



Critical inquiry

Expanded environmental law establishes new requirements for properties

by Pamela V. Rothenberg, Esq.

The amended Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) has three defenses—the “innocent landowner” defense, the “bona fide prospective purchasers” defense and the “contiguous property owners” defense.

To be eligible for any one of these defenses, purchasers of properties must comply with the new “all appropriate inquiry” rule (AAI Rule). The inquiry involves investigating the environmental history of a property for release of hazardous substances in the past or present.

Specifically, the AAI Rule establishes detailed regulatory requirements and standards for conducting all appropriate inquiries into the past history and uses of the property, previous ownership of the property and present environmental conditions of the property. Some of the more significant requirements of the AAI Rule include:

- Establishment of specific standards for environmental professionals responsible for conducting the inquiry activities in the AAI Rule
- Expanded obligations to interview past and present owners and occupants of the property, particularly those persons most likely to be knowledgeable about the past and present uses of the property
- Affirmative requirements to interview neighboring property owners and occupants in the case of abandoned properties
- Requirements for a visual inspection of the property and adjoining properties from the subject property’s property line, public rights of way and any other vantage point
- Review of historical information dating back to the first use of the property for residential, agricultural, commercial or industrial purposes
- Mandates to search for any environmental cleanup liens recorded under any federal, state or local laws
- Reports of specialized knowledge of the prospective purchaser regarding the subject property, adjoining properties, or the surrounding area and the balance of the actual purchase price compared to the value of the property if it were not contaminated
- Substantially increased report drafting and documentation requirements, including obligations to document the extent of the review. Data gaps require the environmental consultant to provide opinions regarding the significance of such gaps on the identification of potential releases of hazardous substances.

The AAI Rule represents a significant expansion of the existing ASTM Standards, increasing the burden in terms of time and cost on prospective purchasers and managers of property, as well as the environmental consultants. Despite the immediate burdens, meeting these requirements potentially strengthens the defenses to CERCLA liability.

To take advantage of one of the three defenses to CERCLA liability, prospective purchasers of property should work closely with environmental consultants and legal counsel before, during and after an assessment to ensure the assessment scope is appropriate, the inquiry is documented properly, and a post-acquisition strategy exists. □

Pamela V. Rothenberg (prothenberg@wcsr.com) is a member of the Real Estate Development and Real Estate Technology Groups at Womble Carlyle Sandridge & Rice, PLLC.

Howard Grubbs (hgrubbs@wcsr.com) and Michael Bogle (mbogle@wcsr.com) substantially contributed to this column. Howard is the chair of, and Michael is an associate in, the firm’s Environmental Law and Toxic Tort Litigation Practice Group.