The New Environmental Liability Protection Standards/All Appropriate Inquiry Requirements

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In January 2002, the President signed into law the Small Business Liability Relief and Brownfields Revitalization Act ("Act"), which amended the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), more commonly known as the Federal Superfund Law. The Act requires the Environmental Protection Agency ("EPA") to develop regulations establishing federal standards and practices for conducting all appropriate inquiries ("AAI") before buying a piece of real estate. By conducting AAI, a prospective purchaser may acquire a contaminated property and not be held liable for the costs of cleaning up the contamination.

For the past twenty years, the Federal Superfund Law has recognized an "innocent landowner" defense to cleanup liability, but until now, CERCLA left unanswered the question of "how much due diligence is enough?" for a buyer to qualify as an "innocent landowner." That question has now been answered by the new AAI rule which was published on November 1, 2005, and **which becomes effective on November 1, 2006**.

For lenders not knowing about the rule, this Halloween may bring some fright to their business! The new AAI rule was promulgated to clarify when an individual could invoke the CERCLA liability defense. However, it seems reasonable to surmise that the rule will likely be used as the new due diligence standard for acquisition of property, and the minimum standard which most lenders will require their borrowers to perform. As you maybe aware, CERCLA allows most lenders providing financing to avoid environmental liability because they are merely taking a security interest or lien on real property which maybe contaminated.

Most environmental professionals have already begun to implement procedures necessary to comply with the AAI rule requirements and they can provide further information on how they have changed their procedures.

As the newly established baseline for environmental due diligence, most elements of AAI must be conducted within one (1) year prior to the date of acquisition of the property and must include:

(i) an inquiry by the person seeking to establish the defense into any recorded environmental cleanup liens, personal specialized knowledge of the property, commonly known or reasonably ascertainable information about the property; and

(ii) an inquiry by an environmental professional documented in a written report inclusive of:

(a) interviews with past and present owners (no more than 180 days prior); in the case of abandoned properties, an interview must be conducted with at least one owner or occupant of a neighboring property to obtain information regarding past owners or uses of the subject property;

(b) reviews of historical sources (i.e., chain of title documents, aerial photographs, building department records, land use records) to determine previous uses and occupancies of the property since the property was first developed;

(c) reviews of governmental records (i.e., waste disposal records; UST records; hazardous waste handling, generation, treatment disposal and spill records at or near the facility) (no more than 180 days prior);

(d) visual inspections (no more than within 180 days prior);

(e) commonly known or reasonably ascertainable information;

(f) degree of obviousness of the presence and ability to detect the contamination;

(g) other information supplied by the user of report;

(h) an opinion as to whether the inquiry has identified conditions indicative of a release or threatened release;

(i) an identification of any data gaps that affect the ability to identify conditions indicative of a release or threatened release;

(j) the qualifications of the environmental professional; and

(k) a declaration by the environmental professional (no more than 180 days prior).

As you can see from the foregoing, the new rule requires fresh information. While many commercial properties will most likely have prior or previously-conducted site assessments, the older reports are merely a starting point for obtaining the new information. While the new AAI does not require sampling and analysis, common sense must be used when the obviousness of the presence or likely presence of contamination on a property. In some cases, a Phase II Environmental Assessment will be required where this obviousness standard should have been reasonably invoked.

The following items are not covered under the AAI:

(a.) Asbestos;

(b.) Radon;

(c.) Lead-based paint;

(d.) Lead in drinking water;

(e.) Mold;

(f.) Indoor air quality issues;

(g.) Wetlands/endangered species; or

(h.) Subsurface issues usually uncovered during a Phase II audit

The authors suggest that most lenders will need to update their loan and credit policies as they relate to real estate acquisition standards to reflect the new AAI rule. Compliance with the new rule not only protects borrowers from environmental liability, of course, it also serves to protect banks and the investments they have made in their asset\loan portfolios. While there may be some increase in the cost of performing environmental due diligence in compliance with the AAI rule, hopefully, the environmental professionals will have refined their fact-finding procedures and investigations so that the average cost of a Phase I Site Assessment does not increase significantly beyond $2,500 to $3,000. For further information on the technical or comparative provisions of the AAI versus ASTM standards, please contact Stephanie Hansen, Esquire at shansen@ycst.com or at (302) 571-6733. The pertinent EPA website is: http://www.epa.gov/brownfields/regneg.htm