

# **New EPA Rules on Environmental Site Assessments Effective November 1, 2006**

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## **Affected Persons: Buyers and Sellers of Commercial or Industrial Real Estate, Real Estate Agents, Foreclosing Lenders on the Property**

### **Key Points:**

- 1) If buying or selling real estate that may be contaminated, such as certain types of commercial or industrial properties, and if the buyer does not want to be liable under U.S. Superfund statute for cleanup responsibilities for existing contamination, the buyer or seller should conduct an environmental inquiry to show whether the property is likely contaminated.**
- 2) Where property may be contaminated, legal advice on the terms of the sales agreement, the environmental assessment and reporting obligations should be considered, as well as use of the federal brownfield law for development of contaminated property.**
- 3) A prospective purchaser may still purchase the property with knowledge of contamination after performing the environmental site assessment and still receive protection from most federal Superfund statute cleanup requirements if the purchaser complies with certain requirements. The parties may agree to adjust the purchase price depending on whether the purchaser accepts the environmental remediation obligations.**

Under the federal Superfund statute, CERCLA, the current owner or operator of property contaminated by hazardous substances (or subject to threat of contamination), and the owner or operator at the prior time of disposal, may be strictly liable for the cost of assessment and remediation of that contamination. Strict liability means “no-fault” liability, that is, the owner may have not been at fault or negligent in any way in causing the contamination, but will be liable for cleanup anyway. A purchaser of the property, and even a donee of the property (such as a non-profit organization like the Boy Scouts), or a lender which forecloses on the property, or the purchaser of adjacent property contaminated by the property, may face substantial liability for assessment and remediation because of the release or threatened release of hazardous substances. U.S. EPA and others may bring actions to make the property owner pay for the assessment and remediation.

However, certain parties may avoid CERCLA landowner liability if they can demonstrate they did not know and had no reason to know prior to purchasing a property that any hazardous substances had been released on or migrated to the property. To show this, they have to conduct an “all appropriate inquiry” (or “AAI”) into the previous ownership, uses and environmental conditions of the property before closing on the purchase. This protection can extend to the contiguous property owner. These protections are referred to as: 1) innocent landowner defense, 2) contiguous property exemption, 3) bona fide prospective purchaser exemption, and 4) the brownfields site grant program. The cost of an AAI may run between \$1500 and \$3500 or more.

U.S. EPA issued a new rule that took effect November 1, 2006 with the requirements for conducting AAI in order to qualify for protection from CERCLA cleanup obligations. After November 1, 2006, these parties must follow the AAI Final Rule for conducting site assessments or follow the standards set forth in the ASTM E1527-05 Phase I Environmental Site Assessment Process to qualify for those protections. The ASTM E1527-05 Phase I Environmental Site Assessment Process may be more “user friendly” and more detailed than the AAI.

Prospective purchasers and contiguous property owners must show they are not liable for the release nor affiliated with someone liable for the release, nor allowed the release.

A purchaser may still purchase the property with knowledge of contamination after performing the AAI and receive protection from CERCLA cleanup requirements if the purchaser complies with other requirements, including acquiring the property after disposal ceased, providing required notices as to the discovery of the release, taking reasonable steps to prevent releases, cooperate with those conducting response actions, complying with land use restrictions and institutional controls, complying with informational requests, and not being liable or affiliated with those responsible for the releases of contamination. The seller and buyer may adjust the purchase price depending on which one accepts the obligations for the remediation. An innocent landowner may obtain the defense from CERCLA liability if the landowner conducts the

AAI before acquiring the property and meets certain requirements similar to the above plus shows the contamination was not caused by the landowner or its agent, etc.

Important: There are no new reporting or disclosure obligations to EPA or any other governmental entity, although the environmental professional conducting the AAI must record the results of the inquiry and his or her conclusions in a written report on behalf of the property owner. This report need not be retained. However, on-going releases in “reportable quantities” must still be reported to the appropriate governmental agency. Historical releases that have ended need not be reported if one does not want the protections from CERCLA liabilities, such as a prospective purchaser who decides not to purchase the property after the AAI report is received.

The key points for conducting an AAI are:

- 1) The AAI must be conducted or supervised by an environmental professional, which includes a person holding a Professional Engineer’s or professional Geologist’s license with three years of relevant experience or have a B.A. degree in a relevant discipline and five years of relevant experience or a BA and ten years of relevant experience.
- 2) The AAI is to include:
  - a. Interviews with past and present owners and operators and occupants regarding the potential for contamination.
  - b. Historical sources must be reviewed, such as chain of title, aerial photos, land use records, etc. to determine previous uses since the property was first developed.
  - c. Searches for environmental cleanup liens.
  - d. Reviews of government records on waste disposal, spill records, etc.
  - e. Visual inspections of the property and adjoining property.
  - f. Specialized knowledge or experience of the landowner (if the landowner fails to provide information for the report, his or her protection from CERCLA may be affected and the “data gap” may be noted in the AAI report).
  - g. Relationship of the purchase price to the value of the property if not contaminated.
  - h. Commonly known or ascertainable information about the property.
  - i. The degree of obviousness of contamination and the ability to detect the contamination by appropriate investigation.
- 3) The AAI must be conducted within one year prior to taking title to the property or updated if older than 180 days prior to transfer of title.
- 4) The seller may conduct the AAI and the purchaser may use the AAI report if the purchaser reviews and updates the contents, such as with the purchaser’s knowledge and relationship of the price to the value if not contaminated.
- 5) The detection of extremely small quantities of contamination that would not pose a threat to human health or the environment need not be identified in the AAI report.

Purchasers and property owners may still face liability under state laws and common law despite compliance with federal AAI requirements. Environmental assessment and remediation, and potential third party claims, can be very costly. Hence, the real estate attorney representing a prospective seller or buyer of property that has a significant risk of contamination should consider bringing in an environmental attorney in the preparation of the sales agreement and conduct of the AAI and negotiations with the applicable environmental agencies. Use of the federal law on development and voluntary remediation of brownfields should be considered when appropriate. Legal advice on whether a release needs to be reported to a governmental agency should also be sought immediately after discovery of the release.

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