

Client Alert

A report
for clients
and friends
of the firm

October 2006

“All Appropriate Inquiries” (ASTM E1527-05) – The New Standard For Conducting Environmental Due Diligence Under the Federal Superfund Law

New Rule

On November 1, 2005, the United States Environmental Protection Agency (“EPA”) published a final rule setting forth the federal standards for the conduct of “all appropriate inquiries” to assess a property for the presence or potential presence of environmental contamination. The final rule specifies and expands the level of environmental due diligence required in conducting an environmental site assessment (commonly known as a Phase I) for the purposes of qualifying for certain limited property owner liability protections under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. (also known as the Federal Superfund Law). The final rule does not impose any new reporting or disclosure obligations. **The final rule will become effective on November 1, 2006.**

Applicability

The final rule setting forth the “all appropriate inquiries” standard (the “AAI Standard”) is applicable to any public or private party seeking to:

- assert the innocent landowner defense under CERCLA (§101(35)(A)(i) of CERCLA);
- assert the contiguous property owner exemption under CERCLA (§107(q) of CERCLA);
- assert the bona fide prospective purchaser exemption under CERCLA (§107(r)(1) and §101(40) of CERCLA); or
- receive grants for site characterization and assessment under the EPA's Brownfield Grants program (§104(k)(2) of CERCLA)

Old/Interim Standard

Until the final rule becomes effective on November 1, 2006, parties may use either: (i) the final AAI Standard for conducting environmental site assessments, as embodied in the new standard for conducting Phase I Environmental Site Assessments developed by the American Society for Testing and Materials (ASTM), known as ASTM E1527-05 (which EPA recognizes as compliant with its final rule); or (ii) the interim standard for “all appropriate inquiries” that had been established by the Small Business Liability Relief and Brownfields Revitalization Act (the federal “Brownfields Amendments” to CERCLA), as embodied in the old ASTM E1527-00 standard for Phase I Environmental Site Assessments.

Significant Changes Imposed Under The Final AAI Standard (ASTM E1527-05) As Compared To The Interim Standard (ASTM E1527-00)

Under the final AAI Standard (ASTM E1527-05):

- *Environmental Professional Qualifications:* There are specific qualifications, including specific educational and experiential requirements, for the Environmental Professional performing a Phase I

Environmental Site Assessment ("Phase I ESA"). Under the old ASTM E1527-00 standard, no specific qualifications were imposed.

- **Interviews and Regulatory Records Reviews:** Regulatory database reviews and interviews of prior and neighboring owners and operators are more exhaustive under the new AAI Standard (ASTM E1527-05) than under the old ASTM E1527-00 standard. The new AAI Standard includes mandatory interviews with current site owners and occupants, mandatory interviews with neighboring or nearby property owners and occupants of abandoned properties, review of historical sources from when the property was first used, mandatory review of local government records, mandatory review of environmental cleanup liens filed or recorded against the property, etc. Under the old ASTM E1527-00 standard, many of these interviews and records reviews were discretionary or were limited to information that was reasonably ascertainable.
- **User Responsibilities:** There are specific obligations and responsibilities of the "User" of a Phase I ESA (i.e., to provide certain information to the Environmental Professional). For example, unlike the old ASTM E1527-00 standard, which required the prospective property owner to consider the relationship of the purchase price and the fair market value of the property only if the prospective property owner has actual knowledge that the purchase price is significantly lower, under the new AAI Standard (ASTM E1527-05), the prospective property owner must, even in the absence of actual knowledge, consider the relationship of the purchase price to the fair market value of the property and evaluate whether a lower purchase price compared to the fair market value of the property could be due to the presence of contamination. Although the new AAI Standard does not require that a real estate appraisal be obtained to ascertain fair market value of the property, if the prospective property owner does not provide the Environmental Professional with information regarding the relationship between the purchase price and the fair market value of the property, the Environmental Professional should treat the lack of such information as a data gap.
- **Data Gaps:** Data gaps and the sources of information consulted to address or fill the data gaps must be identified by the Environmental Professional and the Environmental Professional must evaluate the significance of any data gaps with respect to the Environmental Professional's ability to identify conditions indicative of releases and threatened releases concerning the property.
- **Viability of a Phase I ESA:** A Phase I ESA is valid if completed within 180 days prior to the acquisition of the property, which is consistent with the old standard under ASTM E1527-00. Under the new AAI Standard (ASTM E1527-05), a previously conducted Phase I ESA may only be used if certain of the information contained therein, including interviews, records reviews, visual inspections of the property and adjoining sites and the declaration of the Environmental Professional, is updated within 180 days prior to the date of the acquisition of the Property. A summary of any relevant changes to the condition of the property and any specialized knowledge of the prospective landowner must also be included in the update. In contrast, under the old ASTM E1527-00 standard, a previously conducted environmental site assessment could be used if, in the reasonable judgment of the User of the Phase I ESA, the environmental conditions at the property were not likely to have changed materially since the prior assessment was conducted. In addition, under the new AAI Standard, if a prior all appropriate inquiries investigation was completed more than 1 year prior to the property acquisition, all aspects of that prior investigation must be reviewed and updated.

