

EPA's new all appropriate inquiries (AAI) standard now in effect

For years, if a purchaser of commercial real estate wanted to seek environmental liability protection under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a.k.a. Superfund, the industry standard guideline was the ASTM Standard E1527, first published in 1993.

Now, due to changes mandated by the January 2002 Small Business Liability Relief and Revitalization Act (the Federal Brownfields Law), the EPA has written the nation's first federal standard for conducting "all appropriate inquiries" (AAI) to be codified as Part 312 - Standards for Conducting All Appropriate Inquiries. This is the process by which AAI is made into "previous ownership and uses of the property" consistent with good customary or commercial practice. This new standard was implemented and published for the first time in November 2005. Historically, when a consultant conducted a Phase I Environmental Site Assessment (ESA), the standard followed was ASTM Standard E1527. Now this has changed due to the new EPA standard.

The most significant application of the new standard relates to CERCLA liability protection, or landowner liability protections (LLPs). The new regulation applies not only to the traditional "innocent landowner defense," but also to two new defenses that property owners have at their disposal. These include the bona fide prospective purchaser defense and the contiguous property owner defense. Both can help to ease developers' fears about purchasing contaminated properties or sites adjacent to such properties.

Innocent Landowner Defense (ILD): Can protect

the landowner if they qualify as one of three types: a person that "did not know and had no reason to know" of contamination on the property at the time of purchase, a government entity acquired the property by escheat, involuntary transfer, or eminent domain, or a person that "acquired the facility by inheritance of bequest." For the first qualification listed above to apply, the landowner must have performed AAI prior to purchase, and the AAI can not have resulted in knowledge of contamination.

Bona Fide Prospective Purchaser (BFPP) Defense: Creates liability protection for a property owner who knowingly purchases a contaminated property. The owner must be able to demonstrate that contamination onsite occurred prior to the purchase. Also, the AAI must be made on or before the purchase date, and the property must have been purchased after January 11, 2002.

Contiguous Property Owner (CPO) Defense: Provides liability protection for the owner from contamination caused by the migration of hazardous substances from an adjacent property that he/she does not own. However, the owner must demonstrate that he/she did not know of contamination on his/her property at the time of purchase, and that at the time they conducted AAI resulting in no knowledge of any contaminants.

Environmental conditions that are recognized by the new EPA AAI standard do not include controlled substances. Also not included in the standard are substances that generally do not threaten the environment or human health. Substances that are included are hazardous substances and petroleum products. These must

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be on a property and show signs of existing release, past release, or threat of release into structures on a property to be recognized as environmental conditions. Release of these substances is considered a problem as well if released into the grounds, surface water, or ground water on the property.

The new EPA AAI standard follows the ASTM E1527 standard in many ways but adds new levels of investigation activities necessary to complete a Phase I ESA. These new levels include:

- Which CERCLA defenses apply;
- The type of properties the standard will apply to;
- The objective of the assessment or inquiry;
- What are the contaminants of concern;
- Who is qualified to perform assessments/inquiries;
- Responsibilities for searching records of engineering and institutional controls;
- What sources of government records must be searched;
- How extensive are historical research requirements;
- What is the time frame for historical research;
- What if there are data gaps;
- Is it necessary to interview neighboring property owners;
- What if a site visit cannot be performed; and
- How long is a Phase I report considered valid.

There are numerous differences between the old ASTM standard and the new EPA AAI standard. One example of such differences is that the ASTM standard provides broad definitions or does not address some of these categories, whereas the new EPA standard is more precise in defining these categories. Another example of the differences between the ASTM standard and the EPA AAI standard concerns the "who is qualified to perform assessments/inquiries" category. ASTM broadly defined a qualified environmental professional as:

"a person possessing sufficient training and experience necessary to conduct a site reconnaissance, interviews, and other activities in accordance with this practice, and from the information generated by such activities, having the ability to develop opinions and conclusions regarding recognized environmental conditions in connection with the property in question. An individual's status as an environmental professional may be limited to the type of assessment to be performed or to specific segments of the assessment for which the professional is responsible. The person may be an independent contractor or an employee of the user."

The EPA AAI standard is more precise defining a qualified environmental professional in the following terms.

The standard recognizes professional engineer (P.E.), professional geologist (P.G.), and other state-certified or licensed environmental professionals with three years experience as environmental professional,

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OR

The standard also recognizes education and experience qualifications for others: 1) a degree in a relevant science or engineering discipline, plus 2) five years of relevant full time experience,

OR

Persons with any degree and 10 years experience grandfathered.

This new standard can eliminate "fly-by-night" companies who did not necessarily conform to the old ASTM standard or who might have cut corners to keep the costs low. Another new aspect of the EPA AAI standard pertains to the shelf life of the Phase I ESA generated. The ASTM standard allowed updates of any old report without concern for how old the original Phase I ESA document was, whereas the new EPA standard states that:

- A previously conducted AAI may be adopted if completed or updated within one year of the current purchase date.

- Some aspects of an AAI must be updated if a previously conducted AAI is more than 180 days old (e.g., visual inspection, interviews, records searches).
- Any prior AAI may be used as a source on information.

Therefore, any original AAI document (Phase I ESA document) older than one year is invalid, and a "full blown" Phase I ESA must be performed on the piece of property.

With the differences between the new EPA regulations and the old ASTM standard, it is important for the property owner to keep in mind that these regulations may not include any or all regulations put forth by the federal, state, and local environmental laws, of which some may be stricter. Also, in order to ensure that the process goes smoothly for all parties involved, it is recommended that documentation of research and reports be kept and included in a written report. 