

All Appropriate Inquiry Regulation: The November 2006 Deadline is Approaching

Introduction

The November 1, 2006 deadline for performing environmental due diligence in accordance with the Federal All Appropriate Inquiry (AAI) regulation is around the corner and industry feedback suggests that change to the new standard by that deadline will not be consistent.

Weaver Boos Consultants (Weaver Boos) prepared this environmental brief to relay useful feedback that we have received concerning how various parties currently perceive the need for AAI compliant Phase I Environmental Site Assessments (Phase I ESA) by the deadline and to highlight key requirements of the AAI regulations and points to consider in its application.

Phase I ESA User/Industry Feedback

The feedback that Weaver Boos has received from Phase I ESA users and other members of the industry provides insight concerning how various parties perceive the need for an AAI compliant Phase I ESA by the deadline. Not surprisingly, the responses below generally are dependant on the party's role in a transaction.

Financial Institutions/Lenders – Many financial institutions/lenders do not appear to be hard pressed to change their current Phase I ESA practices by the deadline, but do anticipate changing at some point in the future. Lenders are afforded other separate CERCLA protections in most circumstances and are able to collect the information they believe is necessary to evaluate their risk using current practices. Other lenders will make the necessary changes to meet particular fiduciary duties.

Property Buyers/Sellers - Most property buyers/sellers experienced with the environmental due diligence process are fully aware and mindful of the deadline and have taken the steps they believe are necessary to comply with the AAI regulations. Their position is driven by the fact that they are taking on more risk and potential liability and also typically have fairly comprehensive due diligence practices in place already. Buyers/sellers with less due diligence experience are not as familiar with the changes and rely on advice from other due diligence assistance professionals, such as consultants and attorneys, to help them with the process.

Due Diligence Assistance Professionals – Professional that assist clients in performing environmental due diligence, such as consultants and attorneys, are inclined to consult with their clients on a case-by-case basis whether they need to comply with the AAI standard. The need to comply will depend primarily on the client's role and risks in a transaction, the historic and current use of the property in question, and need for CERCLA liability protections.

AAI Regulation Background

On November 1, 2005, the USEPA published its final AAI Rule (70 Fed. Reg. 66070) titled "40 CFR Part 312, Standards and Practices for All Appropriate Inquiries." The USEPA considers the American Society for Testing and Materials (ASTM) E1527 2005 Phase I ESA Standard published on November 21, 2005 (the ASTM Phase I Standard) to be consistent with the AAI regulation.

The AAI regulation applies to parties seeking CERCLA landowner liability protections and parties applying for federal Brownfield grants. Under CERCLA, persons may be held strictly liable for releases or threatened release of hazardous substances at properties they owned or operated at the time of release. This rule means that a potentially responsible party may be liable for contamination based solely on property ownership without regard to fault. AAI, which is an outgrowth of the Federal 2002 Small Business Liability Relief and Revitalization Act (also known as the Brownfields Amendments), provides the following expanded CERCLA landowner liability protections:

- 1) **Bona Fide Prospective Purchaser** – for the first time, a purchaser may knowingly acquire contaminated property while limiting future CERCLA liability.
- 2) **Contiguous Property Owner** – also a new defense category which provides protection from CERCLA liability for contamination caused by a neighbor's actions.
- 3) **Innocent Landowner** – this pre-existing defense provides CERCLA protection to those who, after performance of appropriate due diligence, find at a later date that they have unknowingly acquired contaminated property.

A party can meet one of the requirements for the aforementioned CERCLA landowner liability protections by performing AAI prior to gaining an interest in a property.

Key AAI Requirements/Changes

Generally, AAI and the ASTM Phase I Standard are more prescriptive than prior standards, require more information to be provided by the user of the Phase I ESA report, and call for more comprehensive assessment requirements by the Environmental Professional performing the Phase I ESA. An AAI compliant Phase I ESA will still have the same four basic components: records review, site reconnaissance, interviews, and report, but the following are key changes to those components:

- **Qualifications** - Specific licensing, educational, and experience qualifications for "Environmental Professionals" performing Phase I ESAs.
- **Specific Declarations** - The Environmental Professional is required to make specific declarations about their qualifications and conclusions of the Phase I ESA.

