American Society of Testing Materials (ASTM) - Environmental standard reaches second anniversary

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The current ASTM E1527-21 standard went live on February of 2024 and just reached its second anniversary in the marketplace. Since real estate transactions have been less robust with higher interest rates slowing activity, many may not have noticed. But what is occurring with the new standard is the ability for buyers to conduct more due diligence, using the findings of the 21-standard which casts a wider net for potential environmental concerns than previous standards have. One of the most notable changes is looking at adjoining and adjacent properties as well as the "Subject Site". I outlined this in 2022 when the standard was adopted but not yet approved. This is how the standards define that issue.

Under ASTM E1527-21, adjoining properties are those that share a direct border (contiguous) or are separated only by a public thoroughfare (e.g., a street). Adjacent properties are a broader, less strict term that can include nearby properties in the surrounding area that do not directly touch or share a boundary.

In short, all adjoining properties are adjacent, but not all adjacent properties are considered "adjoining" under the strict definitions of the ASTM E1527-21 standard.

Depending on the location of the property being purchased, there may be many sites that fall into the adjoining/adjacent definition with a potential environmental concern. Consultants are finding it hard to rule out potential impacts from these properties in densely populated commercial, industrial, and manufacturing zones under the 21 standards. Keep in mind these operators do not need to be currently engaging in said activities, they just need to be flagged as a historical operator. Add in known plumes of contamination that can extend literally for miles, and you have many more phase one reports with recommendations for additional investigation or a "Phase 2".

Working for buyers since the release of the new standard creates an opportunity for consultants to educate their clients so they understand the value of additional testing. Especially if they have not yet identified a lender since having more due diligence is always better. The challenge has been properties that are going through a refinance as they seek to place new debt on a property they already own. Using a combination of a new standard and potentially a new lender from the last time they may have obtained financing, there can be surprises and increased costs associated with the lender's perceived environmental risk. During a refinance, the bank typically picks the consultant off their approved list who works for the lender not the borrower.

Absent of another environmental standard, lenders rely on the ASTM E1527 standard which was designed to protect a buyer from CERCLA liability.

Lenders always have the latitude of deciding what they believe is a risk for the money they are lending but tend to be cautious (especially traditional state and federally charted banks and credit unions).

A common way of determining if these adjoining-adjacent sites may have impacted the subject site is vapor sampling. Through a process of collecting sub slab vapors (conducted below the lowest level of the property) and indoor air, the data provided can aid in determining if a problem exists. Different states can have varying standards to determine the acceptable level of vapors present. Collecting this data is less invasive than drilling holes and obtaining samples of the soil and groundwater and can be conducted in tight spaces where traditional equipment cannot get.

As consultants have become more familiar with the changes of the standard, and the additional work involved, pricing has been moving up as was to be expected. Working for a buyer directly provides an opportunity for a team approach along with the buyers' attorney and broker to get the best report possible and discuss what steps should be taken next when a Recognized Environmental Condition (REC) is identified. If a Phase 2 investigation is recommended, more time may be needed. Therefore, it's important to know if the seller allows more time to obtain this additional data. The consultant hired should be willing to communicate to the buyer and the attorney the concerns raised (especially when they may be the adjoining or adjacent property). From there, a consultant can provide some guidance with a scope and cost. Since the term phase one infers additional phases may be needed, the current ASTM standard (which is typically revised every 5-8 years) provides a path forward when concerns arise at adjoining/adjacent properties. Buyers would be prudent to utilize that opportunity as part of their due diligence.

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