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New Requirements for Phase I Environmental Site Assessments Effective November 1, 2006

On November 1, 2005 the United States Environmental Protection Agency ("EPA") published its new rule for conducting "all appropriate inquiries" ("AAI") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").¹ The standard, which becomes effective November 1, 2006, will replace ASTM "Phase I Site Assessment Process" Standard E 1527-00 (the "2000 ASTM Standard") as the primary environmental due diligence document in real estate acquisitions. EPA was mandated to develop the standard pursuant to amendments to CERCLA in 2002 that provided the "bona fide prospective purchaser" and "contiguous property owner" defenses to CERCLA liability. The AAI standard will be the document used to help establish these defenses along with the older "innocent land owner defense." Some states also rely on AAI or similar requirements for establishing certain defenses under state environmental laws.

EPA helped bridge the gap between the 2000 ASTM Standard and AAI by specifically providing that a new version of the ASTM "Phase I Site Assessment Process Standard", E 1527-05 (the "2005 ASTM Standard") may be used to meet AAI. As most who perform or rely on environmental site assessments around the country have grown accustomed to use of the ASTM Phase I Site Assessment Process Standard, environmental consultants will likely use the 2005 ASTM Standard rather than consultants trying to follow the AAI requirements in the Code of Federal Regulations. This article describes the components of AAI and discusses some of the aspects of the 2005 ASTM Standard that may affect the user.

Environmental Professional

AAI requires that an "Environmental Professional" complete or supervise the completion of most of the foregoing elements, but allows the user to address some of them. To qualify as an "Environmental Professional" the individual must have certain levels of education and experience as provided in the regulation. An AAI report must include a certification that the provider has the requisite qualifications of an "Environmental Professional". The Environmental Professional must also certify that it has completed the report in conformance with AAI.

Primary Elements of AAI

The general AAI components are:

Interviews with past and present owners, operators and occupants.

- Must include current owner and occupant.
- If multiple occupants, must include major occupants and those most likely to handle hazardous substances.
- One of the following as necessary to achieve the objectives of AAI:
 - Current and past facility manager.
 - Past owners, operators or occupants.
 - Employees of current and past owners and operators.
- Abandoned properties – interviews with owners and occupants of neighboring properties from which it is possible to observe uses on the subject property.

Reviews of historical sources of information.

- Historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time

the property was first used for residential, agricultural, commercial, industrial, or governmental purposes.

- The Environmental Professional may exercise professional judgment in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records.
- Historical documents and records may include, but are not limited to, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.

Searches of recorded environmental cleanup liens.

- Search must be completed and provided to the Environmental Professional.
- Should include land title records and any special state registry for such liens.

Reviews of federal, state, tribal and local government records.

- Same approach as current ASTM Standard to government records, except AAI specifically mentions databases or registries for institutional controls, engineering controls or land use restrictions.
- Provides that additional records should be reviewed if in the judgment of the Environmental Professional it is necessary to achieve the AAI objectives for:
 - Reported and threatened releases on the site and adjoining properties.
 - Permitted or “registered” hazardous waste management activities.

Visual inspections of the facility and of adjoining properties.

- Visual inspection of subject property including improvements.
- Visual inspection of adjoining properties from the subject property, right-of-way or other vantage points.
- Where on-site inspection cannot be made due to “unusual circumstances” such as physical limitations, remote and inaccessible locations, or other inability to obtain access to properties following good faith efforts, other possibilities include:
 - Aerial imagery.
 - Contiguous properties.
 - Public roads.
- Must document efforts and Environmental Professional must note the significance of its failure.
- Refusal by owner to allow access is not an “unusual circumstance.”

Specialized knowledge or experience on the part of the purchaser.²

- AAI requires the consideration of the specialized knowledge of the purchaser of the subject property, the condition of the adjoining property and other experience relevant to the inquiry.
- Must take into account the relevant and applicable specialized knowledge and experience of the purchaser.

The relationship of the purchase price to the value of the property, if the property was not contaminated.

- Must consider whether the purchase price of the subject property reasonably reflects the fair market value “FMV” of the property if it were not contaminated.
- If it is determined that the purchase price is not the FMV, then the purchaser must determine if this is because of releases or threatened releases of hazardous substances.
- Preamble notes that a formal appraisal is not required, but suggests a comparison to the sales price of similarly situated properties in the same area.

Commonly known or reasonably ascertainable information about the property.

- Throughout the AAI process the purchaser and the Environmental Professional should be attempting to obtain known or reasonably ascertainable information within the local community about releases or threatened releases of hazardous substances at the subject property.
- Should refer to one or more the following sources:
 1. Current owners or occupants of the property or adjoining properties.
 2. Local and state governmental officials who may have knowledge of the property.
 3. Others with knowledge of the property.

4. Other sources such as newspapers, websites, community organizations, local libraries and historical societies.

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.

