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EPA'S UPDATED "ALL APPROPRIATE INQUIRIES" (AAI) STANDARD REDEFINING THE RULES FOR THE PHASE I ENVIRONMENTAL SITE ASSESSMENT (ESA)

On November 1, 2005, EPA promulgated its long-awaited "All Appropriate Inquiries" (AAI) rule (40 CFR part 312) that will redefine the steps that a prospective purchaser of real estate will need to take to establish the innocent landowner, continuous property owner and bona fide prospective purchaser (BFPP) defenses to liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This EPA initiative, which was mandated by federal legislation in 2002, changes what is required for a Phase I Environmental Site Assessment (ESA) - the first look at environmental conditions of a site. This article will highlight the most significant changes of the AAI rule.

Overview. The real estate industry has been accustomed to the interim AAI standards that were specified in CERCLA (that is, the procedures of the American Society for Testing and Materials (ASTM), including the document known as Standard E1527-97 (and subsequently, E1527-00) entitled "*Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process*" and these interim standards can continue to be employed until **November 1, 2006**. At that time, the newly defined environmental professional must use ASTM E1527-05 to satisfy the AAI requirements.

New York State (NYS) in its October 2003 amendments to its state superfund program (Article 27, Title 13 of the New York State Environmental Conservation Law) established its own innocent landowner defense and specified the use of ASTM E1527-97 to conduct all appropriate inquiries. Recently proposed amendments to 6 NYCRR Part 375 (the implementing regulation for the state superfund program) provide for the use of ASTM E1527-00. The comment period on this initial set of proposed amendments to Part 375 ended on March 27, 2006 and whether NYS will modify its regulation to incorporate the updated federal AAI rule is unknown.

AAI Changes. The principal changes to the AAI rule are summarized as follows:

(1) *Use of an Environmental Professional (EP).* Only an EP can conduct the Phase I ESA and the ESA report must include the EP's opinion on whether the review indicates the possibility of a release or threatened release of hazardous substances. The ASTM protocol also requires the user (that is, the person seeking to establish one of the CERCLA defenses) to collect certain information for use in evaluating the subject property's environmental condition.

(2) *Definition of an EP.* The interim ASTM standards require merely that the person conducting the AAI possess "sufficient training and experience necessary" to complete the specified work tasks and have the ability to "develop opinions and conclusions regarding *recognized environmental conditions*." That subjective standard is being replaced with very specific objective standards. The EP must now (a) hold a professional engineer's or geologist's license or a government license to perform environmental inquiries and have 3 years of full-time relevant experience, (b) a Baccalaureate or higher degree in science or engineering and 5 years of full-time relevant experience or (c) 10 years of full-time relevant experience. Under the new rule, a person who does not qualify as an EP may assist in the conduct of the ESA, provided such person is under the supervision of an EP. The EP will be required to sign a declaration that he or she meets the minimum EP qualifications and that the investigation was carried out in accordance with the AAI rule.



(3) *Phase I ESA Work Tasks.* As with the interim ASTM standards, the new rule requires that the EP perform certain work tasks. Of particular significance, the EP must inspect the site and conduct interviews of the current owner and occupant, and if there are multiple occupants, interviews must be conducted with all “major” occupants as well as those likely to use hazardous substances. The rule also requires additional interviews with current and past facility managers, past owners, operators or occupants of the subject property and employees of past and current occupants of the subject property “to the extent necessary to achieve the objectives and performance [criteria]” of the rule. The obligation to conduct interviews of occupants is a departure from the interim standard which requires only a reasonable attempt to conduct interviews of occupants.

(4) *Identification of Data Gaps.* The EP must (a) identify data gaps that impact the ability of the EP to identify conditions that are indicative of releases or threatened releases of hazardous substances, (b) identify the sources of information consulted to address such gaps, and (c) comment upon the significance of those gaps on the EP’s ability to provide an opinion on whether his inquiry has identified conditions indicative of releases or threatened releases “on, at, in, or to the subject property.”

(5) *User’s Obligation to Conduct Investigation.* The user must conduct a concurrent environmental inquiry and consider information such as specialized knowledge of the subject property, the surrounding area, commonly known information about the property, presence of any environmental cleanup liens and the relationship of the purchase price to the fair market value of the property if uncontaminated. Although the user is not required to provide any of this information to the EP, the EP must determine if the data gap hinders the ability to make a judgment about the likelihood of disposal of hazardous substances at the property. If so, that lack of information must be noted in the EP’s report. Bottom line – a new tension has been introduced into the relationship between the user and the EP.

(6) *Shelf Life of Phase I ESA Report.* The rule establishes a shelf life of one year for a Phase I ESA report, which is marked from the date of transfer of the property (“Closing Date”). However, various aspects of the investigation (such as historical records review, interviews, onsite visual inspections and search for environmental liens) must be performed within 180 days prior to the Closing Date.

At the conclusion of the Phase I ESA, the question must be raised whether a Phase II ESA (a more intrusive investigation that includes sampling and analysis of environmental media) must be conducted. It is clear that if the EP identifies a data gap that prevents the confirmation that there has been no release or threatened release of a hazardous substance, it will, as a practical matter, be necessary for the user to conduct a Phase II ESA to secure the CERCLA defense.

As a result of the new AAI rule, Phase I ESAs will be more professionally prepared, require considerably more involvement on the part of the user and be more expensive and time-consuming to conduct. The foregoing summary does not pause to explore the considerable complexity of the AAI rule, the various ASTM standards or the scope of the environmental due diligence that should be performed when acquiring real property. These topics shall be addressed in an upcoming AAI seminar sponsored by Bond, Schoeneck & King, PLLC. Details will follow in a future Information Memo. In the interim, questions about the AAI rule can be directed to the following:

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