

Environmental and Energy Advisory

A monthly update on law, policy and strategy

EPA Issues Final Rule Defining “All Appropriate Inquiry”

On November 1, 2005, the United States Environmental Protection Agency (“EPA”) published its Final Rule establishing standards and practices for “all appropriate inquiry” (“AAI”). The rule establishes a minimum due diligence standard for innocent landowners, bona fide prospective purchasers, and contiguous property owners seeking liability protection under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), and for assessments under the CERCLA § 104(k)(2)(B) brownfield grant program.

This Advisory summarizes key provisions of the EPA’s AAI Rule, highlights key differences between that rule and the American Society of Testing and Materials’ (“ASTM”) Phase I Standard, and discusses the impact that the rule will have on environmental due diligence for transactions involving the transfer of commercial real estate.

Background

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (the “Brownfields Amendments”). The act created new liability protections under CERCLA for prospective purchasers of properties ultimately found to be contaminated by hazardous substances on or upgradient of the property purchased. To qualify for these protections, prospective purchasers must, among other things, make “all appropriate inquiry” to determine whether the property may be contaminated.

The Brownfields Amendments directed EPA to issue regulations by January 11, 2004 establishing standards and practices for “all appropriate inquiry.” Following a negotiated rulemaking process, EPA published its draft rule on August 26, 2004. After receiving and considering over 400 comments on the draft rule, the EPA published its AAI Rule on November 1, 2005, at 70 Fed. Reg. 66070. The AAI Rule will take effect on November 1, 2006.

The prevailing standard for pre-acquisition environmental due diligence has long been ASTM’s “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,” issued in 1997, and updated in 2000 (E1527-97 and E1527-00, respectively) (collectively, the “ASTM Phase I

Standard”). As compared to the ASTM Phase I Standard, the AAI Rule clarifies the details and broadens the scope of environmental inquiry. Specifically, the final rule contemplates that an environmental professional conducting an environmental inquiry will:

- Conduct interviews with a wider range of individuals with knowledge of the subject property, including past owners and operators of the subject property and, in certain circumstances, owners and occupants of nearby properties;
- Undertake a more thorough visual inspection of properties adjoining the subject property;
- Review a broader array of governmental records; and
- Draft a report that expressly acknowledges areas of uncertainty that may have an effect on the environmental professional’s conclusions.

Relationship Between the EPA’s AAI Rule and ASTM Phase I Standard

To maintain continuity with established practice, ASTM worked cooperatively with EPA to update its own standard to ensure its consistency with the AAI Rule. The AAI Rule states that compliance with the 2005 ASTM Phase I Standard will constitute compliance with the rule.

Until the AAI Rule’s effective date of November 1, 2006, a party seeking to obtain liability protection under CERCLA may conduct a Phase I Environmental Site Assessment in accordance with the 1997, 2000 or 2005 ASTM Phase I Standard, or in accordance with EPA’s AAI Rule. The following sections compare and contrast the ASTM Phase I Standard (as it existed prior to its revision in 2005) and the AAI Rule.

Purpose of Environmental Inquiry

The purpose of pre-acquisition environmental inquiry is to allow a prospective purchaser to evaluate the target property for potential environmental contamination and assess and minimize potential liability for such contamination. The ASTM Phase I Standard focused on identifying “recognized environmental conditions” (“RECs”): “the presence or likely presence of any hazardous substances ... on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances ... into structures on the property or into the ground, ground water, or surface water of the property.” RECs do not include *de minimis* conditions.

The AAI Rule eliminates the concept of RECs in favor of the “identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.” The AAI Rule also includes an exception for quantities or amounts of hazardous substances that, in the opinion of the environmental professional, “generally would not pose a threat to human health or the environment.”

Timing of Environmental Inquiry

The AAI Rule requires that the environmental professional's inquiry be conducted "within one year prior to the date of acquisition of the subject property." However, certain components of the inquiry, including interviews with past and present owners, operators and occupants, the review of governmental records, and the visual inspection of the property, must be conducted or updated within 180 days prior to the date of acquisition.

By contrast, the ASTM Phase I Standard presumed that a report prepared less than 180 days prior to the date of review – which could be weeks before the actual acquisition – remained valid, and allowed the reliance on "stale" reports under certain circumstances.

Scope of Environmental Inquiry

The AAI Rule allocates responsibility for specific tasks between the environmental professional and the party for whose benefit the inquiry is being conducted, *e.g.*, the prospective purchaser. The environmental professional's inquiry must include:

- Interviews with past and present owners, operators, and occupants;
- A review of historical sources of information, *e.g.*, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records;
- A review of federal, state, tribal, and local government records for the subject property and nearby or adjoining properties;
- Visual inspections of the subject property and adjoining properties;
- Consideration of commonly known or reasonably ascertainable information within the local community about the subject property;
- Consideration of the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation; and
- A written report documenting the results of the environmental inquiry.

