

# DUVAL & STACHENFELD LLP

New York

California

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## The Plain & Simple

November 2006

Environmental Law

Volume I

### \*CLIENT REMINDER\*

#### ***EPA's New Environmental Due Diligence Rule is Now in Effect—Do The Phase I Assessments in Your Real Estate Transactions Measure Up?***

If you are purchasing commercial real property (or have a client who is purchasing commercial real property) on or after November 1, 2006, then you should read this Client Reminder!

On November 1, 2006, the U.S. Environmental Protection Agency's ("EPA") All Appropriate Inquiries Rule ("AAI-06") came into effect. *See Standards and Practices for All Appropriate Inquiries, Final Rule*, 70 Fed. Reg. 66070 (Nov. 1, 2005) (codified at 40 C.F.R. Part 312). What this means is that any entity (or person) acquiring an interest in commercial real property on or after November 1, 2006 should make certain that the pre-acquisition environmental due diligence it performs complies with AAI-06 or it may lose the ability to assert possible statutory defenses to liability for preexisting contamination at such property. Compliance with AAI-06 is now a prerequisite to coverage under one of the several enumerated defenses to liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" also known as "Superfund"), 42 U.S.C. § 9601 et seq. These affirmative defenses, commonly known as the landowner liability protections ("LLPs"), are set forth in the Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. 107-118, 115 stat. 2356, and include the "innocent landowner," "bona fide prospective purchaser," and the "contiguous property owner" defenses.

Prospective purchasers and others who wish to qualify for one of these LLPs must have a Phase I Environmental Site Assessment ("Phase I ESA") of the target property performed in accordance with AAI-06. EPA has determined that the new *ASTM Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, E1527-05, meets the requirements of AAI-06 and may be used to comply with the provisions of AAI-06. The former ASTM standard (E1527-00)—commonly recognized as the industry standard for many years—however, does not. As such, all Phase I ESAs should now be conducted in accordance with ASTM E1527-05.

#### The New Standards

In short, AAI-06 requires that environmental due diligence be guided by certain objectives and performance criteria. The principal objective is to identify conditions indicative of releases and threatened releases of hazardous substances. In that regard, the environmental due diligence process now includes certain tasks that were not previously required. Some of these new tasks include, for example, the following:

- The Phase I ESA must be conducted by an environmental professional ("EP") with specific levels of education, licensing and/or experience, and the Phase I ESA report must contain certain declarations from the consultant that he or she qualifies as an EP and has conducted the assessment in accordance with AAI-06.

- The EP must interview current owners and occupants of the target property and, in some cases, prior owners/occupants or neighboring property owners who may have knowledge of conditions indicative of releases or threatened releases on the target property.
- The EP must conduct a more detailed review of historical records.
- The EP must explain any “data gaps” that may affect the EP’s ability to draw conclusions about releases or threatened releases of hazardous substances.
- The EP must conduct visual inspections of the target property and, to the extent possible from the target property, of adjoining properties.
- The Phase I ESA must consider the relationship between the purchase price and the fair market value of the target property, if the target property were not contaminated, and must document any specialized knowledge or experience of the purchaser (such as that possessed by real estate developers).

Certain tasks must be completed within the six month period prior to closing, or they must be updated if the prospective purchaser seeks to qualify for one of the LLPs. In particular, the site inspection, interviews, regulatory records review, search for environmental liens and EP declarations must have occurred (or have been updated) within six months prior to closing.

Although pre-acquisition compliance with the “all appropriate inquiries” requirement is important to preserve one or more LLPs under CERCLA, equally important are the continuing obligations that apply post-closing, including, for example, the need to comply with land use restrictions, preserve the integrity and effectiveness of institutional controls, provide legally required notices about contamination to regulators, and take reasonable steps to stop any continuing or threatened releases of hazardous substances.

#### The Bottom Line

Although it can be quite difficult to assert a successful affirmative defense under CERCLA, the LLPs nevertheless are of significant interest to both purchasers and their lenders, as they may form the first line of defense against CERCLA liability. To comply with AAI-06 and to preserve possible LLPs under CERCLA, parties seeking to acquire any interest in real property should make certain that the environmental consultants they retain are qualified EPs, that the scope of work or consulting contract expressly states that the Phase I ESA will be performed in accordance with ASTM E1527-05, and that the purpose of the ESA is to complete an all appropriate inquiry in satisfaction of AAI-06 so that the purchaser may qualify for one or more of CERCLA’s affirmative defenses. As a final note, make sure that if you rely heavily on form agreements (environmental consulting, site access, etc.) that you update those forms and cite the new ASTM E1527-05 standard and AAI-06 when referring to Phase I ESA matters.

#### **Environmental Department**

Duval & Stachenfeld LLP offers full service environmental expertise—transactional, regulatory and litigation. The firm’s environmental practice group is chaired by J. Andrew Stephenson. For more information about this newsletter or the firm’s environmental practice, please contact Mr. Stephenson at [jstephenson@dslip.com](mailto:jstephenson@dslip.com) or at 212-692-5530.

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