New EPA Standard for Investigating Contaminated Sites

Protection for Those Conducting "All Appropriate Inquiries"

— by Clifford P. Case —

The U.S. Environmental Protection Agency is about to propose a regulation that will significantly affect how municipalities acquire real property. Pursuant to the 2002 Small Business Liability Relief and Brownfields Redevelopment Act (the 2002 Brownfields Act),[1] the EPA will define "all appropriate inquiries," a statutory term used in several defenses to landowner liability for cleanup of contamination under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), popularly known as the Superfund Law.[2] Municipalities are entitled to special protections under CERCLA that are not available to private parties, but as these protections do not cover all situations, municipalities will need to know how to conduct "all appropriate inquiries" to qualify for the landowner defenses, and municipalities will have to carry out "all appropriate inquiries" to qualify for grants under the 2002 Brownfields Act.

CERCLA Background

CERCLA casts a wide net of legal responsibility for release of a broad range of hazardous substances. Included under the statute as "potentially responsible parties," or PRPs, are persons who own or operate a "facility," or who owned or operated a facility when hazardous substances were disposed of; persons who arranged for the disposal of hazardous substances at a facility; and persons who transported hazardous substances to a facility.[3]

Superfund liability for cleanup costs and damage to natural resources is strict, joint and several, and retroactive.[4] Prior to the 2002 Brownfields Act, defenses to liability were only available to those who could establish that a release and any resulting damage were due to an act of God, an act of war, or an act or omission of a third party (but only if the otherwise responsible party had no relationship, contractual or otherwise, with the third party, and could demonstrate that it acted with due care and took precautions against the foreseeable acts or omissions of the third party[5]).

The statutory definition of "contractual relationship" required that the property owner or operator had to have "no reason to know" of any release after "appropriate inquiry," taking into account (1) the owner's or operator's specialized knowledge or experience, (2) the relationship of the property's purchase price to what the price would have been if the property had been uncontaminated, (3) commonly known or reasonably ascertainable information about the property, (4) the obviousness of the presence or likely presence of contamination at the property, and (5) the owner's or operator's ability to detect the contamination by "appropriate inspection."[6]

Instances of the successful application of this "innocent landowner" defense were few and far between.[7]

2002 Brownfields Act

The 2002 Brownfields Act modified the CERCLA "innocent landowner" defense and added two other related defenses: one for non-responsible contiguous property owners, and another for bona fide prospective purchasers. Persons who prove their entitlement to these landowner defenses are excluded from the Superfund owner or operator PRP category. All three defenses require the proponent to prove that it undertook "all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices."[8] However, those who qualify as bona fide prospective purchasers are given a big advantage—they are entitled to their defense even if their due diligence discloses a release, while innocent landowners and non-responsible contiguous property owners lose the defense if their search finds contamination.[9] This distinction reflects the new law's policy of encouraging the involvement of previously unrelated parties in brownfields sites. EPA must establish by regulation, within two years after passage of the 2002 Brownfields Act, "standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries."[10]

For properties purchased on or after May 31, 1997 and until EPA promulgates its new rule, the 2002 Brownfields Act provides that compliance with the ASTM E1527

Standard satisfies the appropriate inquiry requirements.[11] Before May 31, 1997, the simpler criteria for appropriate inquiry prior law shall apply.[12]

Special Provisions For Municipalities

Municipalities enjoy special exemptions from CERCLA liability in limited circumstances—condemnation and involuntary acquisitions—so that pre-acquisition inquiry is not legally needed to avoid PRP status.[13] While these CERCLA provisions make "appropriate inquiry" legally unnecessary for municipalities in these circumstances, they do not help municipalities in other situations or make it wise for municipalities to acquire property "blind" (without investigating environmental conditions that could cause post-acquisition expense or delay), nor do they protect private parties acquiring properties from municipalities or operating such properties. These provisions also do not affect the requirements of most, if not all, public and private sources of funding for redevelopment (including those established in the 2002 Brownfields Act itself[14]) that due diligence be undertaken. Thus, for municipalities—as for other potential acquirers of real property— there is a need for "all appropriate inquiries."