Practical Implications Of The New AAI Standard (ASTM E1527-05):

Cost

- The EPA estimates that the additional requirements imposed under the new AAI Standard (ASTM E1527-05) will increase the cost of a Phase I ESA on average, between \$52-\$58. However, environmental consulting firms estimate that the increased cost of a Phase I ESA prepared under the new AAI Standard will be substantially higher, and could result in added costs ranging from 10%-20% over standard rates, or approximately \$200 to \$600, depending on the complexity of a site.

More Time-Consuming

- The additional requirements (e.g., additional interviews, including tracking down prior owners or operators and neighboring property owners, additional records searches including searches for institutional controls for which there often are no available national sources of information and only few state sources, purchase price evaluations, etc.) imposed under the new AAI Standard are likely to make the process more time-consuming (by approximately 1 to 2 weeks) and more burdensome.

More Client Involvement

- A User should, but is not required under the new AAI Standard (ASTM E1527-05), to provide the Environmental Professional with the User's specified knowledge or experience, and any commonly known or reasonably ascertainable information that the User may have that is material to determining whether there is an environmental concern with respect to the property. However, any failure to provide such information to the Environmental Professional may be identified as a data gap. Accordingly, to limit the data gaps, there is likely to be more interaction between the User and its counsel and the Environmental Professional.

Data Gaps

- Identification of data gaps may result in more conservative conclusions and increased recommendations by the Environmental Professional to undertake further investigations involving intrusive sampling (Phase II ESA) of soil, groundwater or other potential areas of concern.

- It may well be possible to satisfy the new AAI Standard even where data gaps are identified by the Environmental Professional.

Shelf Life

- Stricter limitations on the shelf life of a Phase I ESA and the viability of previously conducted Phase I ESAs likely will increase the number and frequency of Phase I ESAs or updates that will need to be conducted.

Conclusions

Although the new AAI Standards do not represent a wholesale departure from the old/interim standards that have been adhered to in the industry, the final/new rule does impose certain additional requirements that expand the scope of environmental due diligence and will have numerous implications ranging from cost, timing, frequency and attorney and client involvement in the conduct of environmental due diligence to satisfy the new AAI Standard.

**NEW YORK • LOS ANGELES • WASHINGTON
BOSTON • BOCA RATON • NEWARK
NEW ORLEANS • PARIS**

Client Alert

The Environmental Practice Group at Proskauer Rose LLP advises clients on various aspects of environmental law, including compliance, remediation, enforcement and litigation.

If you have any questions or are interested in additional information concerning the new AAI Standard, please contact:

Robert J. Kafin
212.969.3280 – rkafin@proskauer.com

Gail S. Port
212.969.3243 – gport@proskauer.com

Aliza R. Cinamon
212.969.3417 – acinamon@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

© 2006 PROSKAUER ROSE LLP. All rights reserved.

You can also visit our Website at www.proskauer.com