



## EPA ISSUES NEW “ALL APPROPRIATE INQUIRY” RULE *Changes are Coming to Environmental Due Diligence*

Those involved in real estate transactions will soon have new standards to follow when they conduct environmental due diligence of property they wish to acquire. On November 1, 2005, EPA issued its new Rule defining the steps that must be taken to demonstrate that “all appropriate inquiry” (“AAI”) has been made into the environmental conditions and history of the targeted property. Although the Rule will not go into effect until November 1, 2006, it’s not too early for prospective purchasers, developers, lenders and others involved with real estate transactions to begin planning for these upcoming changes. Compliance with this new standard will pave the way toward liability protection under the federal Superfund program, but such benefit will have its cost in terms of additional time, money and effort.

### Background of the AAI Rule

In 2002, Congress enacted several changes to the federal Superfund statute in an effort to provide incentives for developing formerly used and potentially contaminated properties (known as brownfields). Under these amendments, *bona fide* prospective purchasers, contiguous property owners and innocent landowners could be protected from Superfund liability, provided that they engaged in “all appropriate inquiry” into the environmental conditions and history of the property before they acquired it. After a lengthy negotiated rulemaking process, EPA issued its proposed rule establishing the minimum requirements for AAI in August 2004. EPA took nearly a year to evaluate more than 400 comments from the public and, in the end, did not significantly change the approach that was outlined in the proposal.

### The New Rule

Once the new Rule becomes effective next year, those involved in property transactions or seeking federal brownfield grants will need to take new and more involved steps in order to show that they conducted AAI. To date, the most common approach to conducting environmental due diligence has been to follow the “Phase I Environmental Site Assessment” standards established by ASTM in 1997 and 2000. Although EPA’s AAI Rule does not differ significantly from this approach, there are several changes and additions that users should keep in mind, including the following:

- Environmental Professional – EPA’s new Rule requires that AAI be conducted by an “Environmental Professional,” and spells out the minimum educational and experience levels that he or she must meet. It will be critical that you retain knowledgeable and qualified consultants to conduct these due diligence efforts.
- Interviewing Requirements – More rigorous interviews into the current and past uses of the property will be required. Interviews of current owners will now be mandatory, and

interviews of past owners or operators will be required in situations where the Environmental Professional believes that such information is necessary to achieve the overall performance standards under the Rule. If a property is “abandoned,” the Environmental Professional must interview owners/occupants of neighboring properties, which could cause problems when confidentiality of the transaction is important.

- Documenting “Data Gaps” in the Final Report – EPA’s Rule requires that the Environmental Professional identify data gaps that remain after his or her work is completed, and comment on the significance of those gaps with regard to his or her ability to identify potential environmental problems. ASTM’s current standard does not focus on data gaps to this extent.
- “Additional Inquiries” by the User – Although the current ASTM approach places some responsibilities on the “user,” EPA’s Rule adds to the burden. These “additional inquiries” include (1) specialized knowledge of the prospective landowner, (2) evaluation of the relationship between the purchase price and the fair market value of the property (if uncontaminated) and (3) commonly known or reasonably ascertainable information about the property. Although EPA originally proposed that the user would have to share this information with the Environmental Professional, the final Rule recommends, but does not require, that this information be shared. In some circumstances, however, the Environmental Professional may consider the lack of this information as a “data gap” that will limit the extent of his or her report.

### **AAI Does Not End the Inquiry**

Although these new rules will clarify the steps required to demonstrate AAI, it is critical to recognize that this is not a shelter from all liability. For example, compliance with the Rule will provide liability protection only from federal Superfund liability, and will not affect potential liability under other federal and state laws. In addition, even if a buyer has satisfactorily performed AAI, they must also perform other “continuing obligations” in order to maintain their hard-earned liability protection, such as taking “reasonable steps” to stop the release of hazardous substances, providing full cooperation and access to EPA or others performing response actions, and complying with land use restrictions and release reporting requirements. In some circumstances, these “continuing obligations” could largely negate the liability protections that are triggered by conducting AAI in the first place.

### **ASTM Phase I Changes**

As noted above, the most common approach to conducting environmental due diligence has been to follow the Phase I standards developed by ASTM in 1997 and 2000 (ASTM E 1527-97 and 1527-00, respectively). When the final Rule becomes effective next year, these standards will no longer meet the AAI requirements. As a result, ASTM has updated its standard, and is expected to release the revision in the next few weeks (ASTM E 1527-05). EPA’s final Rule specifies that compliance with ASTM’s new standard will satisfy the requirements of AAI as well. Until EPA’s Rule is effective next fall, users can satisfy the requirements of AAI by complying with EPA’s final rule or ASTM’s current or new standards.

### **Stay Tuned**

EPA’s new Rule and ASTM’s revised standard will likely have significant impacts on the way that you conduct environmental due diligence. BCCZ has been following these developments and intends to keep its clients and friends updated on evolving developments through a soon-to-be-announced webcast, more detailed analyses of the Rule and numerous seminars. If you have any questions about these new changes, please feel free to contact Lindsay Howard, Lisa Bruderly, Seth Rice or any of the attorneys in our Environmental, Health & Safety Group at 412-394-5400.