



Commercial Real Estate/Multifamily Finance Group (CREF)  
presents

## **All Appropriate Inquiry**

Informational Conference Call  
Thursday, December 18, 2003  
3:00 p.m. – 4:00 p.m., Eastern

### **NOTES**

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#### **I. Background**

##### Until 2002, few defenses to SUPERFUND liability

1. Innocent purchaser - but could be lost if the courts determined that you could or should have known of the hazardous substance through your inquiry into the property.
2. Scared off people from buying brownfields properties

##### 2002 Amendment – Brownfield Law – added two defenses

1. Bona fide purchaser
  2. Contiguous landowner
- **Must conduct all appropriate inquiry – (“AAI”)**
  - Can now buy the land without being liable for the past behavior of another

##### Congress directed EPA on the new defenses

- EPA must determine what AAI is required for an owner to fall under the defenses. Congress gave them 2 years.
- While EPA determined the requirement for AAI, ASTM Standard E1527 (ASTM Phase I) is the definition of AAI until EPA law is completed.
- Congress set out 10 criteria that must be included in the standard.  
*(Part of the ten requirements was language Congress took from the past innocent landowner defense and carried over to include in the new regulation)*

Criteria:

- I. The results of an inquiry by an environmental professional.

- II. Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.
- III. Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.
- IV. Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.
- V. Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.
- VI. Visual inspections of the facility and of adjoining properties.
- VII. Specialized knowledge or experience on the part of the defendant. [Defendant or owner cannot hide information not uncovered by environmental professional]
- VIII. The relationship of the purchase price to the value of the property, if the property was not contaminated.
- IX. Commonly known or reasonably ascertainable information about the property.
- X. The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

## **II. Negotiated rulemaking**

EPA collected 25 interested parties to create the regulation. EPA has only one seat at the table representing itself and the other government agencies. Those sitting around the table held wide and varying amount of experience with environmental site inspections.

American Society of Civil Engineers  
 ASFE  
 Block Environmental (National Groundwater Association)  
 Center for Public Environmental Oversight  
 Environmental Bankers Association  
 Environmental Defense  
 Gila River Department of Environmental Quality - Gila River Indian Community  
 Illinois EPA, Bureau of Land Pollution Control (ASTSWMO)  
 International Council of Shopping Centers  
 International Municipal Lawyers Association  
 MD Department of the Environment (ASTSWMO)  
 Mortgage Bankers Association  
 National Association of Development Organizations  
 National Association of Homebuilders  
 National Association of Industrial and Office Properties

National Association of Local Government Environmental Professionals  
National Brownfield Association  
Partnership for Sustainable Brownfields Redevelopment  
The Real Estate Roundtable  
The U.S. Conference of Mayors  
Trust for Public Land  
U. S. EPA Office of Solid Waste and Emergency Response  
U.S. Public Interest Research Group  
Wasatch Environmental, Inc.  
West Harlem Environmental Action

#### Negotiated Rulemaking Committee Rules

- Unanimous consensus was required to complete the regulation.
- Participants in the process can not dissent to the final regulation if the group came to consensus [MBA cannot dissent]
- Some participants were chosen to have a voice at the table, since they were most likely to dissent to the new regulation
- Compromise and negotiation required – to complete consensus.
- Still have notice and public comment – some issues may get fixed

### III. **ASTM**

Rejected as the starting point

Was not on the table to serve as the standard for AAI. Even though most of the ten criteria are already incorporated in ASTM's standard today.

ASTM's role is unclear.

Once ASTM revises their standards there may be a role -- They are now revising their standard.

### IV. **Goal**

1. Create the least amount of disruption in the marketplace.
2. 250,000 Phase I's are conducted annually – did not want the inspection process to be more expensive (cost prohibitive) in the future.

Perspective of the real estate market

- Develop a level of finality/certainty but not increase expense.

### V. **Highlights of AAI Draft Regulatory Language**

Took each criteria and determined:

1. The type of information to be gathered
2. *The goal of gathering the information requested in that criteria*  
-- each criteria has the overall goal to: "seek to identify conditions indicative of... releases or threatened releases"

