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## Environmental e-News

### Recent Environmental Alert Informs Lenders on New "All Appropriate Inquiry" Rule

#### Lenders Take Note: New All Appropriate Inquiry Rule Goes into Effect November 1, 2006

On November 1, 2006, the Environmental Protection Agency's All Appropriate Inquiry rule for conducting environmental site assessments becomes effective (70 Fed. Reg. 66,070 (Nov. 1, 2005)). Purchasers of real property seeking to assert defenses to Superfund liability must demonstrate compliance with these new standards. Lenders should take note of the new standards because the availability of these defenses could affect the lender in a number of ways.

#### AAI's Purpose

AAI applies to purchasers of commercial property that seek to assert the innocent landowner, bona fide prospective purchaser and contiguous landowner defenses under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (40 U.S.C. §§ 9601-9675) when faced with the specter of strict liability for environmental contamination based solely on property ownership without regard to fault or negligence. While a purchaser has certain other on-going obligations under CERCLA in order to preserve its defense, AAI sets out those steps required *prior to or on the date of acquisition* for a party to be eligible for the Superfund defenses.

AAI requires identification of seven elements in order to meet the rule's objectives:

1. current and past property uses and occupancies;
2. current and past uses of hazardous substances;
3. waste management and disposal activities that could have released hazardous substances;
4. current and past corrective actions and response activities addressing past and on-going conditions;
5. engineered controls in place at the subject property and adjoining properties;
6. institutional controls in place at the subject property;
7. adjoining or nearby properties with releases that affect the subject property (40

C.F.R. § 312.20(e)).

Lenders have traditionally required borrowers to follow the current ASTM standard when conducting environmental site assessments in the loan origination process. As a result of the adoption of AAI, ASTM has revised its E 1527-00 standard. The new ASTM E 1527-05 Phase I Environmental Site Assessment Standard is consistent with AAI, and compliance with ASTM E 1527-05 satisfies AAI requirements (40 C.F.R. § 312.11(a)). [\[back\]](#)

### **Critical Differences between AAI/ASTM E 1527-05 and ASTM E 1527-00**

AAI requires several steps to be taken that were not necessary in the previous standard. The most significant of these include the following:

#### *Definition of Environmental Professional*

The site assessment must now be conducted by an "Environmental professional" (EP). An EP supervising the assessment must meet specific certification/licensing, education, and experience requirements (40 C.F.R. § 312.10). The EP must also include in the report a certification that his/her qualifications meet the statutory qualifications and that he/she has performed all appropriate inquiry (40 C.F.R. § 312.21(d)). The ASTM E 1527-00 (the "previous standard") did not specify requirements for EPs.

#### *Interviews with current owner and occupants of the Subject Property*

Current owners, operators, and occupants must be interviewed. If the subject property has multiple occupants, major occupants must be interviewed as well as those likely be handling hazardous substances (40 C.F.R. § 312.23(a), (b)). Previous standards only required reasonable attempts to interview the key site manager and a reasonable number of occupants.

#### *Interviews with past owners and occupants of the Subject Property*

Past owners and occupants must be interviewed to the extent necessary to identify any of the seven attributes required to be identified (40 C.F.R. § 312.23(c); see also above and 40 C.F.R. § 312.20(e), (f)). The previous standard did not require interviews with past owners.

#### *Interviews with Neighboring or Nearby Property Owners or Occupants*

AAI mandates interviews of neighboring or nearby property owners or occupants when acquiring abandoned property (40 C.F.R. § 312.23(d)).

#### *Review of Historical Sources: period covered*

AAI requires review from the present to when the property first contained structures or was developed for almost any purpose, including residential and agricultural uses, which ever is earlier (40 C.F.R. § 312.24(b)). Previously standards only required review back to 1940 or to the property's first obvious developed use, which ever was earlier.

#### *Engineering and Institutional Controls*

All federal, state, local and tribal records must be reviewed for engineered and institutional controls that apply to the subject property and to determine whether any adjoining properties within a half mile of the subject property contain engineered controls (40 C.F.R. § 312.26).

### *Environmental Liens*

AAI requires the search of federal, state, local, and tribal records for any environmental liens on the subject property (40 C.F.R. § 312.25). The previous standard held the purchaser responsible for determining whether any environmental liens existed based on a search to land title records.

### *Government Records Review*

AAI mandates the review of federal, state, tribal, and local records, provides a list of records or types of records for review, and the minimum search distance from the subject property and adjoining properties for specific types of records (40 C.F.R. § 312.26). The previous standard required only a review of state and federal records.

### *Site Inspection*

The EP must conduct a visual inspection of the subject property and of adjoining properties (40 C.F.R. §312.27). The previous standard did not require a visual inspection of adjoining properties.

### *Data Gaps*

An EP must identify in the report all sources consulted to address data gaps and comment on the significance of data gaps that impede the EP's ability to identify whether a release has occurred. (40 C.F.R. § 312.20(g), § 312.21(c)(2)). The previous standard gave the EP discretion to pursue data gaps and did not require disclosure of sources that revealed no findings.

### *Report Shelf Life*

The report may be used for one year prior to acquisition, but environmental lien searches, interviews, governmental records reviews, visual inspections of the subject and adjoining properties, and the EP's declaration must be updated within 180 days of the acquisition (40 C.F.R. § 312.20(a), (b)).

AAI codifies and makes mandatory several components of the ASTM E 1527-00 standard including the prospective purchaser's specialized knowledge or experience (40 C.F.R. § 312.28), the purchase price in relationship to the property's fair market value (40 C.F.R. § 312.29), commonly known or reasonably ascertainable information about the property (40 C.F.R. § 312.30), and the degree of obviousness of the presence or likely presence of contamination (40 C.F.R. § 312.31).[\[back\]](#)

## **Importance to Lenders**

Lenders that do not participate in the management of a facility, or did not do so prior to foreclosure, will continue to be eligible for protection from Superfund liability pursuant to the lender liability provisions of CERCLA. 42 U.S.C. § 9601(20)(E). However, the adoption of AAI affects lenders in several important ways:

- the availability of the Superfund defenses, or lack thereof as a result of the failure to perform AAI, could affect the borrower's liquidity and/or its willingness to close on a deal;
- site conditions will continue to influence the purchase price; the increased scope of investigation mandated by AAI has the potential to identify more environmental conditions and may bring additional price pressures to bear on the market;
- lenders' risk assumptions may have to change based on the presence or extent of data gaps, requiring lenders to re-evaluate loan-attractiveness;
- if a lender had previously relied on insurance to eliminate some portion of the risk associated with loans to potentially challenged properties, insurers' risk assumptions and therefore willingness to insure may change based on the presence or extent of data gaps;
- lastly, lenders who invest in properties and are therefore now property owners will also have to conduct AAI to make sure their own portfolio does not subject them to Superfund liability. [\[back\]](#)

## Understanding and Complying with AAI

At Robinson & Cole, LLP we have experienced environmental attorneys who also understand that environmental compliance is but one aspect of the complex, multi-faceted, and sometimes competing demands made on businesses. For more information, please call any of our Environmental attorneys or call: [Pamela Elkow](#) in our Metro-New York office at 203.462.7548, [Earl Phillips](#) in our Hartford office at 860.275.8220, or [Christopher Foster](#) in our Boston Office at 617.557.5908. [\[back\]](#)

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