



Spring 2005

Industry News: EPA's AAI & Commercial Real Estate Transactions

For years now, bankers, real estate brokers, and developers have become accustomed to the process of a Phase I Environmental Site Assessment (ESA). The ESA has been a necessary evil in helping to protect entities from having to pay out enormous amounts of money to clean up properties contaminated from someone else's negligence. Just when you think you've become familiar with the ESA, a new rule comes to light.

Welcome to the new era of ESA's. All Appropriate Inquiry (AAI) will soon become the new standard for the ESA. The Environmental Protection Agency (EPA) is currently finalizing the new standards for AAI. Here are a few things you should know.

1) What is AAI?

- On August 26, 2004, the United States Environmental Protection Agency (EPA) published the proposed All Appropriate Inquiry (AAI) in the Federal Register. Once promulgated, the EPA's rule will establish for the first time that environmental due diligence is codified in a Federal Regulation – 40 CFR Part 312 – Standards and Practices for All Appropriate Inquiries.
- The proposed rule will establish specific regulatory requirements for performing AAI for the purpose of qualifying for certain landowner liability protections under the Comprehensive Environmental Response, Compensation and Liability Act (also known as "CERCLA", "Superfund", and/or "the Brownfields Law"). The proposed rule will outline the steps property owners must take to qualify for certain landowner liability protections under CERCLA, which can protect an owner from cleanup liability for pre-existing contamination if the owner conducted AAI into the previous ownership and uses of the property prior to acquisition, and if the results did not reveal the presence of contamination.

2) When will AAI be finalized?

- The EPA estimates that the promulgation of the final AAI rule will be formalized by the summer of 2005 or later.

3) What are the interim standards for conducting AAI?

- Until the AAI rule has been finalized the EPA has set two (2) interim standards for conducting AAI that apply depending on the date a property was purchased.
- The two (2) EPA interim standards are summarized below:
 - i. "Properties purchased prior to May 31, 1997, the law provides that a court shall consider the following when making a determination with respect to a defendant: specialized knowledge or experience of the defendant, relationship of the purchase price to the value of uncontaminated property, commonly known information about the property, obviousness of contamination, and the ability of the defendant to detect contamination by appropriate detection."
 - ii. Properties purchased after May 31, 1997, the law requires the use of procedures developed by the American Society for Testing Materials (ASTM), in particular ASTM's standard E1527-97 or E1527-00, or "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process."

4) What are the anticipated economic impacts of AAI?

- **Increased Costs:**

A member of the Environmental Bankers Association stated in an article published in March of 2004 by the Bureau of National Affairs, Inc. that the economic impact of the new AAI could possibly increase the cost of a Phase I Environmental Site Assessment Report by as much as \$500 - \$1,500. According to an article published by Environmental Data Resources, Inc. (EDR) titled "State Of The ESA Industry 2003, February/March 2004", they stated that the 2003 national average cost for performing a Phase I Environmental Site Assessment was \$2,060 and the average minimum cost was around \$1,700. Therefore, based on the above referenced information the potential cost for performing an AAI could range from \$2,200 – \$3,200 to \$2,560 - \$3,560.
- **Increased Turnaround Times:**

The new AAI Rule outlines requirements for conducting more comprehensive research when performing an AAI, which in turn is one of the reasons for the anticipated increase in costs as well as the increase in the amount of time it takes to perform an AAI. According to an article published by Environmental Data Resources, Inc. (EDR) titled "Technology Takes Hold: Clients, AAI Law Drive Need for Efficiency, September 2004", they stated that the 2004 national average for completing a Phase I Environmental Site Assessment was 10 to 15 days. And with the implementation of AAI the completion time could increase significantly to 20 to 30 days.



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5) Impact of AAI on Commercial Real Estate Investors and Developers?

- **Q:** I'm an investor and developer that frequently buys, sells, and develops commercial real estate properties. Based on the new EPA AAI rule, will I be required by law to perform an AAI?
- **A:** No, not necessarily. You only have to perform an AAI if you want qualify for certain landowner liability protections under CERCLA. Additionally, if you are financing your project through a financial institution you should check with them to find out what their requirements are for performing environmental due diligence.

6) Impact of AAI on Lenders?

- **Q:** I'm a loan officer for a financial institution that finances commercial real estate transactions. Based on the new EPA AAI rule, will we be required by law to perform an AAI?
- **A:** No, not necessarily. Lenders have the Secured Creditor Exemption and liability protection which offers much better protection from CERCLA liability than certain landowner liability protections clarified by the new AAI rule. CERCLA provides a secured creditor exemption from liability for banks and lenders that do not participate in the management of the property. Further, lenders don't have to perform AAI to get the Secured Creditor protection. Therefore, lenders are free to require whatever due diligence procedures and practices they think are appropriate for their own business risk.

7) Alternatives to AAI?

- **Q:** I'm an investor that is currently in the process of purchasing a commercial real estate property and I am not interested in qualifying for the certain landowner liability protections under CERCLA, but I would like to evaluate my potential environmental risk that might be associated with the property; therefore, are there other alternatives for performing environmental due diligence besides conducting the EPA AAI?
- **A:** Yes, there are several different options of environmental due diligence services that one can have performed by an environmental professional to evaluate their potential environmental risk. However, if you are financing your project through a financial institution you should check with them first to find out what their requirements are for performing environmental due diligence. Some examples of different environmental due diligence services that an environmental professional can perform are as follows (*the list is not all inclusive*): 1) Limited Phase I Environmental Site Assessment; 2) Environmental Transaction Screen; and/or 3) Environmental Database Summary/Review. It is important to note that the alternative environmental due diligence services that are performed in place of EPA's AAI, will not meet the qualifications for certain landowner liability protections under CERCLA.

New Faces: Pinnacle welcomes Shane Johnston to its staff!

- A graduate of Texas State University (formerly Southwest Texas State), Shane brings to Pinnacle a broad range of experience in the performance of environmental site assessments, environmental management, land use planning and solid waste management. His strong work ethic and enthusiasm will no doubt be a benefit to our clients.

Other News:

- Scott Turner and GCG Advertising are currently updating our website. We hope to have it up and running soon. We apologize for any inconvenience this may cause.
- New Metro Line! Please feel free to contact us using our new Metro Line. That number is (817) 287-0520.

