



**FINAL STANDARDS ESTABLISHED FOR ENVIRONMENTAL SITE ASSESSMENTS
FOR PROPERTY PURCHASERS SEEKING SUPERFUND LIABILITY PROTECTION**

INTRODUCTION

On November 1, 2005, the U.S. Environmental Protection Agency (EPA) published final regulations that establish federal standards and practices for the conduct of “All Appropriate Inquiries” into the previous ownership, uses, and environmental conditions of a property for the purposes of qualifying for certain landowner liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act, more commonly known as CERCLA, or Superfund. The rule is expected to encourage urban redevelopment and increase private cleanups of brownfields properties by clearly defining the steps a property owner, developer, or prospective purchaser must take to avoid future Superfund liability when purchasing or redeveloping a potentially contaminated site.

To qualify for liability protection, the prospective property purchaser must comply with the statutory requirements for obtaining liability defenses. Among those requirements is the need to undertake “All Appropriate Inquiries” prior to the date of property acquisition. After November 1, 2006, prospective purchasers must comply with the requirements of the “All Appropriate Inquiries” final rule, or follow the standards set forth in the ASTM E1527-05 Phase I Environmental Site Assessment Process.

HISTORY

In 1980, Congress passed legislation, commonly known as Superfund, which gave EPA broad powers to investigate and remediate the most contaminated properties throughout the country. The Superfund legislation contained a concept called “strict liability,” meaning liability without fault, for contamination on a property. This meant that an “innocent purchaser” of a property could be held liable even though they did not cause the contamination.

When Congress passed the Superfund Amendments and Reauthorization Act in 1986, EPA included liability protection known as the “innocent landowner provision” for purchasers of property, provided that the purchaser completed “All Appropriate Inquiries” consistent with “good commercial real estate practices.” At that time, however, Congress never defined “good commercial real estate practices,” now known as “All Appropriate Inquiries.” As a result, the American Society for Testing and Materials (ASTM) in 1993 published its own guidance for “All Appropriate Inquiries,” known technically as the ASTM E-1527 Standard Practice for Phase 1 Environmental Site Assessments and the ASTM E-1528 Standard Practice for Transaction Screens. The ASTM standards, since that time, have become the accepted standards for the minimum levels of environmental due

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diligence within the environmental consulting, legal, and financial services industries.

In January 2002, President Bush signed the Small Business Liability Relief and Revitalization Act (Brownfields Amendments) which:

- Specifically defined the ASTM E-1527 protocol for phase 1 environmental site assessments as the interim standard until EPA published final regulations for "All Appropriate Inquiries;" and
- Required EPA to promulgate regulations for "All Appropriate Inquiries."

In August 2004, EPA issued a proposed "All Appropriate Inquiries" rule and subsequently received and considered 400 public comments on the proposed rule. The final "All Appropriate Inquiries" rule was published on November 1, 2005.

WHAT IS "ALL APPROPRIATE INQUIRIES?"

The final rule, 40 CFR Part 312 – Standards and Practices for All Appropriate Inquiries, defines the steps that a property owner, and the owner's environmental professional, must complete before purchasing a property to qualify under Superfund as an:

- Innocent landowner;
- Bona fide prospective purchaser; or
- Contiguous property owner.

The rule is expected to affect 250,000 commercial real estate transactions annually. After the effective date of the rule on November 1, 2006, any property purchasers seeking Superfund liability protection and any entity receiving an EPA brownfields grant must hire an environmental professional who meets the qualifications of the final rule to conduct a phase 1 environmental site assessment in accordance with the requirements of the rule.

DEFINITION OF ENVIRONMENTAL PROFESSIONAL

To ensure the quality of "All Appropriate Inquiries," the final rule includes specific educational and experience requirements for an environmental professional. In the final rule, an environmental professional is defined as:

"A person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to a property, sufficient to meet the objectives and performance factors of the rule."

EPA Issues "All Appropriate Inquiries" Final Rule

The rule also specifies that an environmental professional must have:

- A state or tribal issued certification or license and three years of relevant full-time work experience; or
- A Baccalaureate degree or higher in science or engineering and five years of relevant full-time work experience; or
- Ten years of relevant full-time work experience.