To help fulfill its duty to define "all appropriate inquiries" under the 2002 Brownfields Act, EPA set up a negotiated rulemaking committee drawn from various interest groups.[15] The ground rules for the committee provided that if it was able to reach consensus on a rule defining "all appropriate inquiries" based on the statutory criteria, EPA would accept that rule and promulgate it as EPA's proposal. In meetings between April and November 2003, the committee, at length, reached consensus on an acceptable regulation, about to be released for public comment.[16]

The "Environmental Professional"

The new rule is both more and less specific than the ASTM E1527 Standard that it is to replace. Accordingly, those who expect to work with the new rule cannot rely on their knowledge of the ASTM standard to carry them through. An example of the new rule's greater specificity is the important and controversial definition of "environmental professional," on which the committee received more comments than on any other single issue.

The 2002 Brownfields Act requires that appropriate inquiries must include "the results of an inquiry by an environmental professional."[17] The new rule, although containing general language like that in the ASTM standard (stating that an environmental professional must possess sufficient education, training, and experience to exercise professional judgment in evaluating the presence of releases or threatened releases of contaminants), also requires an environmental professional to have one of the following combinations of training and experience: (1) a professional engineer's or professional geologist's license and the equivalent of three years' full-time relevant experience; (2) a governmental license or certificate to perform environmental inquiries and three years' experience; (3) a bachelor's or higher degree from an accredited institution in a relevant discipline of engineering, environmental science, or earth science, and five years' experience; or (4) as of the date of promulgation of the final rule, a bachelor's or higher degree from an accredited institution and ten years' experience.[18] The new rule also requires an environmental professional to remain current in his or her field through participation in continuing education or similar activities.[19]

It should be noted that persons who do not qualify as environmental professionals may undertake many of the activities included in "appropriate inquiries" provided they act under the supervision or responsible charge of an environmental professional.[20] The report of the results of the inquiry must be also signed by an environmental professional.[21]

Elements of "Appropriate Inquiries"

The elements of "all appropriate inquiries" are interviews with past and present owners, operators and occupants of the facility being assessed; reviews of historical sources to determine previous uses and occupancies of the property; searches for recorded environmental cleanup liens; reviews of government records concerning contamination at or near the property; and a visual inspection of the facility and surrounding properties.[22] The inquiry must also take into account any specialized knowledge or experience of the person for whom the inquiry is being conducted; the relationship of the purchase price to the value of the property, if uncontaminated; commonly known or reasonably ascertainable information about the property; the degree of obviousness of the contamination; and the ability to detect that contamination by appropriate investigation.[23]

All elements of the inquiry must be carried out by or under the supervision of the environmental professional, other than the search for recorded environmental liens, the assessment of the specialized knowledge or experience of the person for whom the inquiry is being conducted, the assessment of the relationship of the purchase price to the fair market value of the property, if uncontaminated, and the assessment of commonly known or reasonably ascertainable information about the property.[24] The purchaser or the property owner is responsible for obtaining this information and furnishing it to the environmental professional.

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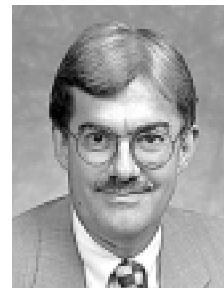

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The environmental professional is to gather required information "that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed," and is to "review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice listed…taking into account information gathered in the course of complying with the other standards and practices."[25] If data gaps make it difficult to assess releases or threatened releases, the environmental professional is required to identify the sources of information consulted in an effort to fill the gaps, and evaluate the gaps' significance. The proposed regulation provides that "[s]ampling and analysis may be conducted to develop information to address data gaps."[26] In any case, the property owner will be obliged to stop a release after acquiring the property, even if it was not identified pre-closing due to a data gap.[27]

Interviews

Under the proposed rule, the inquiry must include interviews of the current owner and occupant of the property. Where there is more than one occupant, major occupants must be interviewed, "as well as those occupants likely to use, store, treat, handle or dispose of hazardous substances…, or those who have likely done so in the past."[28] Further, if necessary to achieve the performance objectives of the inquiry, the inquiry should include interviews with one or more current and past facility managers, and past owners, occupants or operators, or their employees.[29]

An issue much discussed by the committee was the degree to which community residents should be sought out during the interview process, given the common desire of people to keep property transactions confidential. The committee determined that for abandoned properties, "where there is evidence of potential unauthorized uses of the subject property or evidence of uncontrolled access to the subject property, the environmental professional's inquiry must include interviewing one or more (as necessary) owners or occupants of neighboring or nearby properties from which it appears possible to have observed uses of, or releases at, such abandoned properties."[30]

Historical Document Review

Unlike the ASTM standard, the proposed rule does not list specific documents to be looked at, requiring instead that historical document review "cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes."[31] The environmental professional may exercise judgment as to what this means in specific cases.

