



Buyer beware: User responsibilities under All Appropriate Inquiry (AAI) standards

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Consider the following scenario: a prospective purchaser of real property retains an environmental professional (EP) to perform a Phase I Environmental Site Assessment (ESA). The purchaser has knowledge of the presence of regulated waste disposed, of and stockpiled upon, the property, but does not tell the EP about it. Because of inspection access issues, the EP does not see the regulated waste during the course of the site inspection and, as such, no mention of the waste is included in the ESA Phase I Report. Following the transfer of title, an enforcement action is brought against the new Owner by the State environmental regulatory agency. The new Owner then files suit against the EP for not finding the regulated waste during their ESA.

Sound far fetched? Unfortunately, this is a more common occurrence than one might expect. In fact, this author was retained as an expert witness in a similar case (litigation pending). The old ASTM due diligence standard (E 1527 00) contained some ambiguity as to responsibilities of the purchaser or "user" of an ESA in identifying "Recognized Environmental Conditions" (RECs) and thus completing all appropriate inquiry into the environmental conditions on a property.

However, last year's advent of EPA's All Appropriate Inquiry (AAI) Rule (40 CFR Part 312) along with its "sister" ASTM Due Diligence Standard (E1527-05) while certainly increasing the responsibilities of the EP conducting a Phase I ESA, has also carved out specific responsibilities for the "user" as well. E1527-05 defines the "user" as "the party seeking to use practice E 1527 to complete an environmental site assessment of the property." This may include a prospective purchaser, potential tenant, owner, lender or property manager and is basically the person or entity who commissions the Phase I ESA.

User responsibilities under 1527 05 are described as tasks that do not require the expertise of EPs, are generally not performed by the EP, and include the following:

1. Review of Title and Judicial Records for Environmental Liens or Activities and Use Limitations (AULs) recorded against the Property. (ed. note: it is now common practice for EPs to provide this information as part of their standard information searches);
2. Specialized Knowledge or Experience of the User as it relates to potential recognized environmental conditions in connection with the Property;
3. Actual Knowledge of the User pertaining to any environmental liens or AULs in connection with the Property;
4. Reason for Significantly Lower Purchase Price as compared to fair market value (e.g. has the price has been reduced due to the presence of hazardous substances or petroleum products affecting the Property?);
5. Commonly Known or Reasonably Ascertainable Information within the community that is material to recognized environmental conditions in connection with the Property; and

6. Other: the reason the user is requesting the environmental site assessment.

E1527 provides an optional environmental questionnaire to be submitted to the User by the EP and, in our experience, it is beneficial to submit such a questionnaire to clarify that it is the user's responsibility to provide this information.

For further clarification, the questionnaire contains a statement at the top explaining that the User must provide the requested information (if available) to qualify for one of the Landowner Liability Protections (LLP) offered by the Small Business Liability Relief and Brownfields Revitalization Act of 2001 (the Brownfields Amendments). In addition, there is a warning that states: "Failure to provide this information could result in a determination that All Appropriate Inquiry is not complete."

Upon reviewing these informational requirements, it becomes apparent that the User may not always be the one best equipped to answer some of the questions in the environmental questionnaire. If the User is a lender or purchaser, they may have no specialized knowledge or experience with a property. As such, it is usually good practice to submit the User responsibility questionnaire to both the User, and the current owner/operator of the property for completeness.

This new requirement for user-obtained information changes the landscape of the Phase I Environmental Site Assessment process significantly in that it solidifies the purchaser, lender or other "user" as an integral part of the process and does not rely upon the environmental professional alone to satisfy due-diligence requirements while the user remains an "innocent bystander." Under the new standard, it is incumbent upon the purchaser listed in the opening "bad news" scenario to share any specialized knowledge with the EP in order to satisfy due diligence requirements and if he/she chooses not to, for whatever reason, there is really no one to blame but the purchaser for not completing "All Appropriate Inquiry."

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