

## New cleanup law may protect property owners

Imagine the dilemma if your company purchases a property — only to find out that it is contaminated with hazardous substances.

Next, imagine the dilemma if the Environmental Protection Agency or a third party holds your company liable for clean-up costs under the Superfund Law. Such a situation can wreak havoc with your company's bottom line.

On Nov. 1, the EPA's long-awaited All Appropriate Inquiries Rule takes effect. Its purpose is to clarify the steps you can take to protect your company against Superfund liability based on property ownership.

It does so by clarifying protections offered by the Small Business Liability Relief and Brownfields Revitalization Act, a 2002 amendment. The Brownfields amendment and the All Appropriate Inquiries Rule provide that certain property owners can receive protection from liability by conducting a pre-acquisition due diligence process that includes "all appropriate inquiries" into the prior uses of a property.

An All Appropriate Inquiries investigation will become equivalent to a Phase I pre-purchase investigation.

The rule clarifies existing liability provisions for "innocent landowners." In addition, it clarifies protections under the Brownfields Amendment for two other classes of landowners — "bona fide prospective purchasers" and "contiguous property owners."

Generally, the All Appropriate Inquiries Rule does not apply to residential property or to the investigation of such things as radon, mold or lead-based paint. It does not prescribe what must be done to satisfy state law requirements such as the Washington Model Toxics Control Act, although it is hoped that agencies like the Washington Department of Ecology will use the rules as a guideline.

To be protected, an "innocent landowner" must have had no knowledge (or reason to know) of contamination on the property prior to purchase, and must have conducted all appropriate inquiries.

The new "bona fide prospective purchaser" defense has great potential value to companies. To be protected, this purchaser

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condition for liability protection. These include:

- Complying with land-use restrictions and not impeding the effectiveness of institutional controls (for example, a deed restriction);
- Taking "reasonable steps" to prevent the release of a hazardous substance;
- Cooperating with the EPA, the state or some other party conducting cleanup at the property;
- Complying with any Superfund information requests and administrative subpoenas; and
- Providing legally required notices. For properties purchased after Nov. 1, the All Appropriate Inquiries Rule is satisfied by conducting a pre-acquisition assessment in compliance with a certain standard. The investigation must include:

- Interviews with past and present owners and occupants of the property;
- Reviews of historical sources to determine previous uses and occupancies of the property — such as chain of title documents, aerial photographs, building department records and land-use records;

must have conducted all appropriate inquiries and must make sure that all hazardous substances are disposed of before the property is acquired.

The new "contiguous property owner" defense applies to an owner whose property is contaminated by the migration of hazardous substances from neighboring properties. In general, if the owner purchases the property without knowing (or having reason to know) that it has been contaminated, and if all appropriate inquiries are conducted prior to the purchase, the owner may be protected.

There are also post-acquisition obligations imposed as a continuing

• Searches for recorded environmental cleanup liens against the property;

• Reviews of government records concerning contamination at or near the property;

• Visual inspection of the property and adjoining properties;

• The relationship of the purchase price to the value of the property, if the property were not contaminated;

• Commonly known or reasonably ascertainable information about the property; and

• The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect it by appropriate investigation.

• The All Appropriate Inquiries Rule requires that the investigation be overseen by an "environmental professional." It sets stringent minimum educational and experience requirements for these individuals.

The results of the investigation overseen by an environmental professional must be documented in a written report that includes:

• The environmental professional's opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances at the property;

• An identification of any gaps in the available data that might affect the environmental professional's ability to identify these conditions; and

• The qualifications of the environmental professional(s).

Careful observance of the new rule will go far towards solving many of the environmental dilemmas faced by commercial property owners.

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