Municipalities that need to satisfy the "all appropriate inquiries" standard to qualify for one of the CERCLA landowner defenses, or to obtain a brownfields grant, will have to become familiar with EPA's new inquiry requirements. While these are similar to the existing ASTM standard for site assessments, they are certainly not the same, and reliance on knowledge of the superceded ASTM standard will not be enough.

Government Record Review

Records to be reviewed for both the property under investigation and nearby or adjoining properties are specified in the proposed rule—in general, records that might contain information on environmental incidents, storage or disposal of hazardous materials, leaks, or other releases or threatened releases. For nearby or adjoining properties, minimum distances for record searches are specified (for example, a search is to be conducted for typically heavily polluted National Priorities List sites within one-half mile of the main property), but these distances may be adjusted by the environmental professional.[32]

Visual Inspections

The proposed rule requires that visual inspections of the property, "including a visual inspection of the areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed," be carried out in all but a few cases.[33] In the unusual circumstances where on-site access cannot be obtained, despite good faith efforts, due to "physical limitations, remote and inaccessible location, or other inability to obtain access to the property," inspection from the border of the site or other means of inspection are acceptable.[34] The proposed rule notes, however, that "[t]he mere refusal of a voluntary seller to provide access to the subject property does not constitute an unusual circumstance" excusing an on-site inspection.[35] A visual inspection of adjoining properties "from the subject property line, public rights-of-way, or other vantage point, including a visual inspection of areas where hazardous substances may be or may have been stored, treated, handled or disposed" is also required.[36]

Generalized Factors

As noted, Congress directed in the 2002 Brownfields Act that "all appropriate inquiries" take into account the specialized knowledge or experience of the person for whom the inquiry is being conducted; the relationship of the purchase price to the value of the property, if uncontaminated; commonly known or reasonably ascertainable information about the property; the degree of obviousness of contamination; and the ability to detect that contamination by appropriate investigation. The boundaries of any inquiry required by these factors are difficult to define with precision—the few decided cases that have cited these or similar factors seem to have used an "I know it when I see it" approach.[37]

The committee was unable to do much more with these factors than to

recite them verbatim (and therefore, rather unhelpfully) in the proposed rule. In the case of commonly known or reasonably ascertainable information, the committee noted, and EPA will therefore propose, a variety of possible sources:

(1) current owners or occupants of neighboring or adjacent properties;

(2) local and state officials with knowledge or information relating to the property;

(3) others with knowledge of the property; and

(4) other information (e.g., newspapers, Web sites, community organizations, local libraries and historical societies).[38]

In the case of obvious contamination, the proposed rule, while not requiring any sampling or analysis, notes that "[t]he inquiry of the environmental professional should include an opinion regarding additional appropriate investigation, if any."[39] The post-closure obligations of a property owner under the 2002 Brownfields Act (such as stopping ongoing releases and preventing threatened future releases) may make some form of testing a good idea in particular circumstances, even though it is not necessary to qualify for a landowner defense.

Conclusion

Municipalities that need to satisfy the "all appropriate inquiries" standard to qualify for one of the CERCLA landowner defenses, or to obtain a brownfields grant, will have to become familiar with EPA's new inquiry requirements. While these are similar to the existing ASTM standard for site assessments, they are certainly not the same, and reliance on knowledge of the superceded ASTM standard will not be enough. Further, because a municipality will have the burden of proving entitlement to the CERCLA landowner defenses, if challenged, and since the proposed definition of "all appropriate inquiries" leaves so much to the discretion of the environmental professional, extreme care in selecting the environmental professional, diligence in overseeing his or her activities and ensuring that the professional's report fully documents what choices were made and why, will be essential.

