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New EPA Rules May Affect Real Estate Transactions

The EPA has finalized a new draft rule for “all appropriate inquiry” (AAI), based on the 2002 Small Business Liability Relief and Brownfields Revitalization Act. In essence, the new rule would require purchasers and borrowers to conduct a more involved Phase I assessment than is required under the current ASTM standard to avoid liability for hazardous substance releases when acquiring or making a loan on property.

This is according to **Daniel E. Johnson** and **Joseph L. Kesling** of SCS Engineers, Long Beach, California. The company provides transactional risk and liability due diligence support services to the real estate and financial communities.

Under the current ASTM Phase I guidelines, innocent land owners, bona fide prospective purchasers of brownfield sites and contiguous land owners can qualify for liability exemption under CERCLA, also called the federal “Superfund.”

The pending EPA rule, however, poses both more and less strict Phase I assessment requirements for purchasers, borrowers and lenders. The draft AAI rule is much more performance-based, allowing for more discretion on the part of the environmental professional conducting the Phase I assessment on the purchaser’s behalf.

On the other hand, the environmental professional is required to meet much more detailed criteria under the “all appropriate inquiry” umbrella as part of an active investigation to detect any existing and/or threatened releases of hazardous substances at or near the property. The Phase I assessment must be based on very specific information relative to the property’s former uses, hazardous substances management and disposal and other data. Moreover, environmental professionals performing Phase I assessments are required to have more extensive field experience and education than what is currently required under ASTM.

If, under the draft AAI rule, the environmental professional does not detect any hazardous substance releases during the Phase I assessment, then the purchaser of that property is considered an “innocent land owner.” If releases are found, the purchaser could still acquire the property, be considered a “bona fide prospective purchaser” and not be held liable as long as he or she takes “reasonable steps” with respect to hazardous substance releases. Reasonable steps include containing releases, preventing future threatened releases and preventing or limiting human and environmental exposure to hazardous substance releases.

The EPA’s pending AAI rule is not perfect, but does further refine CERCLA liability for a purchaser of real property and developers of environmentally

impaired sites, according to the SCS Engineers executives. Over the next year, the provisions of the new rule should become clearer as the stakeholders in the process refine their interpretation of the rule and translate it into a practical business application. In the meantime, the ASTM standard will continue to provide qualified land owners with CERCLA liability protection.

With the pending regulations soon to reach fruition, Phase I providers and both the financial and real estate communities at large would be well served to stay as informed as possible on the latest developments, and to take a proactive approach toward compliance, the engineers pointed out.



Daniel E. Johnson



Joseph L. Kesling

10 Criteria for Conducting All Appropriate Inquiry

Here are 10 criteria from SCS Engineers for conducting “all appropriate inquiry:”

- Interviews with the past and present owners and operators of the facility to gather information regarding the potential for contamination of the facility.
- Review of historical sources, such as the chain of title documents, aerial photographs, building department records and land use records to determine previous uses and occupancies of the real property since the property was first developed.
- Searches for recorded environmental cleanup liens against the facility that are filed under federal, state or local law.
- Review of federal, state and local governmental records, waste disposal records and hazardous waste handling, generation, treatment, disposal and spill records, concerning contamination at or near the facility.
- Visual inspection of the facility and adjoining properties.
- Specialized knowledge of experience on the part of the defendant.
- The relationship of purchase price to the value of the property, if the property was not contaminated.
- Commonly known or reasonably ascertainable information about the property.
- The degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect contamination by appropriate investigation.
- Results of an inquiry reported by an environmental professional. ■