The AAI Rule expressly assigns the following issues to the prospective purchaser:

- If not obtained by the environmental professional, a search for the existence of environmental cleanup liens against the subject property filed or recorded under federal, tribal, state, or local law;
- Consideration of the party's specialized knowledge of the subject property, the area surrounding the subject property, the conditions of adjoining properties, and any other experience relevant to the inquiry;
- Consideration of the relationship of the purchase price of the subject property to the value of the subject property if it were not contaminated; and

- Consideration of commonly known or reasonably ascertainable information within the local community about the subject property, to the extent not otherwise obtained by the environmental professional.

The prospective purchaser may, but is not required to, share the information obtained as a result of these additional inquiries with the environmental professional. In either case, the prospective purchaser must take into account the results of these inquiries in evaluating whether conditions indicative of a release or threatened release have been identified. To the extent that the information is shared, the environmental professional must take it into account in reaching his or her conclusions.

Interviews

The AAI Rule expands the range of individuals who must be interviewed. As under the ASTM Phase I Standard, the environmental professional must interview the current owner and occupant of the property. Under the AAI Rule, if the property has multiple occupants, the environmental professional must interview the major occupants, as well as all occupants likely to use, store, treat, handle, or dispose of hazardous substances, or who have likely done so in the past. If necessary to meet the rule's objectives, the environmental professional also must interview past owners and occupants of the subject property.

Additionally, if the inquiry is being funded by a brownfields grant under CERCLA Section 104(k), the interviews must include occupants who use, store, treat, handle, or dispose of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined under the Food and Drug Act, 21 U.S.C. § 802) or have likely done so in the past (an inquiry not required under the ASTM Phase I Standard).

To the extent necessary to identify conditions indicative of releases or threatened releases of hazardous substances, the environmental professional must interview one or more of the following persons:

- Current and past facility managers with relevant knowledge of uses and physical characteristics of the property;
- Past owners, occupants, or operators of the subject property; or
- Employees of current and past occupants of the subject property.

For inquiries concerning “abandoned properties” where there is evidence of potential unauthorized uses of the property or evidence of uncontrolled access to the property, the AAI Rule mandates that the environmental professional must interview one or more owners or occupants of neighboring or nearby properties.

In addition to requiring the review of governmental records (discussed below), the AAI Rule also recommends that the environmental professional interview at least one local or state government official who may have knowledge of the subject property, when necessary to identify conditions indicative of releases or threatened releases of hazardous substances at the subject property.

Review of Government Records

The ASTM Phase I Standard provided a list of specifically enumerated federal and state environmental databases that must be reviewed, with corresponding search radii from the subject property to identify potential releases from nearby or adjacent properties. The AAI Rule expressly includes tribal and local records in the list of databases to be searched, and provides separate (although similar) database lists to be reviewed for the subject property and nearby or adjoining properties.

Although the AAI Rule's database categories closely coincide with those reviewed under the ASTM Phase I Standard, the broad language of the AAI Rule may trigger the review of records not normally covered under the ASTM Phase I Standard. Moreover, the AAI Rule specifically requires a review of lists of engineering and institutional controls; under the ASTM Phase I Standard, whether to review local land use records for activity and use limitations was left to the environmental professional's discretion.

Visual Inspections

Both EPA's AAI Rule and the ASTM Phase I Standard require that the environmental professional make an on-site inspection of the subject property and any facilities, structures, or improvements located thereon. Under the ASTM Phase I Standard, the environmental professional was required to note the uses of adjoining properties, to the extent that such uses were visually observed during the inspection of the subject property. By contrast, the AAI Rule requires that the environmental professional must make a visual inspection of adjoining properties. If observation of an adjoining property from the subject property is difficult or infeasible, the environmental professional must attempt to find some other publicly accessible vantage point from which to observe the adjoining property, *e.g.*, from the subject property line, public rights-of-way, or aerial photography.

The AAI Rule contains a limited exception for the "unusual circumstance" where on-site visual inspection of the subject property is not possible because of physical limitations, remote and inaccessible location, or other inability to obtain access. The mere refusal of a voluntary seller to provide access to the subject property does not constitute such an unusual circumstance.