Notes

1. Pub. L. No. 107-118, 115 Stat. 2356 (2002).
2. 42 U.S.C. § 9601 *et seq.* (2000); amendments resulting from the 2002 Brownfields Act are in 42 U.S.C.A. § 9601 *et seq.* (West Supp. 2003).
3. 42 U.S.C. § 9607(a)(1)-(4) (2000).
4. United States v. Alcan Aluminum Corp., 990 F. 2d 711 (2d Cir. 1993).
5. 42 U.S.C. § 9607(b) (2000).
6. 42 U.S.C. § 9601(35)(B) (2000). These five factors must also be taken into account under the new "all appropriate inquiries" standard established under the 2002 Brownfields Act, but as discussed, new criteria have been added.
7. *See, e.g.,* State of New York v. Lashins Arcade Co., 91 F.3d 353 (2d Cir. 1996).
8. 42 U.S.C.A. § 9601(40)(B)(i), § 9601(35)(B)(i)(I) (West Supp. 2003) (bona fide prospective purchasers and innocent landowners). The wording of 42 U.S.C.A. § 9607(q)(1)(A)(viii)(I) (West Supp. 2003) for contiguous property owners differs slightly.
9. 42 U.S.C.A. § 9601(40)(B) (West Supp. 2003). *Compare* 42 U.S.C. § 9601(35)(A)(i) (2000) (innocent landowners) and 42 U.S.C.A. § 9607(q)(1)(A)(viii)(II) (West Supp. 2003) (contiguous property owners).
10. 42 U.S.C.A. § 9601(35)(B)(ii) (West Supp. 2003).
11. 42 U.S.C.A. § 9601(35)(B)(iv)(II) (West Supp. 2003).
12. 42 U.S.C.A. § 9601(35)(B)(iv)(I) (West Supp. 2003).
13. 42 U.S.C. § 9601(35)(A)(ii); § 9601(20)(D) (2000).
14. 2002 Brownfields Act, § 211, adding 42 U.S.C.A. §§ 9601(39), 9604(k) (West Supp. 2003).
15. Notice of Intent to Negotiate Proposed Rule on All Appropriate Inquiry, 68 Fed. Reg. 10,675 (March 6, 2003). The "stakeholders" represented included environmental groups; the environmental justice community; federal, tribal, state and local governments; real estate developers; lenders; and environmental professionals. IMLA, the U.S. Conference of Mayors, and the National Association of Local Government Environmental Professionals were the local government organizations asked to designate representatives to serve on the committee. Committee meeting minutes and other materials are posted at http://epa.gov/swerosps/bf/regneg.htm. Bizarrely, one of the environmental members, the U.S. Public Interest Research Group, withdrew from the committee in December, 2003 after having participated in all committee meetings, negotiated compromises in the positions of others, and agreed to the consensus committee proposal in November, 2003.
16. The committee's final consensus document ("Draft") is available at http://epa.gov/swerosps/bf/aai/draftreglangfinal.htm or http://epa.gov/swerosps/bf/aai/draftreglangfinal.pdf. Citations are to this draft, which has not yet been promulgated by EPA.
17. 42 U.S.C.A. § 9601(35)(B)(iii)(I) (West Supp. 2003).
18. Draft, *supra* note 16, § 312.10(b).
19. *Id.*
20. *Id.*
21. *Id.* at § 312.21(d).
22. *Id.* at § 312.21-31.
23. These criteria are set forth in 42 U.S.C.A. § 9601(35)(B)(iii)(II)-(X) (West Supp. 2003). As noted above, the last five criteria were taken over from prior law.
24. Draft, *supra* note 16, § 312.21(b).
25. *Id.* at § 312.20(e).
26. *Id.* at § 312.20(f).
27. 42 U.S.C. § 9607(b)(3) (2000) (innocent landowners), 42 U.S.C.A. § 9601(40)(D) (West Supp. 2003) (bona fide prospective purchasers), and 42 U.S.C.A. § 9607(q)(1)(A)(iii) (West Supp. 2003) (contiguous property owners).
28. Draft, *supra* note 16, § 312.23(b).
29. *Id.* at § 312.23(c).
30. *Id.* at § 312.23(d).
31. *Id.* at § 312.24(b).
32. *Id.* at § 312.26.
33. *Id.* at § 312.27(a)(1).
34. *Id.* at § 312.27(c).
35. *Id.*
36. *Id.* at § 312.27(a)(2).
37. *See, e.g.,* Foster v. United States, 922 F. Supp. 642 (D.D.C. 1996), where the court found that a small amount of additional investigation would have revealed the presence of contamination to the defendant, making the innocent landowner defense unavailable.
38. Draft, *supra* note 16, § 312.30(c).
39. *Id.* at § 312.31(b). **ML**

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