- **Identification and Discussion of Data Gaps** - Generally, a data gap is the inability to obtain required information despite good faith efforts. The Environmental Professional must identify data gaps and discuss their significance or the uncertainties they pose and their affect on the Environmental Professional's ability to form a conclusion. Data gaps may require further investigation for a satisfactory resolution, although it does not necessarily mean that AAI is not met.
- **Need for Additional Investigation** – The Environmental Professional is required to provide an opinion, not necessarily a recommendation, regarding appropriate additional investigation, if necessary, in circumstances when greater certainty is required regarding a recognized environmental condition.
- **Records reviews** – The records review provisions include additional government databases.
- **Additional Compounds of Concern** – Includes controlled substances (only the AAI regulation, not ASTM) in addition to hazardous substances, pollutants, contaminants, petroleum, and petroleum products.

Phase I ESA User's Responsibilities

In addition to information traditionally provided by the user, AAI requires the user to provide the following information to the Environmental Professional that is material in identifying recognized environmental conditions:

- Information concerning environmental liens or activity use limitations recorded against the property obtained either from the review of judicial and title records, or from actual knowledge.
- Specialized knowledge or experience the user may have.
- Relationship of purchase price to fair-market value of the property if it were not contaminated.
- Commonly known or reasonably ascertainable information within the local community.
- Any obvious indicators that suggest the presence or likely presence of contamination at the property.

Failure to provide this information could result in a data gap.

Property Owner's Continuing Obligations

AAI requires the property owner to comply with continuing obligations that vary depending on desired CERCLA landowner liability protections, but are generally as follows:

- Acquired the property after all disposal of hazardous substances has ceased and not liable for or did not contribute to such releases.
- Provide all legally required notices with respect to the discovery or release of any hazardous substances.
- Comply with and do not impede the effectiveness of land use restrictions or institutional controls.
- Exercise appropriate care and reasonable steps to stop

continuing or prevent future releases.

- Provide full cooperation, assistance, and access to authorized personnel conducting response actions or natural resource restoration.
- Comply with CERCLA information requests and administrative subpoenas.

Failure to identify a release, land use restrictions, or institutional controls does not release a property owner from continuing obligations.

Points to Consider in Preparing For AAI

Do you need an AAI compliant Phase I ESA? A reduced scope will likely reduce time and cost to complete your environmental due diligence, but may not afford you the protections of an AAI compliant Phase I ESA.

If a property transaction will be completed after the November 1, 2006 AAI deadline, you may want to complete an AAI compliant Phase I ESA scope.

Allow for sufficient time to complete the AAI Phase I scope to minimize potential data gaps due to necessary additional research.

AAI Phase I ESAs have a shelf life of 6 to 12 months prior to the date of the property acquisition. Certain components of the Phase I ESA need to be updated after 6 months and all components need to be completed again after 12 months. Plan accordingly.

Other business risks, such as asbestos-containing building material, lead-based paint, wetlands, etc., are not addressed by AAI.

Be aware of the user's obligations for an AAI compliant Phase I ESA and prepare as necessary.

Your lender's Phase I ESA scope may differ from an AAI Phase I ESA scope and may not afford you the protections of an AAI compliant Phase I ESA.

Data gaps may require investigation beyond a Phase I ESA if the user desires CERCLA landowner liability protections.

Consider consulting with a qualified attorney if you have questions about the legal interpretation or applicability of AAI regulations.

Weaver Boos currently employs qualified Environmental Professionals with the background and experience to assist you with your environmental due diligence needs. For additional information, please contact Keith R. Fetzner at 630-717-4848 or Doug Dorgan at 312-922-1030.

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