- Environmental Professional and the purchaser must consider all of the data collected and the report must include an opinion of the Environmental Professional regarding additional appropriate investigation, if any.

User Provided Information

As indicated in the previous section, those contracting with consultants to complete a Phase I under this new standard will find the consultant will request more information from the user than under previous versions. The standard requires the user to assess information on environmental liens, and activity and use limitations. Such information should be identified in the title commitment and provided to the consultant so that it is documented in the report. The user must consider and should also identify for the consultant any specialized knowledge or experience of the user or actual knowledge of the user that may be material to completing AAI. The latter includes commonly known or reasonably ascertainable information that the user may have concerning the subject property or adjoining properties. The remaining piece of information that the user must assess and should provide is a reason for a significantly lower purchase price if it is below market value. This element was mandated by Congress and is meant to identify where a seller lowers the sales price because the property is contaminated with hazardous substances. Both the AAI regulation and the 2005 ASTM Standard specifically provide that an appraisal is not necessary to establish this element. How users will establish this element is unclear, but presumably the purchaser should commit to writing how the purchase price was reached in comparison to other similarly situated properties or properties located in the vicinity.

Certifications

AAI requires two specific certifications to be made by the consultant in the Phase I report:

- [I, We] declare that, to the best of [my, our] professional knowledge and believe, [I, we] meet the definition of Environmental Professional as defined in 40 CFR § 312.10.
- [I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR part 312.

Data Gaps

The most important aspect of AAI may be the requirement for the Environmental Professional to report any data gaps, i.e. gaps “in the information developed as a part of the inquiry that affect the ability of the Environmental Professional to identify conditions indicative of releases or threatened releases of hazardous substances...’and comment’ regarding the significance of such data gaps on the Environmental Professional’s ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases on, at, in or to the subject property.”³ If a data gap prevents the Environmental Professional from reaching an opinion, the Environmental Professional must specifically identify the concern. The preamble to the regulation includes a discussion of data gaps and how Phase II sampling may be appropriate to address them, but does state that AAI does not require Phase II sampling.

2005 ASTM Standard

ASTM released the 2005 ASTM Standard in late November of 2005. As with previous versions of the standard, the purpose of the Phase I is to identify “recognized environmental conditions” (“RECs”), which is defined as “the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of release of any hazardous substance or petroleum products into structures on the property or into the ground, groundwater or surface water of the property.”⁴ While use of AAI to meet the defenses under CERCLA only requires the assessment for hazardous substances and not petroleum products, the 2005 ASTM Standard includes petroleum products consistent with past versions and customary due diligence of real property. AAI is also used in connection with certain grants that require assessment of concerns for releases of petroleum.

Will material changes in Phase I services occur as a result of AAI?

We are likely to see some changes, but how significant is difficult to project. As with the predecessor ASTM standard, certain elements of the review are only valid for 180 days and therefore must be updated *prior* to the purchase in order to rely on the Phase I. The required certifications are slightly more stringent than what was previously provided. Most consultants currently provide that their services were completed “in general accordance with ASTM Standard E-1527-00.” The certifications in AAI and the 2005 ASTM Standard require exact language stating that the work was performed “in conformance” with AAI. This may lead to higher professional liability insurance costs that will be passed on to the consumers. It may also take the consultant longer to complete the work as there is more data to collect. Most important is that the mandated certifications, new insurance requirements and data gap provisions may force consultants to identify more RECs or take exceptions for data gaps. This in turn could lead to an increased number of recommendations for Phase II sampling. The use of Phase II sampling to bridge data gaps in historical uses is particularly problematic as the lack of information on past uses does not lend itself to targeted testing. Instead, parameters for sampling will be unknown leading to a shot gun approach recommendation. Such sampling can become very expensive and can result in identifying contaminants for which a source is not readily apparent which will in turn lead to more sampling.

Conclusion

Currently AAI is a hot topic in environmental discussions across the country. We may see increased Phase I costs, longer periods for consultants to complete Phase I's and more recommendations for Phase II sampling. Those involved in real estate transactions or corporate transactions that include real estate should understand the 2005 ASTM Standard requirements or have someone on their team who can respond to issues arising from the work. Purchasers whose closing will occur on or after November 1, 2006 must follow the 2005 ASTM Standard or AAI in order to be eligible for the defense available under CERCLA and similar state laws.

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¹ 70 Fed. Reg. 66, 070, *et seq.* (Nov. 1, 2005) to be codified at 40 C.F.R. pt. 312

² AAI is used to establish defenses, therefore the regulations actually use the term "defendant" rather than "purchaser."

³ 40 C.F.R. § 312.21(c)(2).

⁴ ASTM Standard E 1527-05 § 3.2.74. The definition goes on to include hazardous substances or petroleum products under conditions in compliance with law, but excludes de minimis conditions.