



### EPA ALL APPROPRIATE INQUIRIES RULE TAKES EFFECT NOVEMBER 1, 2006 ARE YOU PREPARED?

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On November 1, 2006, EPA's all appropriate inquiries ("AAI") rule takes effect. The AAI rule establishes standards for conducting all appropriate inquiries into the environmental condition of a property in order to qualify for landowner liability protections under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). 40 C.F.R. Part 312.

If you plan to close a commercial or industrial property transaction on or after November 1 and are interested in protection from potential cleanup liability under CERCLA, you must have a Phase I report that was prepared in compliance with the new rule.

#### Background

CERCLA provides liability protection for landowners who qualify as innocent landowners, bona fide prospective purchasers ("BFPP") and contiguous property owners. A showing of "all appropriate inquiries" into the environmental condition of the property, prior to purchase, is a prerequisite to establishing these landowner liability protections. The current industry standard for conducting all appropriate inquiries is the American Society for Testing and Materials ("ASTM") Standard E1527-05 entitled Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process ("ASTM Phase I Standard"). Since the passage of CERCLA in 1980, it has become common practice to obtain a Phase I Environmental Site Assessment ("Phase I ESA") conducted in accordance with the ASTM Phase I Standard, prior to a commercial transaction.

When Congress amended CERCLA in 2002 to add the BFPP and contiguous property owner liability protections, Congress directed EPA to promulgate regulations to address the standards and practices necessary to meet the all appropriate inquiries requirement.

#### Highlights of AAI Rule

##### *ASTM Phase I Standard*

Persons conducting all appropriate inquiries may use the procedure included in the 2005 ASTM Phase I Standard to comply with EPA's AAI rule. The 2005 ASTM Phase I Standard is more detailed than EPA's rule and will likely be the standard that most Environmental Professionals will use to conduct all appropriate inquiries.

##### *Environmental Professional*

The AAI rule requires an Environmental Professional to manage or oversee the all appropriate inquiries and defines Environmental Professional as an individual who meets certain minimum education, licensing and experience qualifications. The Environmental Professional is required to issue a written report that includes:

1. a statement of opinion as to whether the inquiries have identified conditions indicative of releases or threatened releases of hazardous substances;
2. an identification of data gaps and comments regarding the significance of such data gaps on the Environmental Professional's ability to provide the above statement of opinion;
3. a declaration that the Environmental Professional meets the regulatory definition; and
4. a declaration that the all appropriate inquiry has been conducted in conformance with the AAI regulation.

##### *Visual Inspections*

A visual inspection of the property by the Environmental Professional is required, unless the prospective purchaser makes good faith efforts to gain access but is refused access. If access is refused, the prospective purchaser is required to use

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EPA published the final all appropriate inquiries rule on November 1, 2005, with an effective date one year later - November 1, 2006. The 2005 ASTM Phase I Standard satisfies the requirements of EPA's AAI rule.

If you have any questions concerning EPA's AAI rule or the landowner liability protections, please contact Lucy Jenkins at [ljenkins@joneswaldo.com](mailto:ljenkins@joneswaldo.com) or (801) 521-3200.

aerial photography or to inspect from the nearest accessible vantage point. If a visual inspection of the property cannot be conducted prior to the purchase, EPA recommends that the Environmental Professional conduct an on-site visual inspection following the purchase. The visual inspection is required to be conducted by the Environmental Professional, because the Environmental Professional is best qualified to identify environmental conditions.

*Prospective Purchaser Responsibilities*

The prospective purchaser is required to conduct the following inquiries:

1. Search for environmental cleanup liens;
2. Consider specialized knowledge or experience of the prospective purchaser;
3. Consider the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated; and
4. Determine commonly known or reasonably ascertainable information about the property.

The prospective purchaser may arrange to have the Environmental Professional conduct inquiry numbers 1 and 4 above. The prospective purchaser should document the results of these inquiries.

*Interviews*

Interviewing the current owner or occupant of the property is mandatory. Interviewing past owners and occupants of the property is required if necessary to determine the potential for contamination of the property. If the property is abandoned, an interview of an owner of a neighboring property is required.

**Practical Tips**

*Environmental Professional*

Make certain that the consultant qualifies as an Environmental Professional and that the Phase I will be conducted in compliance with the AAI rule or the 2005 ASTM Phase I Standard.

*Use AAI Rule for Closing on or After November 1, 2006*

Phase I reports for property transactions that close on or after November 1, 2006 should comply with the AAI rule or the 2005 ASTM Standard (if the purchaser seeks the landowner liability protections of CERCLA as an innocent landowner, BFPP or contiguous property owner).

*Timing and Expense*

Phase I reports that comply with the AAI rule will probably take longer to prepare and will be more expensive than reports prepared in compliance with the prior ASTM standard.

*Shelf Life*

The AAI must be conducted within one year prior to the transfer of title. However, certain information (interviews, searches for environmental cleanup liens, reviews of government records, visual inspection of the property and adjoining properties and Environmental Professional's declaration) must be updated if collected more than 180 days prior to the purchase date and certain information (relationship of purchase price to property value, specialized knowledge of the purchaser and Environmental Professional) must be collected specifically for the current transaction and user.

*Long Term Tenants*

Courts consider long term tenants with controls and possessory interests equivalent to owners to be liable for cleanup under CERCLA as "owners". Thus, persons entering into long term leases may want to obtain a Phase I report prior to closing in order to qualify for the landowner liability protections.

**Conclusion**

Prospective purchasers who are interested in qualifying for the CERCLA defenses to landowner liability must comply with EPA's AAI rule, but should be aware that conducting AAI is just a threshold criteria and that there may be ongoing, post-acquisition criteria, such as complying with any land use restrictions. The new rule is a performance based standard, with requirements that the prospective purchaser must comply – requiring coordination with the Environmental Professional and documentation of all inquiries, not just following a Phase I checklist. Prospective purchasers should separately evaluate defenses to cleanup liability under state law. Prospective purchasers should also evaluate whether their environmental diligence should evaluate risks outside of the scope of the AAI rule.

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