



LEGAL BULLETIN
NEW EPA ENVIRONMENTAL DUE DILIGENCE REGULATIONS

Issuance of AAI Rule and Effect on Due Diligence.

The United States Environmental Protection Agency ("EPA") recently issued an All Appropriate Inquiry Rule ("AAI Rule") which will have a significant impact on how environmental due diligence is conducted by prospective purchasers of commercial real estate. While it has been long established that purchasers of commercial real estate are required to conduct "all appropriate inquiries" with respect to environmental due diligence in order to qualify for certain CERCLA "Superfund" liability protections, prior to implementation of the AAI Rule, which became effective on November 1, 2006, there were no clearly defined standards as to what constituted "all appropriate inquiries".

The AAI Rule has addressed that deficiency by establishing federal standards and practices for conducting "all appropriate inquiries." It is likely that these standards will become the norm in all environmental due diligence, potentially resulting in increased acquisition costs to real estate purchasers.

Standards of Due Diligence Required by AAI Rule.

The AAI Rule imposes more rigorous methodology and standards in performing environmental due diligence in several areas, including the following:

- **Qualifications and Opinions of Environmental Professionals:** The AAI Rule imposes more stringent requirements for qualification as an "environmental professional".
- **Relationship of Purchase Price to Value of the Property:** The AAI Rule contains a requirement to consider the relationship of the purchase price to the fair market value of the property, assuming the property were not contaminated, and whether any differential between the purchase price and such fair market value is due to the presence of hazardous substances.
- **Data Gaps:** The AAI Rule requires that the environmental professional identify all data gaps (and sources of information consulted to address such data gaps) that may have affected his/her ability to identify releases or threatened releases of hazardous materials and comment upon the significance of such data gaps on the environmental professional's opinion as to the environmental condition of the property.
- **Interviewing Past and Present Owners:** In addition to the present owner and occupants of the property, the AAI Rule requires the environmental professional to interview current and past facility managers, and past owners, occupants or operators of the property or employees of any of them. In the case of abandoned property, interviews of owners or occupants of neighboring properties will be required.
- **Review of Historical Sources:** The AAI Rule requires a search of historical records on the property for a much longer period than was previously the custom.

- **Time for Performance of AAI:** The AAI Rule mandates that all appropriate inquiries must be conducted within one year prior to purchaser's acquisition of the property. In addition, several of the components of the inquiries must be updated to a date no more than 180 days prior to purchase of the property. As a result, delays in closing may require costly updates to environmental reports.

The American Society for Testing and Materials has developed certain standards for the performance of environmental site assessments which have traditionally been used in the performance of environmental site assessments (the "ASTM Standards"). The ASTM Standards in effect at the time the initial draft of the AAI Rule were insufficient to meet the requirements of the AAI Rule. The ASTM Standards for Phase I environmental site assessments have now been revised to meet the objectives of the AAI Rule.

Potential Impact of AAI Rule.

The adoption of the AAI Rule and the resultant changes to the ASTM standards for environmental site assessments may will likely cause significant changes to environmental due diligence practices as well as increased costs to purchasers. Additionally, the scope of inquiry under the AAI Rule is now broader and requires greater detail and analysis than was previously the norm, which will require more active involvement by the purchaser in the environmental due diligence process.