COMPARISON OF FINAL RULE TO INTERIM STANDARD (ASTM E1527-00)

The final regulation published on November 1, 2005 is not significantly different than the interim standard (ASTM E1527-00 Phase I Environmental Site Assessment Process) established by Congress in the Brownfields Amendments. The final rule differs in areas such as the definition of an environmental professional, certain interviewing requirements, and the reporting of data gaps that may affect the environmental professional's ability to provide an opinion regarding the environmental conditions of a property.

Some of the primary differences between the final rule and interim standard are summarized as follows:

- **Definition of environmental professional:**
Interim rule: no specific requirements.
Final rule: specific educational and experience requirements.
- **Interview with current property owner/occupant:**
Interim rule: reasonable attempt required.
Final rule: mandatory.
- **Interview with past property owner/occupant:**
Interim rule: not required but must inquire about past uses with the current property owner.
Final rule: required, as necessary to meet standards.
- **Interview with neighboring or nearby property owners/ occupants:**
Interim rule: discretionary.
Final rule: mandatory for abandoned properties.
- **Historical research timeframe:**
Interim rule: all obvious uses of the property must be identified from the present back to the property's first obvious developed use or 1940, whichever is earlier.
Final rule: uses of the property must be identified from the present back to when the property first contained structures or was used for residential, agricultural, commercial, industrial, or governmental purposes.
- **Historical research time interval:**
Interim rule: specified as a function of property use.
Final rule: not specified; the environmental professional must exercise professional judgment.

• **Searches for environmental cleanup liens:**

Interim rule: the user (prospective purchaser) is required to provide the search results to the environmental professional.

Final rule: either the prospective purchaser or environmental professional may conduct the search.

• **Review of federal, state, tribal, and local government records:**

Interim rule: federal and state records searches required; local records at the discretion of the environmental professional.

Final rule: federal, state, tribal, and local records must be reviewed.

• **Visual inspections of property and adjoining properties:**

Interim rule: visual property inspection required (no exemptions); does not explicitly require a visual inspection of adjoining properties (anything actually observed must be reported).

Final rule: visual property inspection and adjoining properties required (limited exemption with specific requirements if the property cannot be visually inspected).

• **Specialized knowledge:**

Interim rule: the user (prospective purchaser) is required to provide specialized knowledge to the environmental professional.

Final rule: the user (prospective purchaser) is not required to provide specialized knowledge to the environmental professional (the environmental professional must treat the information as a data gap).

• **Contaminants of concern:**

Interim rule: must address CERCLA hazardous substances and petroleum products.

Final rule: must address CERCLA hazardous substances for parties seeking CERCLA defense (for EPA brownfields grant recipients, must address CERCLA hazardous substances, petroleum/petroleum products, and controlled substances).

• **Data gaps:**

Interim rule: generally discretionary; sources that revealed no findings must be documented.

Final rule: the environmental professional must identify data gaps, identify the sources of information consulted to address data gaps, and comment on the significance of the data gaps in regard to his/her ability to identify conditions indicative of releases or threatened releases of hazardous substances.

• **Documentation of results of “All Appropriate Inquiries:”**

Interim rule: written report required; no specified format.

Final rule: written report required; no specified format except two signed declarations by environmental professional.

• **Shelf life of written report:**

Interim rule: updates of specific activities recommended after 180 days.

Final rule: one year with some updates after 180 days.

EFFECTIVE DATE

Prior to the November 1, 2006 effective date of the final rule, affected parties may use the requirements of either the final rule or the interim ASTM E1527 Phase I Environmental Site Assessment Process. Affected parties may also use the newly revised ASTM standard – ASTM E1527-05 – which is consistent with the requirements of the final “All Appropriate Inquiries” rule. After November 1, 2006, all parties must comply with the requirements of the “All Appropriate Inquiries” final rule, or follow the standards set forth in ASTM E1527-05, to satisfy the requirements for conducting “All Appropriate Inquiries.”