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EPA PUBLISHES PROPOSED ALL APPROPRIATE INQUIRY RULE

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Comments on EPA's all appropriate inquiry rule are due November 30, 2004. Until EPA finalizes the proposed rule, the ASTM Phase I Standard continues to be the interim standard for satisfying the all appropriate inquiry requirement.

If you would like to submit comments or have any questions concerning EPA's proposed rule or the landowner liability protections, please contact Lucy Jenkins at ljenkins@joneswaldo.com or (801) 521-3200, or Julie Kilgore at jk@wasatch-environmental.com or (801) 972-8400.

On August 26, 2004, EPA issued its proposed rule to establish standards for conducting all appropriate inquiry ("AAI") into the environmental condition of a property in order to qualify for landowner liability protections under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").⁶⁹ Federal Register 52542. http://www.epa.gov/swerosps/bf/aa/proposed_rule.htm. Comments must be submitted to EPA by November 30, 2004. This rule will apply to all commercial and industrial property transactions where the prospective purchaser is interested in protection from potential cleanup liability under CERCLA. The proposed rule adds substantive requirements for conducting a Phase I Environmental Site Assessment ("Phase I ESA").¹

CERCLA provides liability protection for landowners who qualify as innocent landowners, bona fide prospective purchasers ("BFPP") and contiguous property owners. A showing of "all appropriate inquiry" into the environmental condition of the property, prior to purchase, is a prerequisite to establishing these landowner liability protections. The current industry standard for conducting all appropriate inquiry is the American Society for Testing and Materials ("ASTM") Standard E1527-00 entitled *Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process* ("ASTM Phase I Standard"). Since the passage of CERCLA in

1980, it has become common practice to obtain a Phase I ESA prior to a commercial transaction.

When Congress amended CERCLA in 2002 (the "2002 Brownfields Amendments") to add the BFPP and contiguous property owner liability protections, Congress directed EPA to promulgate regulations to address the standards and practices necessary to meet the all appropriate inquiry requirement and included a list of criteria that EPA must include in the regulation.

EPA considered adopting the ASTM Phase I Standard, but determined that it does not meet the statutory criteria. The following summarizes the highlights of the proposed rule:

- *Environmental Professional.* The proposed rule would establish minimum education, licensing and experience qualifications for environmental professionals who manage or oversee all appropriate inquiries. In addition, EPA proposes to grandfather as environmental professionals those persons who as of the date of the final rule have a baccalaureate or higher degree from an accredited institution of higher education and ten years of full-time relevant experience. The proposed rule would allow persons who do not qualify as an environmental professional to contribute to the all appropriate inquiry, so long as a qualified environmental professional supervises the persons, reviews the results and conclusions and signs the final

report. The environmental professional would be required to issue a report that includes: a statement of opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances; an identification of data gaps and comments regarding the significance of such data gaps on the environmental professional's ability to provide the above statement of opinion; a declaration that the environmental professional meets the regulatory definition; and a declaration that the all appropriate inquiry has been conducted in conformance with the AAI regulation.

- *Interviews.* The proposed rule requires the environmental professional to interview the current owner and occupant of the property to obtain information regarding the potential for contamination at the property. The environmental professional should interview others, including current and past facility managers and employees and past owners, occupants or operators, as necessary in the environmental professional's judgment to determine the potential for contamination. This requirement is similar to the current ASTM Phase I Standard. However under the proposed rule, if the property is abandoned, the environmental professional is required to interview one or more owners or occupants of neighboring or nearby properties. Either the environmental professional or a person under his or her supervisions is required to conduct the interviews.

- *Visual Inspections.* A visual inspection of the property by the environmental professional is required, unless the prospective purchaser makes good faith efforts to gain access but is refused access. If access is refused, the prospective purchaser is required to use aerial photography or to inspect from the nearest accessible vantage point. If a visual inspection of the property cannot be conducted prior to the purchase, EPA recommends that the environmental professional conduct an on-site visual inspection following the purchase. The visual inspection is required to be conducted by the environmental professional, because the environmental professional is best qualified to identify environmental conditions.

- *Consideration of Relationship of Purchase Price to the Value of the Property as Uncontaminated Property.* The proposed rule would require the prospective purchaser to consider whether or not the purchase price reflects the fair market value of the property, assuming that the property is not contaminated and to consider whether any differential between the purchase price and the value of the property is due to the presence of contamination. A real estate appraisal is not required.

