

## “ALL APPROPRIATE INQUIRY” PROPOSED RULE

### What is “All Appropriate Inquiry”?

“All appropriate inquiry” (AAI) refers to the requirements for assessing the environmental conditions of a property prior to its acquisition.

### Background

On August 26, 2004 the U.S. Environmental Protection Agency (USEPA) published a proposed rule setting forth standards for conducting AAI into the previous ownership, uses, and environmental conditions of a property. Conducting AAI prior to acquisition of a property is a required component of qualifying for liability protection under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Brownfields law.

### Who conducts “All Appropriate Inquiry” under the new Brownfields Law?

Subtitle B of Title II of the Brownfields Law revises some of the provisions of CERCLA Section 101(35) clarifying the requirements necessary to establish the innocent landowner defense under CERCLA in addition to providing Superfund liability limitations for bona fide prospective purchasers and contiguous property owners. Among the requirements added to CERCLA is the requirement that such parties undertake AAI into prior ownership and use of a property at the time at which a party acquires the property.

- Bona fide prospective purchasers who buy property after January 11, 2002 must perform AAI prior to purchase and may buy knowing, or having reason to know, of contamination on the property while still enjoying the limitation on liability provided by the new definition.
- Contiguous property owners whose property is not the source of the contamination, but is "contiguous" to a facility that is the source of contamination found on their property must perform AAI prior to purchase and buy not knowing, or having reason to know, of contamination on the property.
- Innocent purchasers/landowners must perform AAI prior to purchase of a property and must buy without knowing, or having reason to know, of contamination on the property.

The Brownfields Law also establishes that site characterizations or assessments conducted by entities with the use of brownfields grants awarded under CERCLA Section 104(k)(2)(B)(ii) must be conducted in accordance with the AAI standards established under the law.

### What are the statutory criteria for conducting “All Appropriate Inquiry”?

Congress directed EPA to establish, by regulation, standards and practices for conducting AAI. This will be accomplished through the process of regulatory negotiation. In the Brownfields Law, Congress directed EPA to include, within the standards for AAI, the ten criteria shown below:

- The results of an inquiry by an environmental professional;
- Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility;
- Reviews of historical sources, such as 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 clean-up liens against the facility that are filed under federal, state, or local law;
- Reviews of federal, state, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records concerning contamination at or near the facility;
- Visual inspections of the facility and adjoining properties;
- Specialized knowledge or experience on the part of the defendant;
- 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; and
- The degree of obviousness of the presence or likely presence of contamination at the property

and the ability to detect the contamination by appropriate investigation.

### **What are the interim standards for conducting “All Appropriate Inquiry”??**

The interim standards for parties seeking CERCLA liability protection must perform environmental site assessments in compliance with the ASTM Phase I ESA Standard. Once the final AAI Rule is promulgated, the ASTM Phase I Standard will no longer be applicable for establishing CERCLA liability protection.

### **What are the minimum qualifications for meeting the definition of an Environmental Professional?**

The Proposed AAI Rule establishes the following definitions of an environmental professional which includes the following combinations of education and experience:

- Hold a current Professional Engineer’s or Professional Geologist’s license or registration and have the equivalent of 3 years relevant experience; or
- Be licensed or certified to perform environmental inquiries and have the equivalent of 3 years relevant experience; or
- Have a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and have the equivalent of 5 years relevant experience; or
- Have a Baccalaureate or higher degree from an accredited institution of higher education and have the equivalent of 10 years relevant experience

### **Key Differences Between the Proposed AAI Rule and the ASTM Phase I ESA Standard**

The Proposed AAI Rule resembles the ASTM Phase I ESA Standard in several respects, but requires a substantially broader scope of inquiry and vests increased judgment and responsibility in the Environmental Professional.

The ASTM Phase I ESA Standard requires a visual inspection and research concerning the property and neighboring properties to identify any “recognized environmental conditions” on the property. The term “recognized environmental conditions” means the actual or potential presence of hazardous substances as a result of past, present, or threatened releases into the ground, ground water, or surface water on the property.

Typically, any “recognized environmental conditions” would be evaluated under a Phase II Environmental Site Assessment to determine the impacts, if any, to human health and the environment.

Although the Proposed AAI Rule has the same overall objective as the ASTM Phase I ESA Standard (*i.e.* to identify releases and threatened releases of hazardous substances), it mandates a significantly broader scope of environmental inquiry and establishes specific education and experience requirements for Environmental Professionals.

At this time, the differences between the Proposed AAI Rule differs from the ASTM Phase I Standard are as follows:

- Prior owners and operators must be interviewed. Reasonable attempts should be made to interview key personnel under the ASTM Phase I Standard. Required interviews could prove to be a very cumbersome task, as prior owners may be difficult to locate and may not want to cooperate.
- Adjacent properties must be visually inspected.
- Adjacent property owners and operators may have to be interviewed. In instances where the subject property is abandoned or there appears to be unauthorized use of the property, adjacent property owners must be interviewed. As is the case with prior owners and operators, adjacent property owners may be unavailable or unwilling to cooperate.
- The purchaser has a responsibility to share with the Environmental Professional any specialized knowledge it possesses regarding the property.
- The relationship of the purchase price to the fair market value of the property if the property were not contaminated must be considered. According to EPA, this provision does not require that the subject property be appraised. Instead, the intent is to have the prospective purchaser consider whether a significant price discrepancy is due to the presence of contamination on the property.
- The Environmental Professional must possess certain minimum education and/or experience, as discussed above.
- The Environmental Professional must identify data gaps in the report and efforts to resolve such gaps. Some industry personnel believe the sampling may be pursued as a way to resolve any data gap issues.

- The Environmental Professional must provide an opinion about the impact of data gaps on the integrity of the report.
- The Environmental Professional must provide a written opinion regarding the overall integrity of the data underlying the report.
- The Environmental Professional must make certain affirmative declarations in the report regarding the Environmental Professional's credentials and qualifications.

### **Conclusions**

In comparison to the ASTM Phase I ESA Standard, the Proposed AAI Rule articulates a significantly expanded scope of investigation and elevates the role of the Environmental Professional who performs such investigation. Although the Proposed AAI Rule shares many similarities with the ASTM Phase I Standard, the amount of work and thus the cost of performing AAI will certainly increase. Additionally, the necessity to include sampling beyond the current ASTM Phase I ESA Standard to alleviate any data gaps will also impact the cost of work and time required to perform AAI due diligence.

*For further questions concerning this program or other similar state programs, please contact Travis Faul or Mike Purdom using the following contact information.*



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