

All Appropriate Inquiry – A Look At The New Due Diligence Standard

By Robert J. Carr, P.E., LEP

In case you haven't heard, there's a new environmental due diligence standard in town – All Appropriate Inquiry. All Appropriate Inquiry (AAI) grew out of the 2002 Brownfield Amendments to CERCLA, which required the Environmental Protection Agency (EPA) to establish standards of practice for conducting all appropriate inquiries. The AAI Final Rule, 40 CFR Part 312 was adopted on November 1, 2005. Let's take a look at the final rule and review its likely impacts to the environmental due diligence process.

Beginning November 1, 2006, compliance with AAI standards is required for any party who may potentially claim protection from CERCLA liability as an innocent landowner, bona fide prospective purchase, or contiguous property owner. This rule acknowledges the expansion of the "innocent landowner defense" to potential buyers of commercial/ industrial property and innocent landowners of adjacent properties that may be affected by releases or threatened releases from a subject property.

The objective of conducting AAI is to identify conditions indicative of releases and threatened releases of hazardous substances at the subject property. AAI is recognized as only the first step in the assessment process (similar to a Phase I environmental site assessment (ESA)) and does not include the collection and analysis of soil and groundwater samples. If warranted, a Phase II ESA, consisting of intrusive soil and groundwater sampling and analysis, can be conducted to confirm the presence of releases identified in the AAI.

What does AAI Replace?

The new AAI standard replaces ASTM 1527-00, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process", which had been the industry standard since 2000. ASTM recently revised their standard, 1527-05, which currently meets AAI requirements. The EPA has compared the differences between AAI and ASTM 1527-00 in a recently released fact sheet. This fact sheet can be found on the EPA's website at www.epa.gov/brownfields/aai/compare_astm.pdf.

It is important to note that AAI does not replace nor supersede State or Local environmental due diligence requirements, if there are any. A check of your State's assessment requirements is strongly recommended before initiating the due diligence process.

Key Provisions of AAI

Some the key provisions of AAI that go above and beyond ASTM 1527-00 include the following:

- An appropriately qualified environmental professional is required to conduct or supervise the AAI process, and specifies the qualifications for an environmental professional.
- Interviews with current and past property owners are mandatory; if the site is vacant then interviews with adjacent property owners are required
- Performance standard for understanding site development and regulatory history to time of development (no longer need to look back to 1940 if site was not developed)

- Need to consider purchase price to the fair market value of the property
- On-site visual inspection of property is mandatory
- A review for any environmental cleanup liens is required
- Includes assessment of public knowledge and perception of the property
- Any data gaps during the investigation needs to be detailed in the report including how the lack of this information has affected the environmental professional's ability to make an informed opinion on the condition of a property

Environmental Professional Qualifications

The AAI final rule includes specific requirements to meet the definition of an environmental professional. The education and experience based qualifications include; a Professional Engineer's or Geologist's license, or other relevant license, with three years of full-time relevant experience; a Baccalaureate or higher degree in science or engineering and five years of full-time relevant experience; or ten years of full-time relevant experience.

As part of the AAI, the environmental professional must include an opinion on whether a release or threatened release of hazardous substances exists on the property and certify that they meet the qualifications as an environmental professional.

The qualifications requirement will help provide some clarity to both potential buyers and sellers on who should be conducting environmental assessments, especially in states without licensing requirements for environmental professionals. The final rule

should lead to quality improvements (i.e. less data gaps, less incorrect information in reports) in the environmental assessment process.

The Property Appraisal As Part of Environmental Due Diligence?

AAI requires that the relationship of the purchase price compared to the fair market price be considered. The final rule allows the prospective landowner, grantee, environmental professional, or other third party (such as an appraiser) to make the evaluation of price and consider whether the differential is due to potential environmental contamination. However the information is gathered, the information can be provided to the environmental professional who can use the information when rendering an opinion regarding the environmental condition of the property.

I see two consequences of this provision. First, since the majority of environmental professionals do not have any property appraisal experience, experienced property appraisers will be required to work alongside the environmental professional. This will require a significant shift in planning and coordination in the due diligence process since up to now the appraisal and environmental assessment functions have been conducted separately.

Second, since the purchase price may be reduced due to a public perception of a "threatened release of hazardous substances", the issue of how stigma affects the price will need to be presented in the environmental professional's opinion. In fact according section 312.30 of the AAI standard, the environmental professional must take into account commonly known information within the local community about the subject property. How do you measure stigma? (In this context, I am defining stigma as negative

from *perception only*, not to be included in the case where there is technical proof of actual or threatened releases.) What's the economic effect from the actual environmental condition of a property versus the public perception? And how is an environmental professional supposed to use this information in rendering an opinion? Hopefully the EPA will present some clearer guidance on this matter as AAI investigations are actually being conducted.

How Will AAI Affect the Environmental Due Diligence Process?

It may take some time to fully understand the ramifications of AAI in commercial and industrial property transactions. However, in my opinion the following five impacts are likely to be seen in the due diligence process:

1. **Environmental Assessments will take longer to complete** – Requiring interviews of current or adjacent property owners, obtaining property lien and appraisal information, and obtaining other specific property information means that it is going to take more time to complete the AAI assessment. You may see three to four week turnaround times increase to five to six week turnaround times.
2. **Environmental Assessments are going to cost more** – No real surprise here, since increases in effort creates an increase in cost. But also affecting costs will be the type of personnel conducting the AAI assessments, which will require more experienced (and costly) environmental professionals.
3. **A Premium will be placed on Due Diligence Scheduling and Coordination** – The most successful property transactions will have a seamless integration of appraisal, deed research, and environmental assessment services, since the results of each play an important new

role in AAI. More emphasis will be placed on successfully preplanning the due diligence process.

4. **Property Contact Information will be more critical** – To meet AAI's stricter requirements regarding interviews, environmental professionals are going to need not only the current property owner, but past and/or adjacent property owner names and contact information. Having a property owner "in Aruba" or otherwise unavailable for an interview will no longer suffice.
5. **AAI Report results will be more contentious than ever** – If you thought that environmental assessments conducted before AAI pit buyers versus sellers (with their environmental consultants and attorneys), wait until you throw in the additional subjectivity of appraisals and 'perceived impacts' into the process. While in this cauldron environmental professionals will be under more pressure to ameliorate the opinions expressed in an AAI, and still have them be technically defensible to regulatory and industry standards. The successful transactions, I believe, will be those that are successfully mediated to adequately address the concerns of the involved parties.

Regardless of the consequences of AAI, successful adaptation will depend upon our success in educating our clients on this process and appropriately revising their expectations in the due diligence process.

Robert J. Carr, P.E., LEP is the principal of Red Hawk Consulting, LLC, a Connecticut-based environmental consulting and management firm. He can be reached either by phone at 860-568-2924 or by e-mail at Rcarr@red-hawkconsulting.com.