Frequently Asked Questions

1. *Until EPA finalizes its rule, what standard should prospective purchasers use to satisfy the all appropriate inquiry requirement?* Until EPA promulgates the final rule, prospective purchasers should conduct all appropriate inquiry in accordance with either the 1997 or 2000 ASTM 1527 Standard for Phase I Reports.²

2. *Is sampling required as part of the all appropriate inquiry?* EPA states that sampling is not required, but that sampling may be valuable in determining the possible presence and extent of potential contamination at a property or to explain data gaps. EPA also notes that a court may determine that a prospective purchaser should have conducted sampling to satisfy one of the statutory criteria, "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." In addition, sampling may be necessary either pre- or post-acquisition, to fully understand the conditions at the property and to fully comply with post-acquisition statutory requirements necessary to maintain the BFPP landowner liability protection.

3. *To whom does the AAI rule apply?* The proposed rule applies to any person who seeks the landowner liability protections of CERCLA as an innocent landowner, BFPP or contiguous property owner. The proposed rule also applies to persons receiving Federal brownfields grant monies to conduct site characterization and assessment.

4. *May a purchaser use information collected for prior Phase I reports?* The proposed rule would allow the use of previous inquiries collected for the same property, if the previous inquiry was conducted in compliance with the regulations applicable at the time, and the previous inquiry used information that was collected or updated no longer than one year prior to the current property acquisition date. However, certain information (interviews, searches for environmental cleanup liens, reviews of government records, visual inspection of the property and adjoining properties and environmental professional's declaration) must be updated if collected more than 180 days prior to the purchase date and certain information (relationship of purchase price to property value, specialized knowledge of the purchaser and environmental professional) must be collected specifically for the current transaction.

5. *Can the all appropriate inquiry be conducted by one party, such as the seller, and transferred to a prospective purchaser?* Yes, provided the report satisfies the all appropriate inquiries rule; the prospective purchaser reviews all information collected and updates the report as necessary to accurately reflect current conditions at the property; and the prospective purchaser updates the report to include any relevant specialized knowledge of the prospective purchaser and the environmental professional.

6. *Will the EPA AAI rule replace the ASTM 1527 Standard?* Not likely. The proposed AAI rule does not provide specific guidance on how to conduct all appropriate inquiries. EPA has announced publicly that it intends to reference, in whole or in part, the ASTM 1527 standard and any other standard developed through a voluntary consensus process that is deemed to be in compliance with the proposed rule. EPA and ASTM are working together to update the ASTM 1527 Standard to ensure that the ASTM Standard is in full compliance with the proposed AAI rule so that EPA can reference the ASTM Standard as one of the mechanisms for satisfying all appropriate inquiry. ASTM has recently submitted to EPA the proposed modifications to the 1527 Standard for an informal pre-compliance review.

7. *Does the ASTM 1528 Transaction Screen Standard meet the 2002 Brownfields Amendments requirements for all appropriate inquiry?* No, because the 2002 Brownfields Amendments specify the ASTM 1527 Phase I Standard as the interim standard until EPA finalizes its rule and the ASTM 1528 Standard is less rigorous than the ASTM 1527 Standard.

8. *Does the proposed AAI rule apply to residential property?* The proposed rule does not apply to property purchased by an individual for residential or other similar uses where a facility inspection and title search reveal no basis for further investigation. The proposed rule would apply to residential properties, such as an apartment building, purchased by a commercial or governmental entity.

Footnotes

1. EPA's proposed AAI rule does not address the post-acquisition statutory requirements ("ongoing obligations") necessary to maintain the landowner liability protections, such as the duty to take reasonable steps to prevent exposure to a release. EPA notes in the proposed rule, however, that the failure of a prospective purchaser to discover an environmental condition during its all appropriate inquiry does not relieve the landowner from complying with its ongoing obligations if it discovers an environmental condition after the property acquisition.

2. The 2002 Brownfields Amendments specify the 1997 ASTM Standard, but EPA issued a rule that either the 1997 or 2000 ASTM 1527 Standard may be used.

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This update is a periodic publication of Jones Waldo and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult with a qualified attorney concerning the particular circumstances and any specific legal questions you may have.