

E-ALERT | Environmental

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AMENDED ALL APPROPRIATE INQUIRIES (AAI) RULE OFFERS NEW DUE DILIGENCE STANDARD, FOCUSES ON VAPOR RELEASES

Effective December 30, 2013, the United States Environmental Protection Agency (“EPA”) has amended the environmental due diligence standards and practices that prospective purchasers of real property must follow to preserve key defenses to federal cleanup liability. The amended rule offers a new, alternative due diligence standard that focuses on revised definitions and clarifies due diligence investigations with regards to vapor releases and migrations .

The due diligence regulations, codified at 40 C.F.R. § 312 (2013), are commonly known as the All Appropriate Inquiries Rule (the “AAI Rule”). The AAI Rule addresses the process for evaluating the environmental conditions at a property and for assessing the potential for liability for any contamination. It sets forth the pre-acquisition diligence that a purchaser must perform in order to be eligible for certain defenses to environmental cleanup liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”).

Congress passed the Small Business Liability Relief and Brownfields Revitalization Act in 2002; this law included amendments to CERCLA that created liability defenses for persons purchasing property with knowledge that the property is contaminated. The law created two new liability protections—the contiguous property owner defense and the bona fide prospective purchaser defense. In order to qualify for these defenses, as well as for the then-existing innocent landowner defense, prospective purchasers are required to undertake “all appropriate inquiries” into the property’s previous ownership and uses before acquiring the property. In 2005, EPA promulgated the AAI Rule in coordination with ASTM International’s release of industry standard ASTM E1527-05 for Phase I Environmental Site Assessments.

Now, EPA has amended the AAI Rule to reflect an even newer standard recently issued: ASTM International’s E1527-13 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.” This amendment does not require parties to use ASTM E1527-13 in order to comply with the AAI Rule. Prospective purchasers of real property can still use the ASTM E1527-05 standard, which until the adoption of this regulation was the required approach under AAI.

While this amendment does not require parties to use this updated ASTM standard to comply with the AAI Rule, EPA stated it was the Agency’s intention to pursue in a future proposed rulemaking the removal of the reference to ASTM E1527-05, the prior existing standard, in the AAI Rule. Thus, prospective purchasers should consider employing the newer ASTM standard, especially in the context of asserting and preserving CERCLA defenses in the future.

CHANGES IN THE AMENDED AAI RULE

The new ASTM E1527-13 standard is based on the expertise and experience gained by ASTM members and field practitioners since 2005. The updated standard provides some clarifications and

additional guidance for the environmental assessment of commercial and industrial properties, most notably:

- ***An updated definition of “Recognized Environmental Condition” (“REC”).*** The revised definition aligns with the AAI Rule provision that site assessments be conducted with a goal of identifying “conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.” 40 CFR 312.1(c)(2). The new definition clarifies that a de minimis condition is not a REC, thereby narrowing the scope of RECs.
- ***An updated definition of “Historical Recognized Environmental Condition” (“HREC”).*** The updated definition clarifies that the scope and application of a HREC is limited to only past releases that have been addressed to a degree allowing for unrestricted use of the property and without employing any engineering controls.
- ***An added definition of “Controlled Recognized Environmental Condition” (“CREC”).*** This new term is defined as past releases that have been addressed by allowing contamination to remain in place subject to the implementation of required controls. A CREC is distinct from a de minimis condition. EPA anticipates that prospective purchasers looking to claim protection from CERCLA liability will prefer the additional clarity this definition provides.
- ***A revised definition of “migrate/migration” to include vapor migrations and a revised definition of “release” to clarify that the definition has the same meaning as the definition of release in CERCLA.*** EPA anticipates that these revisions will prompt practitioners to consider all conditions indicative of releases and threatened releases of hazardous substances and will reduce previous confusion on how to conduct a thorough AAI investigation with regards to vapor releases and migrations.
- ***Additional guidance concerning the regulatory agency file and record review requirement.*** The new standard provides a framework for reviewing agency information obtained from key databases and encourages environmental professionals to document the validity of information found from searches of agency databases. Environmental professionals must review environmental records concerning the target property and other properties within a certain distance of the target. According to the EPA, the prescribed framework will enhance the quality of reports and the level of confidence that users can place on site assessment results.

FACTORS TO CONSIDER WHEN DECIDING WHETHER TO APPLY THE AAI RULE

In deciding whether to follow the AAI Rule when undertaking environmental due diligence, it is helpful for property owners to keep in mind:

- ***The AAI is not a “one-size-fits-all” legal requirement.*** Rather, the AAI is a due diligence standard that purchasers may choose to seek to apply on a case-by-case basis, depending on their objectives. The decision regarding whether to follow the AAI Rule may turn on: whether preserving certain CERCLA defenses is a priority; the purchaser’s risk tolerance; confidentiality concerns; and the increased costs, burdens, and time that may be involved in meeting the AAI Rule’s requirements. Furthermore, the prospective purchaser should keep in mind that following the AAI Rule is only a threshold factor in qualifying for federal liability protections and that preserving such defenses may require compliance with certain ongoing post-acquisition obligations. A case-specific cost/benefit analysis may assist purchasers when deciding whether to follow the AAI Rule and which ASTM standard to implement
- ***CERCLA liability defenses are limited in scope.*** Following the AAI Rule provides eligibility for defenses under CERCLA liability only. These protections do not apply to potential liability under other federal laws, common law causes of action, or state, local, tribal, and foreign laws.

- ***Satisfying the AAI Rule does not automatically qualify a purchaser for CERCLA liability protections.*** In order to qualify for CERCLA defenses, the purchaser cannot in any way have been responsible for releases or threatened releases on the subject property. In equity deals, such as mergers and stock purchases, a purchaser may not be permitted to invoke the CERCLA liability defense if such purchaser is deemed to have “stepped into the shoes” of the pre-transaction owner. Furthermore, after the property acquisition is completed, the purchaser may be required to comply with certain continuing obligations in order to preserve CERCLA liability defenses. These may include: complying with activity and use restrictions; reporting releases; taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit exposure to a previous release; cooperating with and providing access to those authorized to address actual or threatened releases; and responding to CERCLA requests for information.
- ***Even when CERCLA liability is not a concern, the AAI Rule may be adopted as a general due diligence guideline.*** Since the AAI Rule now includes the option of utilizing the ASTM E1527-13 standard, parties accustomed to following ASTM may begin to use the amended AAI Rule as a general starting point for environmental due diligence. While lenders are generally shielded by secured creditor protections under CERCLA, they may require that the AAI Rule be followed because of concerns over exposure to significant environmental liabilities should they obtain title to a property through foreclosure. Financial ratings of a public company also may take into account the thoroughness of environmental due diligence conducted for property acquisitions.
- ***Other considerations may influence whether to follow the AAI Rule.*** Depending upon the nature of the transaction, deciding whether to adhere to the AAI Rule may involve case-specific factors. For example, strict confidentiality for the prospective transaction may be difficult to maintain if certain requirements of the AAI Rule, such as conducting interviews, are to be met. If the user wishes to place materiality thresholds upon a Phase I ESA’s scope of review, it will likely run afoul of the AAI Rule. Any decision would benefit from a case-by-case cost/benefit analysis of the factual, legal, and business issues. Moreover, the acquirer may wish to examine certain factors not considered in an AAI-compliant Phase I ESA that can present a risk of significant liability or property impairment, such as the presence of wetlands, endangered species, or lead-based paint. Accordingly, property owners may find it beneficial to obtain guidance from environmental professionals and legal counsel when developing a scope of work for environmental due diligence and when assessing whether to prepare or require an AAI-compliant Phase I ESA.

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