

Phase I Property Assessment Requirements Are Significantly Altered - Will Cost More and Take Longer

by Carol René Brophy

Under new U.S. EPA regulations, environmental assessments will take longer to prepare, be more costly, and cause a significant impact to real estate transactions. Further, the regulations also impose *new post-acquisition obligations* on property purchasers.

On November 1, 2006, EPA's "all appropriate inquiry" rule ("AAI Rule") took effect. As a practical matter, the AAI Rule greatly strengthens the due diligence requirements by placing new non-delegable obligations on prospective purchasers themselves, as well as revising phase I environmental assessment requirements. This e-alert summarizes key provisions of EPA's AAI Rule and suggests best practices for compliance.

Background

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 ("Brownfields Revitalization") created new liability protections for prospective purchasers of properties later found to be contaminated by hazardous substances on or upgradient of the property. For these protections to apply, however, the purchaser must make "all appropriate inquiries" to determine if the subject property may be contaminated. These requirements are contained in the AAI Rule that took effect on November 1. Although the regulations establish standards for property assessments required under the Comprehensive Environmental, Response, Compensation, and Liability Act ("CERCLA"), they are also used to limit liability under state, municipal, and federal laws, as well as in commercial real estate transactions. Thus, the AAI Rule will impact the way environmental assessments are performed in the future, and will impose ongoing obligations on landowners to manage hazardous materials and prevent contamination.

Overview of the AAI Rule

The AAI Rule allocates responsibility between the prospective purchaser and an "environmental professional." Now, all phase I assessment activities must be conducted by or under the direct supervision of a *qualified* environmental professional ("EP"). The regulations establish minimum certification, education and/or experience requirements that the EP must meet. Compared with the old requirement, the EP must:

- Interview a wider range of individuals, including past and present owners, operators, tenants and others with an on-site presence, and in some cases, interview the owners, operators and tenants of nearby properties;
- Conduct a much more thorough visual inspection of the site *and* adjoining properties;
- Review a broad spectrum of public documents, governmental records, and historical sources of information, as well as, consider anecdotal or reasonably ascertainable information about the property within the local community;

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and

- Prepare a "certified" written report that identifies data gaps and/or areas of uncertainty that may have an effect on the EP's conclusions. Where data gaps exist, the EP must identify the potential impact of the data gap and how the data if available would alter the EP's opinion.

[FULL STORY]

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