

EPA'S "ALL APPROPRIATE INQUIRY" RULE

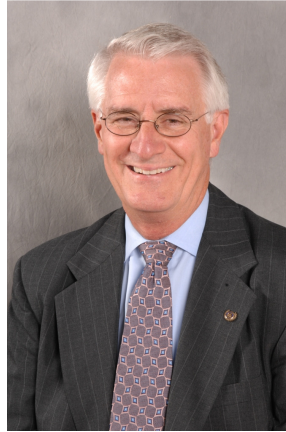
By Robert G. Russell, Jr., Esq.
Procopio, Cory, Hargreaves & Savitch LLP

In January 2002 the Federal CERCLA statute was amended in part to provide that a "bona fide prospective purchaser" of contaminated property would be exempt from CERCLA liability on certain conditions. One of the conditions provided in the 2002 amendment was that the prospective purchaser must have conducted "all appropriate inquiry" into the past history and environmental condition of the property before acquiring it. The statute required EPA to develop a rule concerning what constituted "all appropriate inquiries." On November 1, 2005, the EPA published its "All Appropriate Inquiry" ("AAI") Rule. The final rule becomes effective on November 1, 2006. Accordingly, prospective purchasers of contaminated properties must be prepared to satisfy the requirements of the AAI rule with respect to their acquisitions shortly¹.

It is important to keep in mind that the prospective purchaser of real property is entitled to the Federal immunity only if it satisfies a number of criteria, in addition to its having conducted "all appropriate inquiry." The additional criteria are:

1. The purchaser must exercise post-acquisition "appropriate care" by taking "reasonable steps" to stop continuing releases and to prevent future releases.
2. The purchaser must cooperate with parties requiring access to the property to perform investigation or cleanup work.
3. The purchaser must comply with land use restrictions imposed in

¹ In September 2004 Governor Schwarzenegger signed the California Land Reuse and Revitalization Act of 2004 providing immunity under state law to prospective purchasers of contaminated properties on certain conditions. One of the conditions is a requirement that the prospective purchasers conduct "all appropriate inquiries" required under the EPA rule. Thus, satisfying the AAI standard will be a predicate not only for Federal immunity but also for State immunity.



ROBERT G. RUSSELL, JR.

connection with any cleanups.

For many years purchasers of real property have generally required a Phase I Environmental Site Assessment to be conducted in order to ascertain whether there are any potential environmental concerns at the property. The AAI rule imposes some requirements beyond the standard Phase I requirements. The most significant new requirements contained in the AAI rule follow:

1. Requirement that "all appropriate inquiries" must be conducted by, or under the direction and supervision of, an "Environmental Professional" - In order to qualify as an Environmental Professional, an individual must satisfy one of the following criteria:
 - (a) Hold a current Professional Engineer's or Professional Geologist's license or registration from a State, Tribe, or U.S. Territory and have the equivalent of three (3) years of full-time relevant experience; or
 - (b) Be licensed or certified by the Federal Government, a State, Tribe, or U.S. Territory to perform environmental inquiries (such as, for example, a Registered Environmental Assessor in California) and have the equivalent of three (3) years of full-time

relevant experience; or

- (c) Have a degree from an accredited institution of higher education in a relevant discipline of engineering or science and the equivalent of five (5) years of full-time relevant experience; or
- (d) Have the equivalent of ten (10) years of full-time relevant experience.

A person who does not qualify as an Environmental Professional may assist in the conduct of "all appropriate inquiries" as long as such person is doing such under the supervision of an Environmental Professional.

Thus, it will be critical to ensure that assessments in the future are conducted under the supervision of an Environmental Professional as that term is defined in the AAI rule and that said person is responsible for the ultimate report.

2. Interviews with past and present owners, operators, **and occupants** of the property- The AAI rule requires that inquiry be made of the current owner and occupant of the property. If there are multiple occupants, then the inquiry must include the major occupants and all occupants likely to use, store, treat or handle and dispose of hazardous substances. Accordingly, parties contracting to purchase real property must ensure that they obtain rights from the seller to interview tenants on the property regarding hazardous substances and handling practices.

The rule notes that Environmental Professionals **should** include interviews of employees of current and past occupants of the property to the extent necessary to gather relevant information regarding waste handling practices. In short, the universe of individuals whom the Environmental Professional may have to interview is substantially larger than under the existing Phase I standards, and purchasers of real property need to keep this in mind when negotiating pre-acquisition due diligence rights with the seller.

3. Interviews of neighbors of “abandoned properties” – If the subject property is abandoned, then the Environmental Professional **must** interview one or more owners or occupants of neighboring properties from which it appears such owners or occupants were in a position to have observed the uses of, or the releases of, hazardous substances at the subject property. Again, this is an issue which should be covered in the due diligence rights afforded to a purchaser. Many sellers of real property may object to representatives of a potential purchaser talking to neighbors about waste handling practices on the subject property, discussions which could trigger concerns by the neighbors about possible impacts to their own properties from the subject property.

