

All Appropriate Inquiry Standard Will Create Substantive New Requirements For Phase I Environmental Site Assessments

By Gregory A. Bibler and Nathan J. Brodeur

As part of the 2002 "Brownfields" Amendments to CERCLA, Congress adopted new liability protections for prospective purchasers of properties which ultimately are found to be contaminated. To qualify for this new protection, prospective purchasers are required to conduct an adequate investigation — *i.e.*, conduct "all appropriate inquiry." Since 2002, therefore, purchasers of real property have been held to a uniform federal standard for environmental diligence.

Congress directed the U.S. EPA to issue regulations defining what constitutes "all appropriate inquiry" by January 11. In the interim, Congress effectively mandated use of the American Society of Testing and Materials' 1997 Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process (E1527-97), known as the "ASTM Phase I Standard."

To develop the all appropriate inquiry ("AAI") standard, EPA initiated a negotiated rulemaking process, in which representatives of differing interests were invited to cooperate in drafting a proposed rule. On November 14, 2003, after more than six months of negotiation, the Negotiated Rulemaking Committee on All Appropriate Inquiry ("AAI Committee") reached substantial consensus on a proposed regulation establishing an AAI standard.

The AAI Committee's consensus proposal was expected to result in issuance of a new AAI rule by the January 11 deadline. The January 11 deadline passed, however, without publication of a proposed rule in the Federal Register. In recent correspondence to Committee members, EPA has said it remains committed to the language drafted by the AAI Committee. For its part, ASTM has indicated it intends to revise its own Phase I standard once EPA has adopted an AAI rule.

Although it is too early to state definitively what the new AAI rule will require, it is possible now to ascertain to what degree that rule will diverge from the old ASTM Phase I Standard. This article summarizes key provisions of the draft AAI rule, focusing on the areas of divergence between the ASTM Phase I Standard and the AAI rule and the impact these differences may have on environmental due diligence for transactions involving the transfer of real estate.

Purpose Of Environmental Inquiry

The ASTM Phase I Standard establishes criteria for conducting a minimum threshold examination of real property to determine whether it may be affected by contamination potentially giving rise to liability under CERCLA. A Phase I Environmental Site Assessment consists of a visual inspection and research concerning the property and neighboring properties, but does not include sampling or testing.

The ultimate purpose of an assessment completed in accordance with the ASTM Phase I Standard is to identify any "recognized environmental conditions" on the property. The term "recognized environmental conditions" means the actual or potential



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presence of hazardous substances as a result of past, present, or threatened releases into the ground, ground water, or surface water on the property.

The AAI Committee's proposed rule eliminates the term "recognized environmental conditions." Like the ASTM Phase I Standard, however, the objective of the proposed rule is "identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property." The rule is intended to establish a minimum standard of eligibility for innocent landowners, bona fide prospective purchasers, and contiguous property owners seeking liability protection under CERCLA.

Scope Of Environmental Inquiry

Under the AAI Committee's proposed rule, a prospective purchaser's diligence must include at least the following elements:

- Interviews with past and present owners, operators, and occupants;
- A review of historical sources of information, such as aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records;
- A review of government records for both the subject property and nearby or adjoining properties;
- Visual inspections of the subject property and of adjoining properties;
- Additional interviews or research to gather commonly known or reasonably ascertainable information about the property, to the extent necessary to identify conditions indicative of releases or threatened releases of hazardous substances at the 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.

These elements are similar to but broader than those required for completion of an ASTM Phase I Environmental Site Assessment. More specifically, in comparison to the ASTM Phase I Standard, the AAI rule contemplates that an environmental professional conducting an environmental inquiry will:



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- 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 specifically acknowledges areas of uncertainty that may have an effect on the environmental professional's conclusions.

Definition And Role Of The Environmental Professional

As is the case under the ASTM Phase I Standard, the AAI Committee's proposed rule requires an environmental site assessment conducted by an "environmental professional" at all sites where a landowner or buyer is seeking liability protection. As compared to the ASTM Phase I Standard, however, the AAI Committee's proposed rule (1) sets higher and more specific standards for environmental professionals; and (2) permits substantial delegation of responsibility, including for on-site inspections.

Definition of Environmental Professional. The AAI Committee adopted a definition of environmental professional that takes into account both academic and on-the-job training. More specifically, an environmental professional must have the following qualifications:

- A Professional Engineer's or Professional Geologist's license and three years of full-time relevant experience; **or**
- license or certification to perform environmental inquiries and three years of full-time relevant experience; **or**
- Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and five years of full-time relevant experience; **or**
- Baccalaureate or higher degree from an accredited institution of higher education and ten years of full-time relevant experience, as of the date of the AAI rule's promulgation by EPA.

In contrast, the ASTM Phase I Standard's

definition of environmental professional refers only to "training and experience," making no specific mention of education. Moreover, the ASTM Phase I Standard does not require any specific amount or type of training or experience. A person simply must possess "sufficient" training and experience to conduct the various tasks involved in an ASTM Phase I Environmental Site Assessment and to develop opinions and conclusions regarding "recognized environmental conditions."

The AAI Committee's formulaic approach to the definition of environmental professional provides an objective standard against which to measure the credentials of any prospective environmental assessment firm. By the same token, the proposed AAI rule implicitly places on prospective purchasers a duty to review prospective consultants' qualifications before retaining them to conduct an assessment.

Role of the Environmental Professional.

The ASTM Phase I Standard requires that site reconnaissance, interviews, and the review and interpretation of information upon which the Phase I report is based be performed by the environmental professional. Other activities, such as reviewing records and drafting the report, however, may be performed by other individuals under the supervision of the environmental professional.

In contrast, an environmental assessment conducted pursuant to the AAI Committee's proposed rule may be undertaken "by an environmental professional, or ... under the supervision or responsible charge of, an environmental professional." (emphasis added). Therefore, visual inspections and interviews may be conducted by someone that does not meet the environmental professional definition, provided an environmental professional has a supervisory role. Given the importance placed in the proposed rule on professional judgment and experience, it is notable that it permits individuals that are not qualified environmental professionals to conduct site visits. This provision marks a compromise between setting high standards for environmental professionals ultimately responsible for the quality and results of the work, and establishing a workable and affordable process that prospective purchasers reasonably can be expected to follow.

Conclusion

Until the AAI Committee's proposed rule is adopted by EPA and finalized, parties seeking CERCLA liability protection as bona fide prospective purchasers, innocent landowners, or contiguous property owners should conduct an ASTM-compliant Phase I Environmental Site Assessment. Once the AAI standard is finalized, parties engaged in real estate transactions should expect that a broader environmental inquiry will be required to be eligible for CERCLA liability protection. This broader inquiry may be more costly than an ASTM Phase I and require more time to complete. In the majority of transactions, meeting the requirements of the new standard would be prudent as a means both for obtaining liability protection under CERCLA and avoiding purchasing a property which, in the end, proves to be more a liability than an asset.

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