

New All Appropriate Inquiry rule to change standards

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The U.S. Environmental Protection Agency is finalizing new federal standards for All Appropriate Inquiry (AAI) in connection with current environmental property assessments known as Phase I Environmental Site Assessments (ASTM Phase I standard).

The EPA's new AAI rule will require users (e.g., purchasers, borrowers, owners, etc.) to conduct a more complete and complex assessment than is required under the ASTM Phase I standard.

The current ASTM Phase I standard is intended to help provide an innocent landowner defense under CERCLA.

The new AAI standard will be required to obtain not only the innocent landowner defense, but will also provide liability protections under CERCLA for two new categories of prospective purchasers.

These include the bona fide prospective purchasers defense (i.e., a purchaser can knowingly purchase a contaminated property, provided that they can meet certain criteria, for example, that the contamination occurred prior to their purchase of the property) and the contiguous property owner defense (i.e., protection for an owner of a property contiguous to a contaminated property, provided that they can meet certain criteria, for example, that they did not know of the contamination at the time of the purchase).

The AAI standard will require that the following activities be completed more thoroughly than the ASTM Phase I standard currently requires:

- Interviews with past and present owners and operators of a facility;
- Review of historical sources to determine previous uses and occupancies since the property was first developed;
- Search for recorded cleanup liens filed against a facility;
- Review of regulatory records for waste disposal, hazardous waste handling, generation, treatment, disposal, and spill records for a property and surrounding areas;
- Visual inspection of the facility and adjacent properties;
- Specialized knowledge or experience on the part of the purchaser;
- The relationship of the 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 (newly defined term).

The new federal AAI rule has been formerly proposed in August



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2004, and is expected to be promulgated by early 2005. This new rule will then replace the current ASTM Phase I standard (E 1527-00).

Until then, the ASTM Phase I standard will continue to satisfy AAI requirements under CERCLA liability protection for the innocent land owner defense.

Once the AAI standard is finalized, the ASTM Phase I standard will no longer satisfy AAI requirements unless the ASTM Phase I standard is revised and consistent or more stringent than the AAI standard. Because of this, ASTM is reviewing its standard and the AAI standard for consistency and is making changes and revisions so the standards are consistent.

Changes to the ASTM Phase I standard may include:

- Definition of an "environmental professional (EP)" which establishes mandatory professional credentials and minimum years of experience. The report must state that the EP definition has been met.
- User obligations such as specialized knowledge, environmental conditions, environmental cleanup liens, etc.;
- Local and tribal records or database research requirements;
- Institutional (e.g., deed and land use restrictions) and engineering controls research requirements;
- Additional interview requirements (e.g., if property is abandoned the environmental professional must interview one or more neighboring property owners);
- Address, document, and comment upon all data gaps that arise during environmental research.

The revised ASTM Phase I stan-

dard draft is expected to be released in late 2004. The EPA has indicated that once the ASTM Phase I standard draft is complete and it is determined that the draft is consistent or in compliance with the AAI standard, the AAI standard has then recognized the ASTM Phase I standard as appropriate for complying with the federal requirements of CERCLA liability.

Whether or not the ASTM Phase I standard is deemed consistent or compliant with the AAI standard, it may continue to serve as a tool to assess business environmental risk, rather than protection under CERCLA liability.

Because of the new AAI standard, the scope of work of the Transaction Screen standard no longer serves to (if, indeed, it ever did) qualify a property owner for the requirements of CERCLA defense. As originally conceived by ASTM, the screen was a low-cost alternative to the phase I that could be done by non-environmental professionals such as loan officers or appraisers.

However, over the years the Transaction Screen standard has been changed by users (e.g., lenders) to add out of scope items.

For example, the historical sources review in the Transaction Screen standard requires a review of historical fire insurance maps and fire department records. To augment this limited review, many lenders require consultants to review additional historical resources (e.g., historical aerial photographs, historical city directories, etc.).

Also, while the screen only requires a completed questionnaire as its work product, with the user

left to formulate opinions and conclusions in connection with the data obtained and the marketplace has evolved into phase I reports, complete with conclusions and opinions.

Our experience is that most users (e.g., lenders, property purchasers and property owners) require that the consultant provide opinions, conclusions and recommendations.

In addition, we have seen users conduct screens on properties that should properly be receiving Phase I ESAs (i.e., gas stations, industrial properties, etc.). Users have added many requirements to the Transaction Screen process, which has evolved into a completely different process and work product.

Because of the emergence of the AAI standard, it has become clear that in order to qualify for CERCLA liability protection, a screen will not suffice. Although conducting a screen will not qualify a user for CERCLA liability protection, it may still be used as a lower level screening tool. It is our understanding that the Transaction Screen standard is currently being revised to develop a relatively inexpensive screening tool for assessing the potential business risk in connection with a property.

For example, on a low-risk property or a small capital loan, a user or a lender may not care for or need CERCLA liability protection, but may believe that an assessment of business risk is warranted. The areas of the Transaction Screen standard that are being revised include:

- Formulate a purpose or role of the Transaction Screen standard
- Removal of all mentions to CERCLA
- Removal of all references to the ASTM Phase I standard
- Outline different environmental screening levels

The revised Transaction Screen standard is poised to serve as a tool for a lower level of environmental screening (as opposed to the new AAI and ASTM Phase I standards). And while it will not qualify the user for the three CERCLA liability protections (innocent land owners defense, bona fide prospective purchasers and contiguous property owner defense). We anticipate that we'll find a niche in business risk, environmental screens and the "low cap" loans marketplace.

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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