



Law: EPA proposes to amend AAI Rule for real estate due diligence

August 11, 2014 - Front Section

The Environmental Protection Agency published a notice in the June 17, 2014 Federal Register proposing to amend the All Appropriate Inquiries Rule (the AAI Rule) that applies to environmental due diligence in real estate transactions. The AAI Rule attempts to define the level of inquiry a purchaser of real property should perform to take advantage of a number of statutory defenses such as the innocent landowner defense.

By way of background, the Comprehensive Environmental Response, Compensation and Liability Act, often referred to as Superfund, provides that the owner of a property can be held liable for the remediation of hazardous substances disposed of at the property, even if the owner did not cause, contribute to or even know about the contamination. There is a defense in the Superfund law known as the innocent landowner defense that protects owners from liability if they did not know about the contamination and had no reason to know after performing "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial and customary practice in an effort to minimize liability." By rule published in the Federal Register on November 1, 2005, EPA defined "all appropriate inquiry" in an attempt to provide greater clarity. That rule, found in the Code of Federal Regulations at 40CFR Part 312, included a specific reference to ASTM International's E1527-05 - "Standard Practice for Environmental Assessments: Phase I Environmental Site Assessment Process." The ASTM Standard has become an industry standard before the publication of the EPA rule and the rule affirms that the ASTM Standard satisfies all appropriate inquiry.

In 2013, ASTM International made some revisions to its Phase I Site Assessment standard. Most of the revisions deal with the issue of "vapor intrusion" - the process by which hazardous substances travel through soil in the form of vapor and can seep into buildings. Regulators have shown increased interest in this issue in recent years. On December 30, 2013, EPA published a rule providing that use of the revised standard (ASTM E1527-13) would be compliant with all appropriate inquiries.

The new proposed rule would delete the reference to the old standard (ASTM E1527-05). Thus, those seeking to perform Phase I Site Assessments would be advised to use the updated standard.

Aaron Gershonowitz, Esq., is a partner at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, Uniondale, N.Y.