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## The New Standard for Conducting Phase I Environmental Site Assessments

On November 1, 2005, the United States Environmental Protection Agency (“EPA”) issued a rule that alters the manner in which pre-purchase environmental due diligence will be conducted. The rule, known as the “All Appropriate Inquiries” Rule (“AAI Rule”) becomes effective November 1, 2006.

The AAI Rule arose from the 2002 amendments to the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9601 et seq.) known as CERCLA. Those amendments, contained in the Small Business Liability Relief and Brownfields Revitalization Act (Public Law 107-118, 115 Stat. 2356), impose a myriad of pre-purchase and post-purchase requirements on those seeking to come within the “innocent landowner” defense in order to avoid CERCLA liability. The amendments also establish two new categories of prospective landowners that may avoid CERCLA liability. Those new categories are: (1) contiguous property owners; and (2) bona fide prospective purchasers.

Prior to the 2002 amendments, pre-purchase Phase I environmental due diligence activities were guided by the ASTM E-1527 Standard. The 1997 and 2000 versions of this Standard can be used until November 1, 2006. On that date, however, purchasers of real estate must conduct Phase I environmental due diligence studies that conform to either the EPA AAI Rule or the revised ASTM E-1527-05 Standard.

There are several significant differences between the ASTM E-1527 Standard that has guided due diligence activities over the past decade and the EPA AAI Rule. Please see the attached table.

*This advisory was written by Charlotte A. Biblow, Esq., partner to the firm. Ms. Biblow practices environmental law, handling a broad range of environmental matters including the prosecution and defense of actions brought pursuant to the New York State Environmental Conservation Law and various federal environmental laws. Ms. Biblow counsels clients in transactional matters including the coordination of environmental assessments as part of the due diligence process, and the drafting and negotiating of environmental representations and warranties. She negotiates the terms of consent orders and other agreements with federal, state and local governmental agencies and counsels clients with regard to Brownfields redevelopment.*

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## Standards for Conducting Phase I Environmental Site Assessments

Requirement	ASTM E-1527 Standard	EPA AAI Rule
<p><b>Focus of the Due Diligence Study</b></p>	<ul style="list-style-type: none"> <li>• Identify “recognized environmental conditions” or “RECs.”</li> <li>• Defines RECs as the “presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, ground water or surface water of the property.”</li> </ul>	<ul style="list-style-type: none"> <li>• Dispenses with the “RECs” terminology and focuses on identifying “conditions indicative of releases and threatened releases of hazardous substances on, at, in or to the subject property.” This more closely follows the statutory language found in CERCLA.</li> </ul>
<p><b>Who Can Conduct the Environmental Due Diligence Study?</b></p>	<ul style="list-style-type: none"> <li>• Anyone with the appropriate training and experience can conduct the site investigation.</li> </ul>	<ul style="list-style-type: none"> <li>• Sets out specific criteria for the environmental professional conducting the Phase I study. That person needs to be either:               <ul style="list-style-type: none"> <li>(i) a licensed professional engineer or licensed professional geologist with three years’ full-time relevant experience</li> <li>(ii) a licensed or certified environmental specialist with three years’ full-time relevant experience</li> <li>(iii) a person with a bachelors degree or higher in engineering or science from an accredited institution and five years of full-time relevant experience or</li> <li>(iv) a person with ten years’ full-time relevant experience.</li> </ul> </li> <li>• The environmental professional must include</li> </ul>

