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A pending federal rule for environmental property inspections could affect every U.S. real estate transaction

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The U.S. Environmental Protection Agency is finalizing new federal due diligence standards for "all appropriate inquiry" as it applies to environmental property inspections known as Phase I site assessments.

The rule would replace completely the current American Society for Testing Materials Phase I site assessment standard, giving it the potential to affect every U.S. real estate transaction.

The agency is slated to propose a draft all-appropriate-inquiry rule before mid-2004, followed by a 90-day public comment period. After any necessary changes are made, the final regulations will be placed into effect in late 2004.

To avoid liability for hazardous substance releases when acquiring or making a loan on a property, purchasers and borrowers would have to conduct a more involved Phase I assessment than is required under the American Society for Testing Materials standard.

Under the current standard, innocent landowners, bona fide prospective purchasers of brownfield sites and contiguous land owners can qualify for liability exemption under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, also called the federal Superfund act.

The pending agency rule, however, poses both more- and less-strict Phase I assessment requirements for purchasers, borrowers and lenders.

First and foremost, the draft all-appropriate-inquiry 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 must meet much more detailed criteria under the all-appropriate-inquiry umbrella as part of an active investigation to detect existing or threatened releases of hazardous substances at or near the property.

The Phase I assessment must be based on very specific information about the property's former uses, hazardous sub-

stances management and disposal, and other data.

Moreover, environmental professionals performing Phase I assessments are required to have more extensive field experience and education than currently required.

10 Criteria for Conducting All-Appropriate Inquiry

1. Interview past and present owners and operators of the facility to gather information regarding the potential for contamination of the facility.
2. Review 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 developed.
3. Search for recorded environmental cleanup liens against the facility that are filed under federal, state or local law.
4. Review 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.
5. Visually inspect the facility and adjoining properties.
6. Specialized knowledge of experience on the part of the defendant.
7. The relationship of purchase price to the value of the property, if the property was not contaminated.
8. Commonly known or reasonably ascertainable information about the property.
9. The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect contamination by appropriate investigation.
10. Results of an inquiry reported by an environmental professional.

Under the draft all-appropriate-inquiry rule, if the environmental professional detects no hazardous substance releases during the Phase I assessment, then the purchaser of that property is considered an "innocent landowner."

If releases are found, the purchaser could acquire the property and be considered a "bona fide prospective purchaser" and not be held liable as long as the owner 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 agency's pending all-appropriate-inquiry rule is not perfect but does further refine CERCLA liability for a purchaser of real property and developers of environmentally impaired sites.

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 American Society for Testing Materials standard will continue to provide qualified landowners 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. ■



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