

The Potential Impacts of Volcano AAI

*Coming Changes to the Way Due Diligence
Efforts Will be Conducted*

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A Brief Primer

- **The basics you should know about the August 26, 2004 Proposed Rule – why, what, how, and when**
- **How does AAI change the way due diligence is conducted now**
- **Some potential concerns with the proposed rule**
- **How to get additional information and have input into the process**

What's the Deal About the AAI Eruption?

- **President Bush signed Brownfield's Amendments on January 11, 2002 (*Small Business Liability Relief and Revitalization Act*)**
- **Law requires AAI to ensure obtain innocent landowner liability protections under CERCLA**
- **Law requires EPA to develop regulations that establish standards and practices for how to conduct AAI – Current ASTM Standard not sufficient**
- **Until EPA finalizes the AAI regulations, interim standards have been defined for due diligence**

To Whom is AAI Applicable?

- **Persons or businesses purchasing commercial or industrial property that will be used for commercial or industrial purposes**

AND

- **Such persons/businesses who might seek to claim protection from CERCLA liability for releases, or threatened releases, of hazardous substances**

What are the Defenses Provided in the AAI Rule?

- **If conduct AAI prior to acquisition of the title for the property:**
 - **Bona Fide Prospective Purchaser –**
 - Purchaser had no association with the PRPs for the site
 - Property is acquired after AAI with knowledge of contamination – Brownfield's acquisition
 - Purchaser liability is limited to increase in property value that resulted from EPA cleanup actions
 - **Innocent Landowner –**
 - Property is acquired after AAI with no knowledge of contamination
 - Contamination is later found from on-site source that was not caused by current landowner
 - **Contiguous Property Owner –**
 - Property is acquired after AAI with no knowledge of contamination
 - Contamination is later found originating from a contiguous, off-site source that was not caused by the current landowner

How are Prospective Purchasers Affected?

- ***Historically:*** Landowners that purchases property after May 31, 1997 are retroactively offered a credible defense under CERCLA if they used the ASTM E1527-97 or E1527-00 Standard.
- ***Future:*** Landowners that purchase property after the final promulgation date of the AAI Rule can establish a defense under CERCLA if they meet the new requirements for AAI and comply with post-acquisition requirements.
- ***Now:*** Per EPA Interim Policy (May 9, 2003), if conduct due diligence efforts in accordance with ASTM E1527-00, effectively are meeting AAI.

The Most Significant Changes AAI Will Make to Due Diligence Process Include...

- **A legislated standard will exist for AAI**
- **No real allowance for “transaction screens”**
- **Lowers the tolerance threshold for data gaps**
- **Clear definition of who can perform AAI – the Environmental Professional**
- **Mandates certain professional statements with respect to the presence, or threatened release, of hazardous substances**
- **Additional costs for conducting due diligence**

Ten Statutory Criteria for AAI

- **Inquiry by “environmental professional”**
- **Interviews with past and present owners**
- **Reviews of historical sources**
- **Searches for environmental cleanup liens**
- **Review of federal, state and local records**
- **Visual inspection of facility and adjoining properties**
- **Specialized knowledge or experience**
- **Relationship of purchase price to value of the property**
- **Commonly known or ascertainable information about the property**
- **Degree of obviousness of the presence or likely presence – and ability to detect by investigation**

Environmental Professional

- **The results of an inquiry by an environmental professional (EP)**
 - Sufficient specific experience, schooling to form opinions and conclusions
 - Requires PE, PG, or other license by state + 3 yrs full-time relevant experience, or have BS + 5 yrs, or as of date of standard have 10 yrs experience
 - Requires continuing education or other activities to remain “current in the field”
 - Contemplates delegation – others can perform some AAI activities if under supervision or responsible charge of EP

Interviews

- Interviews with **PAST** and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility
 - Interview current owner and occupants
 - Interview one or more of past owners, occupants or operators
 - For abandoned properties, where there is evidence of potential unauthorized uses or uncontrolled access, **MUST** include interviewing one or more owners or operators of neighboring or nearby properties

