How Much is Enough?

New Rules for Environmental Due Diligence

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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

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.
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
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