

Legal Lookout: EPA Defines 'All Appropriate Inquiry'

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The purchase of commercial and/or industrial property is challenging because of the uncertainties associated with contamination that may not have been fully disclosed prior to sale. Faced with the very real possibility of being saddled with cleanup costs and the need to assert defenses to liability under CERCLA for such liability, purchasers need to engage in due diligence sufficient to benefit from liability protections. EPA proposed a rule on Aug. 26, 2004, that helps eliminate uncertainty as to what constitutes a standard of due diligence. The proposal outlines federal standards and practices for conducting all appropriate inquiries (AAI), a key provision in the 2002 Small Business Liability Relief and Brownfields Revitalization Act. This act amends CERCLA by providing funds to assess and clean up brownfields sites, and by clarifying certain CERCLA liability provisions.

Background

CERCLA provides a federal liability scheme for apportioning responsibility for cleanup of contaminated sites. Under CERCLA, and as the past two decades have confirmed, persons may be held strictly liable for hazardous substances at properties that they currently or previously owned or operated. Strict liability is a legal standard that allows the government, under these circumstances, to assign liability for cleanup merely on the basis of site ownership. If due diligence is inadequate, an unsuspecting purchaser could buy a very expensive headache.

In 1986, SARA amended CERCLA by creating an "innocent landowner" defense. Section 101(35)(B), provided a defense to CERCLA liability for persons who could demonstrate that they "did not know and had no reason to know" prior to purchasing a property that any hazardous substances were released or disposed of on the property. To demonstrate that they had no reason to know, persons acquiring property must have undertaken AAI into prior ownership of the property in a manner consistent with good commercial practices.

The 2002 Brownfields Amendments added potential liability protections for "contiguous property owners" and "bona fide prospective purchasers" who must also demonstrate that they conducted AAI to benefit from the liability protections. The proposed rule is the result of lengthy discussions with bankers, lenders, environmental groups, real estate professionals and others. Once adopted, the rule is expected to have significant influence in dictating the way due diligence is conducted.

What standard applies now?

Under the Brownfields Amendments, Congress established interim standards for the conduct of AAI. Effective Jan. 11, 2002, for properties purchased after May 31, 1997, the interim standards included the procedures of the ASTM E1527-97, entitled *Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process*. On May 9, 2003, EPA published a final rule clarifying that for purposes of achieving the AAI standard under Section 101(35)(B), the standards under either the 1997 or 2000 version of ASTM E1527 would suffice. These interim standards and procedures will remain in effect until the proposed rule is final.



For persons who purchased property before May 31, 1997, and seek to establish an innocent landowner defense or qualify as a contiguous property owner, the interim standards require that they must establish, among other statutory requirements, that they did not know and had no reason to know of releases or threatened releases to the property before the date they acquired the property. This burden of proof requires a showing that an all appropriate inquiry into the property's previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards.

EPA's proposed rule

Importantly, EPA has concluded that the ASTM 2000 standard for conducting an all appropriate inquiry "does not meet the statutory criteria necessary to achieve the purpose of the rule" and will no longer be used. The agency invited comment on its decision in this regard. While the 1997 and 2000 ASTM standards are similar, there are important differences between these standards and the proposed rule.

First, the proposed rule establishes minimum qualifications for persons managing or overseeing all appropriate inquiry. The professional must hold a Professional Engineer's or Professional Geologist's license or registration from a state, tribe or U.S. territory and have the equivalent of three years of full-time relevant experience, or be licensed or certified to perform environmental inquiries as defined in 40 C.F.R. Section 312.21, and have the equivalent of three years of full-time relevant experiences, or have a college degree in a relevant discipline of engineering or other area and the equivalent of five years of full-time relevant experience, or as of the date of the final rule, have a college degree and have the equivalent of ten years of full-time relevant experience. Persons not meeting these criteria may participate in AAI on the condition that they work under the supervision of a person who does meet these criteria. Neither ASTM standard specifies education or experience levels for these purposes.

Second, the proposed rule requires that visual observations of adjoining properties be conducted from the subject property's property line, one or more public rights-of-way, or other vantage point, including aerial photography. The environmental professional is also required to include a review of historical documents and records for the subject property that document the ownership and use of the property as far back in time as it can be shown that the property contained structures, or from the

time the property was first used for residential, agricultural, commercial, industrial or governmental purposes.

Third, the search for liens against the subject property is more demanding under the proposed rule. EPA proposed that the search for recorded environmental cleanup liens be performed by the purchaser or an environmental professional and that it include all recorded cleanup liens.

Finally, the proposed rule requires that the environmental professional interview owners or occupants of neighboring properties in the case of abandoned properties and past and present owners and occupants of a property.

EPA solicited comment on many aspects of the proposal. **Pollution Engineering** environmental professionals engaged in due diligence activities involving contaminated properties should be aware of this proposal rule. Visit www.epa.gov/reg3hwmd/fr/2004/08/26a.htm to read the text of the proposed rule. **PE**

ADDITIONAL INFORMATION

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