 will be identified as RECs under 1527-13, paired with a recommendation for a Phase II subsurface investigation. The investigation results may then necessitate the performance of a human health risk assessment (“HHRA”) that analyzes potential contamination exposure by workers or site occupants. In many cases, multiple rounds of risk assessment may be required to account for seasonal and other variations affecting intrusion rates. The HHRA may also indicate that active remediation is necessary.

For sellers of real property, the switch to 1527-13 likely means far more involved pre-acquisition environmental due diligence by prospective purchasers, heated negotiations over price, and increased ambiguity regarding environmental and human health risks. In addition, as the extent of subsurface investigation increases, the likelihood of discovering additional environmental impacts increases significantly. All of this may greatly complicate negotiations about responsibility for remediation and mitigation – putting sellers between a rock and a hard spot: (1) taking on significant post-closing obligations or (2) accepting substantial decreases in the purchase price. For prospective purchasers, this implicates the need for far more sophisticated environmental due diligence with an increased focus on soil vapor impacts, human health risks, and potential toxic tort liability.

Dialogue among state and local regulators and the consulting community, however, indicates that pending guidance from U.S. EPA will most likely necessitate indoor air sampling as part of an HHRA – beginning as early as this year.

For those accustomed to obtaining HHRA-based regulatory closure, this shift is a game-changer. Indoor air considerations may result in multiple barriers to closure, such as active remediation requirements, or could even indicate that the site is ineligible for closure. Alternatively, indoor air sampling results could indicate the need for substantially more mitigation than previously anticipated.

Also, sites that previously received risk-based closure could be re-opened and regulatory agencies may require that the pre-existing HHRA incorporate indoor air sampling results, which could then indicate that far more remediation and/or mitigation is necessary. This will be especially true for sites that barely achieved risk-based regulatory closure initially. The net effect is that responsible parties may have to spend vast amounts of money on sites for which NFA letters were already issued.

Further complicating this is the wide range of chemicals that may be present in indoor air from sources completely unrelated to subsurface contamination. This is especially true for new construction materials (e.g., carpet adhesives, paints, varnishes, etc.) that are still off-gassing, thereby significantly impacting indoor air quality.

Unless the responsible party can demonstrate the causal gap between subsurface chemical impacts and elevated chemical concentrations in indoor air, the owner of the site (or other responsibility party) may need to incur hundreds of thousands of dollars to investigate and address indoor air impacts, regardless of whether they relate to subsurface conditions. This process will amount to a highly technical, uphill battle. Also, for sites already developed without vapor barriers, this raises crucial questions of what could be required in lieu of barriers.

The adoption of ASTM E-1527-13 and pending changes in EPA policy mean increasingly stringent requirements for evaluating potential soil vapor impacts. As the road to achieving NFA status changes, the need to engage skillful, experienced environmental counsel and qualified consultants becomes more acute than ever before.

Keith Walker is an associate at Cox Castle Nicholson. He may be reached at kwalker@coxcastle.com.