

NOW & NEXT

Environmental Alert

FEBRUARY 1, 2023

Radon on the radar — FHFA and State of New Jersey issue new radon standards

By Sami Groff, Stratton Constantinides, Kelly Sprague, Dana Stanton, and Alison Torbitt

The 2023 Enterprise Multifamily Radon Policy will apply to all Fannie Mae and Freddie Mac loan applications received after June 30, 2023.



What's the Impact?

- / Under the new Enterprise standards, required testing of ground floor multifamily residential units increases from 10% to 25%.
- / When radon levels exceed standards, an additional 25% of GF units in that building must be tested, mitigation must be conducted, and O&M Plans must be issued. These requirements should be added to loan agreement provisions.
- / In addition to the new Enterprise standards, lenders must stay alert to changes in state and local radon rules. For example, New Jersey has issued stricter, new standards for radon testing.

January is National Radon Action Month—and January 2023 was full of action in terms of changes to radon guidelines. On Thursday, January 19th, the Federal Housing Finance Agency (FHFA) announced substantive changes to the Freddie Mac and Fannie Mae (the “Enterprise”) scope of work for radon testing at multifamily residential properties, the “2023 Enterprise Multifamily

This newsletter is intended as an information source for the clients and friends of Nixon Peabody LLP. The content should not be construed as legal advice, and readers should not act upon information in the publication without professional counsel. This material may be considered advertising under certain rules of professional conduct. Copyright © 2023 Nixon Peabody LLP. All rights reserved.

Radon Policy” (the “2023 Enterprise Policy”), which is scheduled to take effect for all loan applications received after June 30, 2023.

Under these revised standards, FHFA is requiring government-sponsored lenders to expand upon current radon testing standards and has billed these changes as “enhancements” to its radon testing standards in its ongoing efforts to ensure that “multifamily properties with hazardous levels of radon are more accurately identified and properly mitigated.”

What is radon and why is it a concern?

Radon is a naturally occurring gas that has been identified as a carcinogen. According to the USEPA, radon is the [leading cause of lung cancer among non-smokers](#) (and second leading cause of lung cancer overall after smoking), responsible for approximately 21,000 deaths per year, 2,900 of which relate to non-smokers. Radon can enter structures undetected through cracks or other openings in a building floor or foundation and risk occurs over the course of years of long-term exposure to radon. Accordingly, the USEPA and many states have radon programs intended to find and prevent radon intrusion into residential structures, including testing and mitigation requirements.

These testing and mitigation requirements become incorporated as the standard industry practice in real estate transactions. The scopes of work used for radon testing in real estate transactions are governed by federal or state law and by industry standards.

The 2023 Enterprise Policy

Testing standards

The most notable change under the new Enterprise standards increases the required testing of ground floor multifamily residential units from 10% to 25%, maintaining the existing minimum number of one test per building. Many existing lender scopes of work require testing of only one ground floor unit per residential structure. Lenders seeking to meet Enterprise standards will need to ensure that the total number of units tested equal 25% of the total ground contact residential units.

The Environmental Professional (EP) responsible for the testing must include the findings in the Phase I Environmental Site Assessment (ESA) and now must also specify recommendations for further investigation and/or mitigation, and, if required, cost estimations for additional work to be performed. The 2023 Enterprise Policy expresses a preference for the initial round of testing to be conducted prior to loan closing but allows for it to be conducted post-closing, where provided for in the loan documents.

Under the 2023 Enterprise Policy, EPs must manage and oversee the testing process but may still direct property representatives to place and retrieve canisters. Notice must be provided to tenants explaining testing protocols. Up to 15% of tests may be disregarded due to lost, faulty, or inaccessible tests or in the EP’s discretion.

If an exceedance of the EPA Action Level is identified, that unit must be re-tested and an additional 25% of remaining groundfloor units in that building also tested OR this step may be skipped and a mitigation system installed. Mitigation must be conducted for all units continuing to indicate exceedances. A Radon Operations & Maintenance Plan (O&M Plan), including periodic inspection of mitigation system equipment, must be implemented. After mitigation is complete, the EP must issue a Certificate of Completion (COC) documenting the work done. The requirement for the Radon O&M Plan and the Radon COC should be added to loan agreement provisions.

Exemptions

Ten exemptions from these requirements are listed, including manufactured housing communities, upper level residential units, properties with no ground-contact residential units (including properties with ground-floor retail, first-floor amenities/leasing, or residential units above parking garage or over code-compliant ventilated crawl space), small balance loans, refinances of existing Enterprise debt with radon testing already conducted that meets the 2023 Enterprise Policy requirements and others, including the discretion of the EP, which must be documented.

Navigating state and local compliance — New Jersey's New Rules

Moreover, the 2023 Enterprise Policy clarifies that all testing and mitigation work is required to comply with state and local regulations but notes that in case of conflict between them, the most stringent standard is to be applied. Lenders must therefore stay alert to changes in local radon rules.

For example, the state of New Jersey has recently implemented its own revised standards for radon testing and mitigation at multifamily residential properties, effective December 23, 2023. See New Jersey Administrative Code (N.J.A.C.) Section 7:28-27A, which also integrates the American National Standards Institute (ANSI)/American Association of Radon Scientists and Technologists (AARST) MAMF-2017 protocols. New radon testing requirements in New Jersey include that all ground contact units be tested (including units closest to ground where no underlying unit has been tested such as over crawl spaces or parking garages), that 10% of total upper floor residential units be tested with a minimum of one per building, that all testing must be conducted by certified testers and businesses, that monthly reporting by certified businesses be submitted to NJDEP regarding all testing and mitigation work conducted, that tenant notification must be provided and that execution of a non-interference agreement by property tenants must be "attempted." Such a "non-interference" agreement is specifically not required by the 2023 Enterprise Policy and the rest of these requirements (other than tenant notification) are more stringent than the Enterprise requirements. Accordingly, a Freddie Mac loan in New Jersey would require testing of all ground contact residential units, including units closest to ground floor where there is no underlying ground floor unit, 10% of total upper floor residential units and execution of the non-interference agreement, as required by the more stringent New Jersey rules, even though these measures are not required by the 2023 Enterprise Policy.

Looking ahead

Lenders following the Enterprise radon standards for their own respective loan originations, should take care to make these changes to their scopes of work and all lenders should remain alert of changes to state and local laws such as the recent changes in New Jersey radon rules described above.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Sami B. Groff

516.832.7543

sgroff@nixonpeabody.com

Stratton Constantinides

213.629.6104

sconstantinides@nixonpeabody.com

Kelly Sprague

518.427.2739

ksprague@nixonpeabody.com

Dana P. Stanton

518.427.2735

dstanton@nixonpeabody.com

Alison B. Torbitt

415.984.5008

atorbitt@nixonpeabody.com