Where on-site visual inspection of the subject property is not possible, the environmental professional must:

- Visually inspect the subject property via another method, *e.g.*, aerial imagery, or from the nearest accessible vantage point;
- Document efforts undertaken to obtain access and explain why such efforts were unsuccessful; and
- Document other sources of information regarding releases or threats of releases that were consulted, with an explanation of the significance of the failure to conduct an on-site visual inspection.

Content of Report

The AAI Rule requires the environmental professional to prepare a written report which summarizes the results of the inquiry and opines “as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances ... on, at, in, or to the subject property.” Unlike the ASTM Phase I Standard, the AAI Rule specifically requires that the environmental professional’s report must identify data gaps in the information developed as part of the inquiry that adversely affect the ability of the environmental professional to identify such conditions. To the extent that such data gaps are noted, the environmental professional’s report also must include comments regarding the significance of the data gaps on the environmental professional’s ability to provide an opinion as to whether the environmental inquiry has identified conditions indicative of releases or threatened releases at the subject property. The AAI Rule states that sampling and analysis may be conducted to develop information to address data gaps, but such sampling and analysis are not required.

Qualifications and Role of the Environmental Professional

Qualifications of the Environmental Professional

The definition of “environmental professional” was among the most commented on provisions in the AAI Rule. EPA ultimately adopted a range of acceptable qualifications, consisting of various combinations of licensure, experience, and education. EPA therefore struck “a balance between the merits of setting a high standard of excellence for the conduct of all appropriate inquiries through the establishment of stringent qualifications for environmental professionals and the need to ensure that experienced and highly competent individuals currently conducting all appropriate inquiries are not displaced.” The environmental professional’s written report must include a statement certifying that the author meets the definition of “environmental professional.”

Role of the Environmental Professional

An environmental assessment conducted pursuant to the AAI Rule may be undertaken “by an environmental professional, or ... *under the supervision or responsible charge of, an environmental professional.*” (emphasis added). Visual inspections and interviews may be conducted by someone not qualified as an environmental professional, provided that an environmental professional has a “supervisory role.” The environmental professional must sign the final report and certify both that he or she meets the requisite professional requirements and that all appropriate inquiries have been undertaken in conformance with the AAI Rule.

Conclusion

Until the AAI Rule takes effect on November 1, 2006, parties seeking CERCLA liability protection as bona fide prospective purchasers, innocent landowners, or contiguous property owners may conduct “all appropriate inquiry” by complying with either the 1997 or 2000 ASTM Phase I Standard, or by complying with the AAI

Rule (which, in turn, endorses compliance with the 2005 ASTM Phase I Standard as an option). After November 1, 2006, all such parties must comply with the AAI Rule, either directly or by meeting the 2005 ASTM Phase I Standard.

While the AAI Rule does differ from the 1997 and 2000 ASTM Phase I Standards in certain respects, as described above, the rule does not represent a sea change. The basic components of a Phase I Environmental Site Assessment remain unchanged. The AAI Rule provides greater specificity regarding the manner in which those components must be conducted, in some cases (such as the identification of data gaps in the written report) simply making explicit what was implicit in the ASTM Phase I Standard.

Parties regularly engaging in commercial property acquisitions should consider starting to follow the AAI Rule or the 2005 ASTM Phase I Standard prior to the November 1, 2006, to become familiar with the new standards and procedures and to make the transition to AAI Rule compliant environmental site assessments. In most transactions involving the acquisition of commercial property, or of companies owning or operating commercial property, meeting the requirements of EPA's AAI Rule would be prudent as a means of both to obtain liability protection under CERCLA and to fully evaluate the environmental condition and value of the assets being obtained.

Going forward, prospective purchasers seeking CERCLA liability protection must be cognizant of, and as of November 1, 2006 adhere to, the more specific requirements of the AAI Rule. Prospective purchasers also should be aware that conducting all appropriate inquiry in accordance with the AAI Rule is only the first step in obtaining liability protection under CERCLA, a point that EPA stressed throughout the promulgation process and in the preamble to the AAI Rule.

The Brownfields Amendments also impose post-acquisition obligations for maintaining liability protection under CERCLA, including:

- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- Taking "reasonable steps" with respect to hazardous substances affecting a landowner's property to prevent releases;
- Providing cooperation, assistance, and access to EPA, a state, or other party conducting response actions at the property;
- Complying with any CERCLA information requests and administrative subpoenas; and
- Providing legally required notices (such as CERCLA notifications regarding releases of hazardous substances).

Therefore, parties seeking to obtain liability protection by conducting AAI Rule-compliant site assessments must be diligent both in exercising "All Appropriate Inquiry" and in complying with all post-acquisition obligations imposed as a continuing condition for liability protection under CERCLA.

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