



The Small Business Administration (SBA) announces new environmental guidelines - by Chuck Merritt

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Chuck Merritt,

Merritt Environmental Consulting

Starting in January of 2018, the Small Business Administration (SBA) will be implementing some new revisions within their commercial real estate loan program. Administered by the federal government, the SBA in conjunction with local banks offers favorable terms to small business owners seeking commercial real estate loans. In conjunction with the loan application, the SBA has always required environmental due diligence as part of that process. The SBA was one of the first government programs to adopt the American Society of Testing Materials (ASTM) E1527-13 Phase One Environmental Site Assessment (ESA) standard which hit the marketplace in 2013. Although not fully implemented until late 2015, the SBA began requiring the standard in conjunction with SBA loan applications in January of 2014.

The SBA due diligence process begins with determining the type of business activity using the North American Industry Classification System (NAICS) which is typically done by the lender. Should that code indicate an environmentally sensitive industry such as a drycleaner or gasoline station, the SBA has a chart outlining the steps required. Typically, these types of properties require a phase one ESA where other less sensitive classifications may require less due diligence such as a transaction screen. SBA will now "require" a phase two investigation for dry cleaners (historical and current) which may have utilized chlorinated solvents such as tetrachloroethene (PCE) and trichloroethene (TCE) and/or petroleum-based solvents during their business operations as they may present significant clean-up costs if these contaminants have entered the soil, soil vapor and/or groundwater.

"Prudent lending practices dictate, and SBA requires that any property with on-site dry-cleaning facilities, whether currently in operation or operated historically at the site, that did, do or likely used chlorinated and/or petroleum-based solvents undergo a Phase II Environmental Site Assessment in addition to a phase one which would be required due to the NAICS code match. Any soil and groundwater contamination and soil vapor intrusion must be addressed." The SBA guidelines go on to state that any phase two investigation performed in connection with an on-site dry-cleaning facility must be conducted by an independent environmental professional who holds a current professional engineer's or professional geologist's license and has the equivalent of three years of full time relevant experience.

Vapor Encroachment (V/E) and Vapor Intrusion (V/I) is the process where contaminants in the soil and groundwater break down into a gaseous state. When this occurs, vapors can migrate into building structures. (Typically, through cracks in the foundation walls and floor slabs). Enough vapors inside a building can cause air quality issues to the occupants. Most vapor encroachment scenarios stem from present and former gasoline stations and dry-cleaners that utilized chlorinated solvents. Based on how vapors can migrate, adjacent properties can be the source of the original impact and must be vetted.

The SBA has clarified some language regarding gas stations in which the language now states that "the Environmental Investigation performed by the Environmental Professional (EP) must include a determination whether or not the gas station is in compliance with all regulatory requirements, if any, pertaining to tank and equipment testing. A loan may not be disbursed until full compliance is achieved. Further, any leaking or otherwise defective equipment, systems, containment devices, etc., must be replaced or repaired prior to disbursement." There is a provision that states that the procedures that lenders can follow should they not want to follow the EP's recommendation, however it must be approved by the SBA committee.

The new SBA revisions discuss the language that is required in which the EP states either - (1) the risk of contamination at the property is so minimal that no further investigation is warranted; or (2) there is risk sufficient to warrant additional investigation. Alternatively, the EP may include a similar statement to this effect. If further investigation is warranted, the EP should provide a detailed description of the recommendations. Separate of the report, the consulting inspector that prepares the ESA must sign the SBA reliance letter. The SBA will not accept any changes or edits to the required reliance language.

For many years, the SBA has partnered with banks and can provide access to capital for commercial real estate loans to small business owners. In addition, SBA has always required a certain level of due diligence to be performed on those loan applications by bank approved consultants. The revisions being implemented in 2018 are a further clarification to help expedite the loan approval process. A copy of the SBA final procedures document can be found at the SBA website. (<https://www.sba.gov/about-sba/sba-performance/policy-regulations/standard-operating-procedures>)

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