



## USEPA IMPLEMENTS NEW RULE FOR PURCHASES OF REAL ESTATE EFFECTIVE NOVEMBER 1, 2006

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In the business world, greater certainty usually means increased cost and the need for more time to investigate. That principle holds true today when a purchaser of real estate wants to benefit from certain defenses to federal liability associated with environmental contamination. Enacted in 1980, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") generally provides that a person may be held strictly liable for the cost of remediating environmental contamination at a property it owns or owned or operated at the time of the release of the hazardous waste. In response to criticisms over the breadth and harshness of the federal liability, Congress established certain defenses such as the "innocent landowner defense," the "bona fide purchaser defense," and the "contiguous property defense."

Receiving the benefit of those defenses comes at the expense of satisfying the "All Appropriate Inquiry" Rule ("AAI Rule"). Beginning November 1, 2006 the purchaser of real estate must obtain, prior to the acquisition of title, a report prepared by a qualified environmental professional and that meets several requirements. In the past, purchasers of industrial or commercial real estate obtained a phase I environmental site assessment that satisfied one of the standards adopted by ASTM. After several years of delay, USEPA passed the AAI Rule, a formal federal regulation that details the specific requirements for such a report.

While there are some similarities between a report satisfying AAI Rule requirements and a phase I environmental site assessment obtained prior to the new AAI Rule under ASTM 1527-00 (the most recent commercial standard prior to the adoption of the new AAI Rule), there are several significant differences, some of which follow. First, the new report must be prepared by a qualified environmental professional. The qualifications for the environmental professional are more extensive than under prior practice. The qualified environmental professional must have "sufficient

specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the objectives and performance factors of the rule, and has: (1) a [specified] certification or license and three years of relevant full-time work experience; or (2) a Baccalaureate degree or higher in science or engineering and five years of relevant full-time work experience; or (3) ten years of relevant full-time work experience." (40 C.F.R. § 312.10.)

Second, the AAI Rule requires that the environmental professional certify in writing with specific language that the environmental professional meets the qualification requirements described above and that the report complies with the AAI Rule. Under the AAI Rule, the certification is broader compared to the certification provided under prior practice.

Third, under the AAI Rule, the environmental professional must interview the current owner and occupant of the property. Under prior practice, the environmental professional was required to make a reasonable attempt to interview the "key site manager" and a reasonable number of occupants.

Fourth, if an abandoned property is being evaluated and there is evidence of unauthorized use or uncontrolled access, the environmental professional must interview neighbors and nearby property owners and occupants. Under prior practice, the consultant had the discretion whether to conduct the foregoing interviews.

Fifth, the environmental professional must review records from historical sources from the present back in time to the moment when the property first contained a structure or was used for residential, agricultural, commercial, industrial, or governmental purposes. Under prior practice, the consultant reviewed the historical use of the

property from the present back to when the property was first developed or 1940, whichever was earlier.

Sixth, the environmental professional must identify any instances where records or information required to be reviewed cannot be obtained and comment upon whether the "data gaps" affect the ability to identify conditions that indicate a release or threatened release of contaminants at the property. Under prior practice, the consultant generally had the discretion whether to identify and comment upon any "data gaps".

And, under the new AAI Rule, the completed report has a "shelf life" of one year, with an update required on certain items after 180 days. Under prior practice, an update on certain items after 180 days was usually obtained.

Consultants and their clients, real estate purchasers, sellers, lenders, and developers, undoubtedly will adapt and incorporate the new requirements in their planning, purchasing, and budgeting decisions. Some of our suggestions for users of a report under the AAI Rule follow.

- Identify an experienced environmental consultant who meets the AAI Rule qualifications. Ask the prospective consultant specific questions about training, experience, and education and whether the consultant is familiar with the AAI Rule. Ask the consultant about how many reports the consultant has

prepared under the new rule and ask for a copy of an already-completed report as an example. Ask for the consultant's resume, statement of qualifications for the consultant's firm, and references.

- When retaining the environmental consultant to prepare the report under the AAI Rule, confirm in writing that the consultant meets the requirements of an environmental professional and will prepare a report that meets the requirements of the AAI Rule.
- Allow more time than in the past for completion and review of the environmental site assessment prepared under the new AAI Rule. In many situations, the consultant will welcome the fact that someone is reviewing the report and evaluating whether the report meets the requirements for the client and the new AAI Rule.
- Plan for increased costs associated with the preparation and review of the environmental site assessment report. Because of the new requirements, consultants are likely to charge more for the report than in years past.
- Maintain the completed report satisfying the requirements of the AAI Rule in a file that can be identified and accessed several years later in the event a question or inquiry about potential liability arises.



You may reach Michael O'Neil at [moneil@murphyaustin.com](mailto:moneil@murphyaustin.com) or by calling (916) 446-2300 should you wish to discuss benefiting from any of the CERCLA defenses or complying with the AAI Rule. *Michael O'Neil, Esq., is a partner at Murphy Austin Adams Schoenfeld LLP. He leads the firm's environmental law practice, and is a member of the firm's litigation and real estate groups.*



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