

# LESSONS LEARNED:

ENVIRONMENTAL SERVICES

## OBSERVATIONS AND LESSONS FROM THE SCHOOL OF EXPERIENCE

### VAPOR MIGRATION AND DUE DILIGENCE

The migration, accumulation, and intrusion of harmful vapors into buildings from contaminated soil and/or groundwater has been a focus of state and federal regulators, as well as the subject of numerous legal actions in recent years. As a result, evaluation of the potential presence and potential for migration of such vapors has become an important and routine part of the real estate transaction due diligence process.

Prior to the purchase of a property a Phase I Environmental Site Assessment (ESA) is typically performed. The Phase I ESA is the industry accepted method to conduct "All Appropriate Inquiry" (AAI), as defined by federal law. A Phase I ESA is conducted to identify known or suspected contamination on or near to the subject site, therefore providing environmental contamination liability protection for the prospective purchaser. If a Phase I ESA identifies potential sources of contamination, then a Phase II ESA is performed which typically includes physical sampling and testing of soil and/or groundwater samples for contamination.

In the past, the potential for harmful vapor migration was not typically raised in a Phase I ESA unless known or suspected contaminated soil and/or groundwater that might impact the subject site was identified by the Phase I ESA. Vapor migration was then evaluated as part of a Phase II ESA.

In June 2010, the American Society for Testing and Materials (ASTM), the organization responsible for producing guidance on standard industry practices, issued the *Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions (E2600-10)*. The new standard requires an evaluation of the potential for harmful vapors to migrate as part of the Phase I and Phase II studies. This new evaluation is known as a Vapor Encroachment Screen (VES). The ASTM standard provides a thorough explanation of how this approach relates to the process of conducting Phase I ESAs.

A VES involves a two-tiered approach to evaluate the potential for vapor migration emanating from contaminated soil and/or groundwater, either from onsite or offsite sources. The VES process details a systematic approach to identify known or suspected contaminated properties within a set search radius using a historical and government records search (Tier I Review). If a contaminated site is identified or suspected, both non-invasive and invasive methods can be employed to further evaluate the potential for vapor migration pathways within the property involved in the transaction, and therefore provide an assessment of the potential environmental risk and liability associated with the site (Tier II Review). Analysis of these data sources permit the prospective purchaser and the environmental professional to decide if the level of risk is acceptable, or if additional evaluation (i.e. exposure evaluations) is needed.

Some recent legal opinions suggest failure to address the potential for harmful vapor migration during the due diligence process is inconsistent with the AAI rule and could result in liability exposure for the prospective property owner. The VES standard states that, while not required to satisfy the AAI rule, conducting a VES is a good commercial and customary practice for evaluating the risks imposed on a site by this issue. Moreover, the ASTM Phase I ESA standard is currently being revised and it appears that the VES process will be specifically incorporated into the Phase I ESA standard in the near future. In other words, the environmental due diligence process will become more involved and complicated as this dynamic issue emerges.

If you are a prospective real estate purchaser, you should check to make sure your environmental professional has a thorough understanding of harmful vapor migration, the requirements of the VES, and site subsurface conditions to properly evaluate your site, and the potential environmental liability associated with the purchase.

We hope that this brief discussion of vapor migration and due diligence has been informative. If you have any questions regarding this topic, or need assistance with a project, please contact your nearest ECS office.

Respectfully,

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