4. Reviews of historical sources of information – Such reviews have always been required in a Phase I site assessment. The AAI rule is specific that the review must cover a period of time going as far back as the property was first used for “residential, agricultural, commercial, industrial, or governmental purposes.” In other words, the review must go back to the date when the property was unoccupied and unused for any purpose.

5. Increased report drafting requirements –The report prepared by the Environmental Professional must identify “data gaps” in the information developed by the professional and must comment on the significance of such data gaps with regard to the ability to identify releases of hazardous substances. The rule suggests that sampling and analysis may be conducted to assist in closing data gaps but does not require such.

6. Identification of land use controls – (Land use controls may be something like a restriction that the property cannot be used for residential purposes or that no structures can be built over portions of the property.) Note that in order to qualify for the immunity, the purchaser must comply with all land use controls after acquisition, even if those land use controls are not recorded. Many land use controls are found in no further action letters from regulatory agencies and are never recorded. Thus,

in the course of the environmental due diligence, the Environmental Professional is required to review all possible regulatory documents to identify potential land use controls which must be complied with by the buyer if it is to be entitled to the immunity.

7. Specialized knowledge or experience of the buyer – To the extent the buyer has any specialized knowledge or experience about the subject property or conditions of neighboring properties, the buyer must provide that information to the Environmental Professional for inclusion in the final report.

8. Relationship of the purchase price to the value of the property if not contaminated – If the price which the buyer is paying for the property is less than what one would ordinarily expect to be paid for the property if it were not contaminated, then such information must be provided by the buyer to the Environmental Professional so that an assessment can be made as to whether the differential in price may be due to the presence of contaminants.

9. Shelf life of the “all appropriate inquiry” report – The following components of the “all appropriate inquiries” must be conducted or updated within 180 days prior to the date of purchase of the property:

- (a) Interviews with past and present owners, operators, and occupants;
- (b) Searches for recorded environmental liens;
- (c) Reviews of Federal, Tribal, State and local governmental records;
- (d) Visual inspections of the property and of adjoining properties; and
- (e) Execution of the declaration required by the Environmental Professional (see Paragraph 10 below).

All other information in the report must have been collected or updated within one (1) year prior to the date of acquisition of the subject property.

“All appropriate inquiries” conducted on behalf of other individuals may be utilized by the prospective purchaser. However, the time limits noted above

must be observed.

The obvious impact of these provisions is that reports have a “shelf life.” Special care must be taken in connection with escrows, the closings of which are extended numerous times, to ensure that at the time of the close of escrow, the AAI report is not outdated.

10. Certification by the Environmental Professional – The Environmental Professional must place the following statements in the report and sign the report:

“[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, We] meet the definition of Environmental Professional as defined in 40 CFR Section 312.10.

[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.”

Frequently asked questions about the AAI rule:

1. If the inquiry suggests that contaminants are present, does the rule require pre-acquisition testing and sampling? No. The rule does not require pre-acquisition sampling and analysis under any circumstance.

2. Can the “all appropriate inquiry” be completed after acquisition? No. In order to qualify for the statutory immunity, “all appropriate inquiry” must be completed prior to the acquisition of the property.

3. If a prospective purchaser satisfactorily conducts “all appropriate inquiry” and buys the property and later discovers contamination on the property, is the purchaser required to investigate that contamination? Since qualifying for “bona fide prospective purchaser” immunity requires not only the conduct of “all appropriate inquiry” but also requires the buyer to take reasonable steps to stop a continuing release, the buyer probably would be required to conduct an investigation and remediation to the extent necessary to stop the ongoing release. However,

absent unusual circumstances, regulatory authorities would not look to the buyer to complete all remediation.

4. If a bona fide purchaser conducts “all appropriate inquiry” and buys property subject to engineering controls (such as maintenance of a cap over a contaminated area) which engineering controls are the obligation of a prior owner, is the “bona fide prospective purchaser” required to maintain those engineering controls if the party responsible for such fails to do so? Yes. The requirement that the “bona fide

prospective purchaser” take reasonable steps after acquisition of the property to prevent exposure to existing contaminants would require the purchaser to ensure that engineering controls are properly maintained.

The key is that the purchaser must understand that performance of “all appropriate inquiry” is only the first step in qualifying for the statutory immunity. After acquisition, the buyer must take reasonable steps to stop continuing releases or to prevent future releases, must cooperate with those responsible

for performing cleanup work at the site and must comply with all land use restrictions.

Robert G. Russell, Jr. is a partner with the Environmental Law Group at Procopio, Cory, Hargreaves & Savitch LLP. His practice focuses on environmental and insurance matters in California and Nevada. He has represented numerous landowners, developers and business operators in matters involving contamination and permitting issues.