



USEPA Finalizes New Standard for “All Appropriate Inquiry” (AAI)

On November 1, 2005, USEPA finalized a new standard for environmental due diligence that could have great significance in the commercial real estate market place. The standard addresses requirements for conducting “all appropriate inquiry” (AAI). The content of the new rule is now final, but it doesn’t become effective until November, 2006. In the interim, existing commercial practices apply.

The catalyst for this change was the Small Business Liability Relief and Revitalization Act passed in January, 2002. In signing the bill, President Bush said that it would “encourage the cleanup and redevelopment of old industrial properties” and provide increased protection for real estate buyers as well as owners of property next to contaminated sites and landowners not responsible for contamination of their property.

The “all appropriate inquiry” concept has been a central focus of environmental due diligence for well over a decade.

All appropriate inquiry: the procedure required to assess environmental conditions of a property prior to its acquisition.

Innocent Landowner Defense

Since 1986, buyers have been able to avoid liability for contamination caused by previous owners through the “innocent landowner” defense--*but only if they made “all appropriate inquiry” into previous ownership and uses” and no evidence of contamination was found.*

A standard for all appropriate inquiry was subsequently developed by the American

Society for Testing and Materials (ASTM). It has since become the accepted standard to qualify a property owner for the “innocent landowner” defense utilizing a Phase I environmental site assessment, now a familiar part of most commercial real estate transactions.

Two New Categories of Defense

The new federal statute added two new landowner liability protections:

- *bona fide prospective purchaser*
- *contiguous property owner.*

To qualify for any of these three liability protections, a property owner must meet certain conditions, not the least of which is conducting AAI under the new USEPA rule.

What’s New and Different?

One of the more significant changes is the new definition of “bona fide prospective purchaser.” If buyers follow the steps outlined in the new rule, they can buy property with soil or ground water contamination--as identified in a Phase I assessment--and still lay claim to the new liability defense. The caveat? They must take positive steps not to make it worse.

Adjacent property owners can also find some comfort in the new rule, since they, too, can take refuge behind the new provisions if impacted by a neighboring site. There are three other areas where AAI differs significantly from the existing standard:

- The definition of “environmental professional”;
- Research and information requirements;

- Explanation of “data gaps.”

These added requirements are expected to increase the price of environmental assessments and could well add to the time necessary to issue final reports. Costs could go up as much as \$500 to \$1,000 per report, but we expect many users to resist the increases and some may even decide to stick with the old system.

Who Can Conduct AAI?

The new AAI rule includes a hotly debated definition of "environmental professional" (EP). The final definition favors those with a background in science or engineering but also includes provisions for professionals with non-scientific backgrounds. Essentially, an individual with a degree in a field *other than* a science, engineering or environmental discipline needs to have at least 10 years of experience. An environmental professional also must "remain current in his or her field through participation in continuing education . . ." Individuals who do not meet the criteria can work under the supervision of someone who does.

More Data Required

The new rule significantly increases the amount of information that must be included or considered in conducting a Phase I assessment. The site reconnaissance must now include interviews with past owners and operators in addition to current ones. If a property is abandoned, neighboring owners or operators must be interviewed. Other new requirements include:

Institutional Controls. The AAI rule requires the EP to identify controls that have been implemented as part of an environmental cleanup program. This would include deed restrictions or the use of parking lots or building foundations as engineered barriers. This is not required by the current standard. Because records of engineering and institutional controls are not available in every state, the AAI rule requires a search only if they are contained in publicly available registries.

Tribal and Local Government Records.

The new AAI rule mandates the review of "reasonably ascertainable" records maintained by Indian tribes and local government agencies. This language is much stronger than the current ASTM standard, which leaves the review of state and local sources up to the environmental professional's judgment.

Historical Research. How far back must the research go to reconstruct past uses? The AAI rule does not require a search back to a particular year but, rather, back to a site's first developed use. The ASTM standard requires research back to the first use or 1940, whichever is first.

Typically, the historical investigation is a significant and often time consuming step in the Phase I process. Consultants have always faced problems of data availability as each historical source represents a different piece of the puzzle. And reliance on an incomplete historical record search has always carried with it the potential for risk.

Explanation of Data Gaps

What happens if some required information cannot be found? Should the property owner still be able to qualify for liability protection? The rule states that if the consultant examines all data that is practicably available and data gaps still remain, then they must be identified and their significance explained. If the data gaps make it impossible for the consultant to reach an opinion, such information must also be noted in the written report. This is a significant departure from current practice and may result in a substantial increase in follow up investigations to close the gaps.

Shelf Life

Phase I reports under both the ASTM standard and AAI have a six-month shelf life. Currently, it is possible to update a Phase I report without redoing each step and the update can be done at any time. However, the new standard requires, in

effect, that a Phase I be completely redone after six months. Up until now, updates have been considerably less expensive than the original Phase I report. Again, the new standard is likely to add an incremental cost to the due diligence process.

Revision of the ASTM Standard

An ASTM task group is revising the current standard to make it consistent with the AAI and expects to complete their assignment by the end of 2005. This will enable the ASTM standard to remain the industry's benchmark for due diligence in terms of CERCLA liability protection and to address the issue of business environmental risk. If they meet their deadline, the new system will essentially go into effect in January, 2006, since the ASTM standard will substitute until the federal rule becomes final next year.

Please contact us if you have questions or comments:

Rich Carlson
(312) 899-0614
rcarlson@carlsonenv.com

Jennifer Guardi
(312) 899-0662
jguardi@carlsonenv.com

Steve Angell
(312) 899-0684
sangell@carlsonenv.com