

EPA's All Appropriate Inquiry Rule: When is Enough, Enough?

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In January 2002, [CERCLA](#) was amended to provide liability protection for certain landowners by passage of the [Small Business Liability Relief and Brownfields Revitalization Act](#). The Brownfields Amendments required bona fide prospective purchasers, contiguous property owners and innocent landowners to conduct “all appropriate inquiries” into prior uses of a property before proceeding with the purchase in order to receive liability protection. The Brownfields Amendments, however, did not define what constituted “all appropriate inquiry,” leaving the question of “how much due diligence is enough” unanswered. This question has now been answered in the [All Appropriate Inquiry Rule](#) (“AAI Rule”) issued by the Environmental Protection Agency (“EPA”) on November 1, 2005. Purchasers of contaminated property, including parties receiving federal Brownfields grants, must follow the procedures promulgated in the AAI Rule in order to receive protection from CERCLA liability.

The AAI Rule was developed through a process known as negotiated rulemaking whereby EPA worked with nine stakeholder groups, including banks, developers and environmental professionals, to reach consensus on the text of the proposed Rule. After the proposed Rule was issued in August 2004, EPA received more than 400 comments, although EPA made relatively few changes to the proposed Rule after reviewing those comments.

The AAI Rule was established to clarify when an individual could invoke a CERCLA liability defense, however, the procedures required by the Rule will likely be used proactively as a due diligence standard. Compliance with the AAI Rule is likely to be required by lenders for all property transactions involving potential environmental contamination, and the Rule will be the new baseline for due diligence conducted on most commercial property transactions. Although the

AAI Rule does not become effective until November 1, 2006, environmental consultants are likely to begin implementing the Rule's requirements over the next twelve months so the industry will be familiar with AAI standards by the time the Rule is effective next year.

The Brownfields Amendments identified ten criteria that must be investigated in order to achieve compliance with the AAI Rule as follows:

- results of an inquiry by an environmental professional;
- interviews with past and present site owners and occupants;
- reviews of historical sources;
- searches for recorded cleanup liens;
- reviews of government records;
- visual inspections of the facility and adjoining properties;
- specialized knowledge of the individual seeking the defense;
- relationship of the purchase price to the value of the property if not contaminated;
- commonly known or reasonably ascertainable information about the property; and
- degree of obviousness of the presence of contamination and the ability to detect contamination by appropriate inquiry.

Until the AAI Rule was promulgated, the Brownfields Amendments directed purchasers to comply with criteria drafted by [ASTM International](#), an organization that develops voluntary standards for a variety of products and services. In the preamble to the proposed Rule, the EPA stated that the then-existing ASTM Standard for Phase I site assessments, [ASTM E1527-00](#), was inconsistent with applicable law, even though it was recognized as good and customary commercial practice. In the preamble to the final Rule, EPA recognizes that ASTM has updated the "2000" version of the Phase I standard to address EPA's concerns regarding the differences between the older standard and what was required by the 2002 Brownfields Amendments. The new [ASTM E1527-05](#) Standard is recognized by EPA as being consistent with the AAI Rule such that inquiries that comply with these standards will be deemed to comply with the Rule.

The AAI Rule imposes more requirements on the investigator conducting an inquiry than the ASTM Standards do in several areas. While a comprehensive comparison of the two programs is beyond the scope of this article, some of the more fundamental differences relate to: (i) the types of records that must be reviewed (AAI includes Health Department records and registries of institutional controls); (ii) how far back in history a search must extend (AAI requires a search as far back in history as there is documentation that the property contained structures or was placed into use, versus ASTM's "bright-line" 1940 cut-off date); and (iii) the requirement to consider the relationship of the purchase price to the fair market value of the property, if the property were not contaminated (ASTM requires the investigator to try to identify an explanation when it has actual knowledge that the purchase price of the subject property is *significantly* less than the purchase price of comparable properties). Despite these differences, however, EPA estimates that the average incremental cost of compliance with the Rule relative to conducting an ASTM E1527-2000 site assessment would be approximately \$55, resulting in the average Phase I site assessment costing approximately \$2,185.

The final AAI Rule clarified some confusion in the proposed Rule relating to the use of previously conducted site assessments and requirements to update older investigations. EPA estimates that 19% of Phase I site assessments conducted in a given year are conducted on properties that were sold at least once in the previous two years, so there are often older reports available at the start of the due diligence process. The Rule states that all appropriate inquiries must be conducted within one year prior to the date on which a person acquires a property. Information from older investigations may be utilized, but if it was completed more than a year prior to the property acquisition date, *all parts* of the investigation must be reviewed and updated for the all

appropriate inquiries to be complete. Some components of the inquiry must be updated within 180 days of the property acquisition as follows:

- interviews with current and former owners and operators;
- searches for recorded cleanup liens;
- reviews of federal, tribal and state records;
- visual inspections of the facility and the adjoining property; and
- the declaration by the environmental professional.

One of the more controversial differences between the programs involves the requirement in the AAI Rule that the final report be overseen and signed by an “environmental professional,” a term now defined in the AAI Rule so as to establish minimum qualifications for all persons conducting these inquiries. In brief, an environmental professional must: (i) hold a current Professional Engineer’s or Geologist’s license and have three years of relevant full-time experience; (ii) be licensed or certified by a federal or state government to perform environmental inquiries and have three years of relevant full-time experience; (iii) have a college degree in science or engineering and five years of full-time experience; or (iv) have the equivalent of ten years of relevant full-time experience (a requirement in the proposed Rule that this individual have a college degree was dropped after much opposition during the comment process). The Rule allows for individuals who don’t meet these criteria to participate in the due diligence process, provided that one member of the team meets the definition of “environmental professional,” reviews the results of the inquiry and signs the final report. EPA recommends that environmental professionals remain current in their field by participating in continuing instruction, though there is no mandatory requirement for additional education.

The final report documenting the results of the All Appropriate Inquiry process must include an opinion as to whether conditions indicative of a release or threat of release have occurred, and an identification of any data gaps that may have affected the environmental

professional's ability to identify these conditions. The report must also include the qualifications of the environmental professional and his or her declaration that the inquiries were conducted in conformance with the AAI Rule.

The promulgation of the AAI Rule reinforces the pivotal role of the environmental professional in commercial real estate transactions. Until now, many prospective purchasers have been willing to rely on older reports for their due diligence—this Rule makes it clear that reliance on reports that are more than one year old will not allow the user to invoke a defense to CERCLA liability. Since these older reports will need to be updated, the demand for environmental professionals' time will increase, reinforcing the need to engage their services early on in a transaction to make certain that all appropriate inquiry can be properly conducted.