

MassDEP Issues Vapor Intrusion Guidance: Don't Worry; It's Only Guidance

December 27, 2011 by [Seth Jaffe](#)

Last week, MassDEP finally issued its long-awaited [vapor intrusion guidance](#). Including appendices, it is 148 pages. There is a separate 52-page [response to comments](#) on the draft guidance. MassDEP has certainly learned that guidance must at least be **described** as guidance. The disclaimer runs a full page, and includes the following text:

“MassDEP generally does not intend the guidance to be overly prescriptive. Use of such words as “shall,” “must,” or “require,” however, indicates that the text is referring to a specific regulatory and/or statutory requirement, rather than a suggested approach and/or optional measure. Use of the words “should” or “recommend” indicates aspects of a method or approach that are considered appropriate and protective, based on MassDEP’s experience and/or sound technical practices, but do not correspond to a specific regulatory and/or statutory requirement.

The guidance is not a regulation, rule or requirement, and should not be construed as mandatory. Accordingly, this document does not create any substantive or procedural rights, and is not enforceable by any party in any administrative proceeding with the Commonwealth.”

My take?

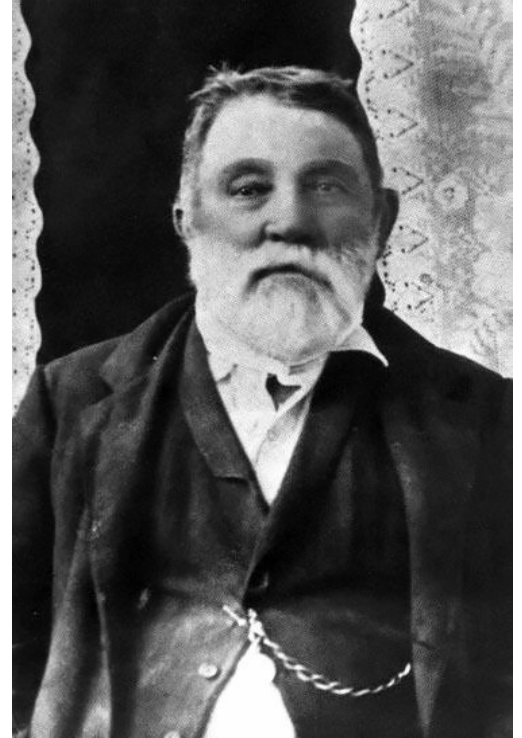
I was tempted to say “trust, but verify.” However, to be honest, I think I have to say instead, “I’ll believe it when I see it.”

For example, one of the most contentious issues has been how to address potential future vapor intrusion issues when there is currently no building on the site and there are no current plans for a specific building. MassDEP has created a three-tiered approach. Owners of property in Category A, with concentrations below GW-2 standards (GW-2 standards, for readers who are not MCP aficionados, are specifically designed to protect against indoor air exposures), need take no additional precautions prior to building. Owners of Category B sites, with concentrations greater than GW-2 standards, but less than 10 times the GW-2 standards, “should” include the installation of a vapor barrier and an active sub-slab depressurization, or SSD, system. Sites with concentrations greater than 10 times the GW-2 standard will be in Category C. Buildings on these sites “would be constructed with a vapor barrier and active SSD system” and the site “should” be sampled over a two-year period.

Don't you just love the artful use of the passive voice here? Who the heck is actually building the buildings? Perhaps the the vapor barrier and SSD will build themselves.

Is this a rule or guidance? Time will tell. My prediction? The first time MassDEP varies from its “shoulds” and “woulds” will be one more time than I expect will ever happen. The street-level bureaucracy at MassDEP is still the law west of the Pecos – or at least east of the New York border – and I do not foresee much flexibility. I would be pleased to be wrong.

(And good luck and best wishes to former Foley lawyer Ben Ericson, now Assistant Commissioner for Waste Site Cleanup, as he tries to implement this guidance -- as guidance.)



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