Less prescriptive than ASTM

More discretion allowed to the Environmental Professional

- A. Environmental Professional (“EP”) – definition
1. Relevant science degree – but also need a lot of experience
  2. Lenders – now may have to ask more questions when hiring about the EP’s experience
    - a. May want representations from the EP – as additional assurances that the EP is in compliance with AAI standard.
    - b. Supervisor – the person in charge must meet EP definition – not everyone who is working on the site assessment must meet the definition, so long as other workers are under the charge/ supervision of EP.
  3. EPA – wanted the definition broader to ensure they don’t put people out of work who now working in the profession.
  4. Hugely discussed issue
- B. Interviews with neighbors
1. Abandoned properties - must interview at least one neighbor -- different than ASTM standard
  2. This issue received a lot of press – heated debates
  3. Also serves as an alternative source of information if one can’t get any information about the property in another way
- C. Shelf life of the report and/or use of existing information
1. Changed from the current ASTM language
  2. Environmental report prepared by an EP for another customer?
    - Allows you to use a report prepared for others
    - Must review it and determine it is reliable
    - Meets the purposes and objectives of the regulation – meets AAI
  3. Timing
    - Report older than 180 days (6 months) – must update 4 of the criteria (different than ASTM)
    - Must automatically do an update past 180 days of:
      - Interviews with owner
      - Review environmental clean up liens
      - Update government records
      - Do another visual inspection
  4. Questions remain:
    - If prepared under ASTM Phase I standard during the transition period before AAI is in effect – can the report be considered compliant with AAI?
    - Possible Answer: Information developed that met ASTM standard probably can be relied upon if meets AAI, but will need to be updated after six months.
- D. Data Gaps
- So the EP performs the AAI in good faith, but in the end there are data gaps.

- AAI requires that the EP must report the data gaps *and* the significance of those data gaps.
- EP must detail the data gaps and the EP's attempts to fill the data gaps. What is missing and can the EP reach a conclusion about the property with the data gaps?
- EPs will probably start adding to their reports new prepared language to explain data gaps.

E. Sampling

1. Sampling was NOT intended to be required for AAI
2. In Preamble to the regulation, EPA will cover the intent of AAI and that AAI is a Phase I criteria and nothing is intended to suggest that sampling and Phase II work is required.
3. This was a Hotly contested area
4. For the real estate industry - this is an issue of risk tolerance, so we did not want sampling required.
5. Other committee members wanted to make sure sampling was an *option* that is available.

F. EP's Opinion – on the report

1. Section 312.31 – Degree of Obviousness
2. This language is from the old innocent landowner defense
3. EP is required to:
  - Take into account the degree of obviousness
  - “include an opinion of more investigation, if any”
4. Not a recommendation - instead opinions and conclusions similar to what most real estate lenders get today from your EP, not an additional burden.

G. Environmental Cleanup Liens

1. Not currently required in ASTM Phase I
2. EP will be required to review and update the report with any liens

H. Institution and engineering controls

1. Not part of ASTM Phase I
2. Databases being built now – as they are available, the EP will be required to check the database and report on the findings
3. Search distances for review is the same as ASTM Phase I sets out

## VI. New Regulation Timing

EPA is drafting the Preamble now

- EPA will allow a review and comments by the negotiated rulemaking committee (but none of their comments are binding on EPA)

EPA sends AAI to the Office of Management and Budget (OMB)

- AAI will receive significant scrutiny – AAI qualifies for the impact rule (there will be over a \$100 million impact in total annually on the industry)

Review by the other government agencies

Then published for public comment – EPA target date is by the end of January – there will be at least a 30 day public notice and comment period,

Finally, EPA will publish final rule – when AAI goes into effect.

## **Questions and Answers**

1. ASTM's Phase I and EPA's AAI – both are compromises – why not stick with Phase I, which has been working this long?
  - Many stakeholders participating in the EPA negotiated rulemaking did not get to participate in ASTM Phase I's creation
  - Some stakeholders were also not proficient in the standards in ASTM Phase I or don't like the standard
  - Congress ten criteria did expand past the current ASTM Phase I language
  - The real estate participants tried to keep the rule close to ASTM Phase I; when it was suggested that ASTM Phase I serve as a “safe harbor” there was strong objection
  - ASTM Phase I will hopefully be a guidance document in the future
2. Currently, 250,000 site inspections are conducted each year. What percentage of those 250,000 are brownfields sites?
  - We do not currently have that data
3. I heard there were issues with the copyright on ASTM Phase I – did that play a role in the decision by EPA and the negotiated rulemaking committee not to use it as a safe harbor?
  - Yes, huge impact – EPA expressed concerns with using any incorporated language from ASTM because of possible copyright infringement.
  - EPA could not incorporate ASTM specific language
  - ASTM and EPA are working together to look at a role for ASTM and most likely, ASTM will show up in the regulation as a resource document in Section 312.11 References.

Additional Information on All Appropriate Inquiry is available on EPA's web site at <http://www.epa.gov/swerosps/bf/regneg.htm>.

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