

How Much is Enough?

New Rules for Environmental Due Diligence

February 12, 2006

Micheal Dobbs

Connelly • Baker • Maston • Wotring • Jackson, LLP



Due Diligence and Environmental Site Inspection

Proper Due Diligence and Environmental Site Inspection is essential to:

- Identify any environmental issues that would affect the sale or lease price or willingness of the parties to proceed with the transaction;
- Identify environmental issues that need to be addressed in the final documentation;
- Identify any environmental issues that would limit the future use of the property;
- Set a benchmark or snapshot of the environmental condition at the time of the transaction; and,
- Satisfy the “All Appropriate Inquiries” standard.



Defenses Requiring “AAI”



- CERCLA
 - bona fide prospective purchasers
 - contiguous property owners
 - innocent landowners
- OPA
 - Innocent landowners/act or omission of a third party
- Most State Environmental Statutes



All Appropriate Inquiries



For property purchased before May 31, 1997, the EPA and Courts will Consider:

- any specialized knowledge or experience on the part of the defendant;
- the relationship of the purchase price to the value of the property;
- commonly known or reasonably ascertainable information about the property;
- the obviousness of the presence or likely presence of contamination at the property; and,
- the ability of the defendant to detect the contamination by appropriate inspection.

AAI Between 1997 and 2006



ASTM (American Society for Testing and Materials) 'Standard E1527-97' entitled 'Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process'

AAI After November 1, 2006



AAI Standard for CERCLA is set forth in 40 C.F.R. Part 312

- the inquiry must be conducted by or approved by an environmental professional;
- interviews with past and present site owners and occupants;
- reviews of historical sources and records (as far back as possible);
- clean-up lien search;
- governmental (federal, state and local) record search;
- visual inspection of the facility and adjoining properties;
- a consideration of the relationship of the purchase price of the property to the value of the property uncontaminated;
- must address data gaps; and
- consideration of any other known or reasonably ascertainable information about the property.

Environmental Professional



An Environmental Professional must:

- hold a professional engineer's or geologist's license and has the equivalent of 3 years of full-time relevant experience, or
- be licensed or certified by the United States government (or state, tribe or U.S. territory) to perform environmental inquiries in compliance with the regulations and have the equivalent of 3 years of full-time relevant experience, or
- have a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science or earth science and the equivalent of 5 years of full-time relevant experience, or
- have the equivalent of 10 years of full-time relevant experience.



AAI Report and Declarations



The report must:

- Document the results of the inquiry
- Include an opinion as to whether identified conditions indicate a release or threatened release
- Identify and explain data gaps
- Be updated within 180 days of closing

The declarations (two) must:

- Certify the qualifications of the Environmental Professional
- Certify that all appropriate inquiries were conducted in accordance with the rule

What is Not Required



The new AAI rules do not:

- Require that a property owner retain the report
- Send the report to the EPA or otherwise change any reporting requirements

How Much is Enough?

New Rules for Environmental Due Diligence



Micheal Dobbs
Connelly • Baker • Maston • Wotring • Jackson, LLP