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		<p>two declarations in the Phase I report:</p> <p>(i) that the person has the qualifications required by the EPA AAI Rule to conduct the inspection and</p> <p>(ii) that the Phase I was conducted in conformance with the AAI Rule.</p>
<b>Interviews</b>	<ul style="list-style-type: none"> <li>The inspector must make reasonable attempts to interview the key site manager and current occupants.</li> </ul>	<ul style="list-style-type: none"> <li>Interviews must be conducted of the current owner and the current operator.</li> <li>Past owners or operators should be interviewed, as necessary, to achieve the objectives of identifying releases or threatened releases. If any of these interviews cannot be conducted, the environmental professional must explain why these data gaps exist in the Phase I report.</li> </ul>
<b>Review of Historical Sources</b>	<ul style="list-style-type: none"> <li>Historical records from 1940, or from the time the property was developed – whichever is earlier – need to be researched.</li> </ul>	<ul style="list-style-type: none"> <li>Does not set a specific date for how far back records need to be searched.</li> <li>Rather, it requires historical records, such as aerial photographs, fire department records, and building records be searched from the time the property was first used for residential, commercial or industrial use.</li> </ul>
<b>Environmental Liens</b>	<ul style="list-style-type: none"> <li>Purchaser is responsible for determining whether the property is subject to environmental liens. The search is limited to reasonably ascertainable records.</li> </ul>	<ul style="list-style-type: none"> <li>Either the purchaser or the environmental professional can conduct the environmental lien search, but the information must be given to the environmental professional if done by the</li> </ul>

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		<p>purchaser so that it can be included in the Phase I report.</p>
<b>Governmental Record Review</b>	<ul style="list-style-type: none"> <li>• Governmental databases must be searched.</li> <li>• Specifies the radius distances for different types of database searches</li> </ul>	<ul style="list-style-type: none"> <li>• Same as ASTM E-1527 except does not specify the radius search distances</li> </ul>
<b>Visual Inspection</b>	<ul style="list-style-type: none"> <li>• On-site inspections of the property are required.</li> </ul>	<ul style="list-style-type: none"> <li>• On-site inspections of the property are required</li> <li>• Also requires visual inspections of adjoining properties</li> <li>• Does not require that the environmental professional trespass upon neighboring properties to conduct this adjacent property inspection</li> <li>• Permits fence-line inspections or other types of assessments to ascertain adjacent property information</li> </ul>
<b>Specialized Knowledge or Experience</b>	<ul style="list-style-type: none"> <li>• The purchaser must share any special knowledge it has about the property with the environmental professional, so that it can be included in the Phase I report.</li> </ul>	<ul style="list-style-type: none"> <li>• Same as ASTM E-1527</li> </ul>
<b>Fair Market Value of Property</b>	<ul style="list-style-type: none"> <li>• Purchaser needs to share with the environmental professional any actual knowledge it has about disparities between the fair market price and the actual price being paid for the property.</li> </ul>	<ul style="list-style-type: none"> <li>• Same as ASTM E-1527</li> <li>• Also requires that the environmental professional independently consider the price disparity to determine if it's related to the release or threatened release of environmental contamination</li> </ul>
<b>Commonly Known or Reasonably Ascertainable Information</b>	<ul style="list-style-type: none"> <li>• Does not specifically require this type of search</li> </ul>	<ul style="list-style-type: none"> <li>• Requires that the environmental professional obtain commonly-known information about the property. This type of</li> </ul>

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		<p>information can be obtained from websites, newspapers or similar “general sources” of information.</p>
<p><b>Degree of the Obviousness of the Presence or Likely Presence of Contamination</b></p>	<ul style="list-style-type: none"> <li>• Inspector recommends Phase II activities based on the findings of the Phase I assessment</li> </ul>	<ul style="list-style-type: none"> <li>• Environmental professionals must discuss data gaps or additional activities that are needed to be undertaken to evaluate the property.</li> <li>• Phase I Report has a “shelf-life” of 180 days. If a Phase I is more than 180 days old, but less than one year old, it can be updated and still qualify as an EPA AAI Phase I. Older Phase I Reports can certainly be used as sources of information about the property, but a new Phase I is required to be done.</li> </ul>
<p><b>Post-Purchase Obligations</b></p>	<ul style="list-style-type: none"> <li>• No post-purchase obligations required</li> </ul>	<ul style="list-style-type: none"> <li>• Contains “post-purchase” requirements that the purchaser must undertake to maintain its “innocent landowner,” “contiguous property owner” or “bona fide prospective purchase” status. These include undertaking actions that stop and prevent releases and threatened releases from occurring. They must also prevent or limit human, environmental or natural resource exposure to any previously released hazardous substance. Other post-purchase requirements include complying with use restrictions or institutional or engineering controls that are applicable to the</li> </ul>

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		site. Lastly, the purchaser must cooperate with governmental authorities providing notice of any release or threatened release.
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