Review of Historical Sources

- **Examples of historical sources include:**
 - chain of title documents
 - aerial photos
 - fire insurance maps
 - building department records
 - land use records
- **Use to determine the previous uses and occupancies of the properties**
- **Must be reviewed back SINCE THE PROPERTY WAS FIRST DEVELOPED**

Environmental Liens

- **Searches for recorded environmental cleanup liens against the facility that are filed under, state or local law**
 - Can be done by buyer or EP
 - If not conducted by EP, must be provided to EP for consideration of opinion

Federal, State, Tribal and Local Records

- **Reviews of governmental records, waste disposal records, underground storage tank records and hazardous waste handling, generation, and treatment, disposal and spill records, concerning contamination at the subject site and adjoining properties**
 - Radii to cover specific search distances defined
 - Similar to ASTM records and search distances
 - EP has discretion to modify search distances with supporting information and must note in report

Visual inspections

- **Visual inspections of the facility and of ADJOINING PROPERTIES**
 - This task as rule currently proposed, **MUST** be performed by the EP
 - Adjoining properties inspected from the site property line or other off-site vantage point
 - Physical limitations to the visual inspections **MUST** be noted in the report by the EP

Specialized Knowledge

- **Specialized knowledge or experience on the part of the defendant at subject site and surrounding properties**
 - Specialized knowledge is broad in scope
 - Information regarding contamination or potential releases by owner
 - Information regarding contamination or potential releases by those responsible for conducting inquiry (purchaser, legal counsel and consultants)

Purchase Price Relationship to Market Value

- **Consider the relationship of the purchase price to the value of the property, if the property was not contaminated**
 - Currently unclear who should conduct this assessment
 - How should this assessment be conducted?
 - How does EP adequately use this information to address AAI criteria
 - A real estate appraisal is not specifically required by this component of the rule

Commonly Know or Reasonably Ascertainable Information

- **Commonly known or reasonably ascertainable information about the property must be included in the assessment**
- **Sources of such information can include:**
 - Current owners or occupants of site or adjacent properties
 - Local or state governmental officials
 - Others with knowledge of the property
 - Newspapers, websites, community organizations, local libraries, or historical societies

Degree of Obviousness to Presence or Likely Presence of Contamination

- **An opinion regarding additional investigation at the site, if any, should be included in the report**
- **Sampling and analysis activities (Phase II) are not specifically required under AAI**
- **If court decides that sampling and analysis was warranted pre- or post-acquisition to adequately assess contamination, could lose landowner liability defense**

Reporting

- **No specific report format required**
- **Signed written report with certification statement by EP**
- **Must identify gaps from AAI procedures, why could not be done, and impacts on findings**
- **Shelf life of reports**
 - AAI met if collected and updated information on site within one year of acquisition of the property, and
 - must update interviews with past and present owners/operators, searches for liens, reviews of government records, visual inspection of facility and declaration of EP if within 180 days of purchase date
- **Do not need to be submitted to regulatory agency**

Current Status of EPA's All Appropriate Inquiry Regulation

- **EPA used Negotiated Rulemaking to define “good commercial and customary practice in interim**
- **EPA issued draft rule on August 26, 2004**
- **Comments to Proposed Rule to EPA by November 30, 2004**
- **Final rule (40 CFR 312) likely to be issued 2nd Quarter 2005**
- **ASTM Committee expects to amend ASTM E1527 to reflect AAI requirements**

For More AAI Information...

- **Public Meetings on Proposed Rule**
 - St. Louis – September 22, 2004
 - Washington, DC – October 20, 2004
 - San Francisco – November 18, 2004
- **Rule Docket (with lots of good background information):**

www.epa.gov/edocket

Docket ID No. SFUND-2004-0001

- **Patricia Overmeyer – EPA Office of Brownfields Cleanup and Redevelopment (202) 566-2774 or overmeyer.patricia@epa.gov**

Some Concerns with the Proposed Rule

- **Environmental Professional Definition**
 - Grandfathering
 - Qualifications
- **Visual Inspections must be done by EP and to what extent need to qualify if limitations to do visual inspections**
- **Review back to first development of property may not be practicable**
- **Assessment of the purchase price versus the property market value**
- **Maintaining confidentiality of the deal**

Thank You...

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