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A New Wave of Phase I Environmental Site Assessments

Phase I Environmental Site Assessments (ESAs) are conducted for a variety of reasons. They are often conducted as a requirement for financial institutions as part of individual bank policy or broader FDIC due diligence requirements prior to real estate transactions. Sometimes they are conducted as a requirement of government agencies prior to development and/or renovation of properties or property acquisition. Regardless of the purpose, Phase I ESAs were typically conducted pursuant to a set of "voluntary" guidelines known as the ASTM Standard Practice E-1527 for ESAs. ASTM E-1527 was first established in 1993 and subsequently revised in 1997 and 2000. Prior to November 1, 2005 there were still no federal standards, rules, or laws dictating how (or when) a Phase I ESA was to be performed.

President George Bush signed the Small Business Liability Relief and Revitalization Act of 2002, also referred to as the Brownfields Amendment

to CERCLA (aka "Superfund"). This Act clarifies liability provisions for certain landowners and potential landowners, if they comply with specific provisions outlined in the federal statute, including conducting all "appropriate inquiries" into



Historic pesticide contamination is a typical issue on agricultural and rural properties.

present and past uses of the property and the potential presence of environmental contamination on the property. This Brownfields Amendment mandated that the USEPA promulgate federal regulations that establish standards and practices for conducting "All Appropriate Inquiries (AAIs)."

After several years of negotiations between government and industry, the USEPA published the final rule, setting federal standards for the conduct of AAIs on November 1, 2005. This rule, codified as 40 CFR Part 312 - Standards and Practices for All Appropriate Inquiries, establishes specific regulatory requirements for conducting AAIs into the previous ownership, uses, and environmental conditions of a property for the purposes of qualifying for certain landowner liability protections under CERCLA. The AAI standards and practices are relevant to 1) the innocent landowner defense; 2) the contiguous property exemption; 3) the bona fide prospective purchaser exemption; and 4) the brownfields site characterization and assessment grant programs. The final rule will be effective on November 1, 2006. After this date, the requirements of AAI Final Rule, or the standards set forth in the newly adopted ASTM E1527-05 Phase I ESA Process, will be used to satisfy the statutory requirements for conducting AAIs. AAIs must be conducted in compliance with either of these standards in order to obtain protection from potential liability under CERCLA as an innocent landowner, a contiguous property owner, or a bona



Discarded drums are a common sight at abandoned industrial facilities or in vacant urban settings.

vide prospective purchaser. The new federal rule is likely to trickle down to the Phase I ESA market in a number of other ways. Lenders and other users of Phase I ESA services may revise their own environmental due diligence policies to recognize USEPA's requirements. Federal agencies (e.g., HUD and SBA) and Wall Street's rating agencies may also adopt the AAI rule into their Phase I ESA protocols.



Phase I ESAs can assist potential landowners in avoiding costly cleanups.

One of the most significant provisions of the AAI Final Rule is the provision that defines “who” can conduct an AAI by defining the term *Environmental Professional*. In the new AAI rule, *Environmental Professional* means: “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 on, at, in, or to a property...” Such a person must be 1) a licensed Professional Engineer or Professional Geologist with three years of full-time relevant experience; 2) have a baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and five years of full-time relevant experience; or 3) have the equivalent of ten years of full time relevant experience.

In addition, the new AAI rule expands the level of research required from previous ASTM practices to include interviews of current and former owners, occupants, and managers of commercial and industrial properties and facilities, as well as adjacent property owners for vacant and/or abandoned properties. As environmental professionals, we are prepared for the necessary changes to our Phase I ESA practices and know what our responsibilities are for evaluating inputs provided by our clients. It is vital that our clients are aware of the CERCLA safe harbors that are now available to them

and the steps that must be met to take advantage of those safe harbors in the future.

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