As commercial and residential development spreads ever further beyond city boundaries in a search for open space, another option presents itself. Two articles address the transformation of "brownfields," those parcels often abandoned due to past industrial or commercial use. Their redevelopment may provide an alternative to what has become known as "urban sprawl."

BROWNFIELDS

A Practitioner's Guide to EPA's "All Appropriate Inquiries" Rule

BY NANCY A. MANGONE

On November 1, 2006, the Environmental Protection Agency's "All Appropriate Inquiries" Rule took effect. A panel of 26 stakeholders negotiated and developed the Rule, which in many ways is the culmination of the EPA's efforts to make the Superfund program "faster, cheaper and fairer." It interprets the provisions of the 2002 Brownfields Amendments[1] to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)[2] to limit the liability of certain current and future landowners of known and potentially contaminated pieces of property.

Although this rule was designed to help eliminate or minimize potential Superfund liabilities, the legal practitioner should know that it does not cure all the legal ills surrounding the return of potentially contaminated property to productive use. This article examines the liability exemptions of the new and improved CERCLA statute and the Rule, the criteria to become eligible for and to maintain their protections, and the limitations of their coverage. It also provides some practical suggestions, in the form of a checklist, for assisting clients in complying with the AAI Rule.

What Are Brownfields?

Federal law defines a "brownfield site" as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutants or contaminants."[3] Brownfields are typically abandoned, idled or underused industrial or commercial facilities, where prior operations or activities may have involved the use, manufacture or disposal of a hazardous substance, pollutants or contaminants, such as chemicals, solvents or metals. Former gas stations, dry cleaners, auto body shops and abandoned mining sites may also be considered brownfields.

The definition of a brownfield site includes more properties than those that may be subject to a Superfund cleanup. For example, although petroleum products (and fractions thereof) are excluded from the definition of "hazardous substances" in CERCLA,[4] real property that may be contaminated by petroleum products can be addressed under the Brownfields program. For these petroleum-only sites, the risk posed by the property must be relatively low (compared to similar sites in the same state), there must be no viable potentially responsible party (PRP) and the property must not be subject to an Underground Storage Tank (UST) compliance order.[5]

Other properties are conversely excluded from the definition. These include properties already subject to an EPA permit, administrative order, judicial consent decree or other EPA enforcement action. Properties within a site finally listed or proposed for listing on the National Priorities List ("NPL"),[6] subject to a closure plan under the Resource Conservation and Recovery Act (RCRA)[7] or undergoing other corrective action, or facilities owned by the United States, are likewise excluded from the definition of brownfield site.[8]

Liability Under Superfund

Why were the Brownfields Amendments and the AAI Rule necessary at all?

The Superfund law was enacted on December 11, 1980, to address abandoned dump sites whose hazardous substances posed a risk to human health or welfare or the environment. It established a liability scheme to ensure that the polluter—not the American taxpayer—pays to clean up the contamination.

CERCLA imposes strict, joint and several liability[9] on four categories of PRPs: (1) current owners and operators; (2) owners and operators at the time of disposal; (3) generators; and (4) transporters.[10] Liability can be imposed retroactively.[11] CERCLA's liability scheme often has been characterized, even by the U.S. government itself, as "draconian," because the United States can recover its costs of responding to releases or threatened releases of hazardous substances, whether or not the costs incurred by the government are "reasonable."[12]

There are few statutory defenses to Superfund liability.

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REDEVELOPMENT

Section 101(35) of CERCLA expressly provides that a person seeking a defense to Superfund liability must show he had "no reason to know" of the contamination because he conducted "all appropriate inquiry" into the site's condition prior to its acquisition. Though this defense provides some limitation to CERCLA liability, the statute itself does not define the term "all appropriate inquiry" to give PRPs a target to shoot for.

Before the enactment of the 2002 Brownfields Amendments, the EPA (and the courts) looked to whether the party had any specialized knowledge about the site, whether the purchase price may have suggested some defect, whether the acquirer consulted all commonly known or reasonably ascertainable information about the property, and whether the presence of contamination was obvious or could be discovered with appropriate inspection. "Innocent landowners" had to employ the "customary" or "good commercial" practices in use at the time the acquisition took place. What constituted "good commercial" or "customary" practice, though, was defined by case law rather than by statut

The Nuts and Bolts of the EPA's AAI Rule

In the 2002 Brownfields Amendments, Congress required the EPA to promulgate regulations establishing standards and practices for conducting "all appropriate inquiries" (AAIs) within two years of the Amendments' enactment.[14] Congress also expanded the "innocent landowner" defense's liability protections to other categories of property owners the EPA had protected in previous guidance documents—"bona fide prospective purchasers"[15] (BFPPs) and "contiguous property"[16] owners. Certain requirements from the AAI Rule apply to all of these parties. Other requirements apply only to certain categories of landowners.

Most parties hoping to take advantage of AAI Rule protections will be innocent landowners or BFPPs. An innocent landowner is a person who buys or otherwise acquires property without discovering it is contaminated. A BFPP knows the property is contaminated but buys it anyway. Both the innocent landowner and the BFPP, however, must acquire the property after the disposal of hazardous substances occurred.[17] The contiguous property owner, on the other hand, may know his property is contaminated but, by definition, does not own the land that is the source of the contamination. Only the BFPP and the innocent landowner must comply with the AAI Rule in order to be exempt from CERCLA liability.

Requirements for Landowners Performing AAIs

"All appropriate inquiries" must be conducted by an Environmental Professional (EP) (for the qualifications of an EP, see the sidebar on p. 36). EPs will investigate:

- the current and past uses of the property
- the current and past uses of hazardous substances at the property
- the waste management or disposal practices that could have caused a release or threatened release of hazardous substances at the property
- if any environmental cleanup has occurred or is occurring on the property
- if the property is subject to any engineering or land use restrictions or controls
- if any adjacent properties show signs of contamination[18]

This type of investigation is commonly referred to as a "Phase 1" assessment. The term "Phase I" comes from the environmental site assessment standards developed by the American Society for Testing Materials (ASTM).[19]

Sources consulted during the Phase 1 assessment include historical and government records. Historical documents and records that should be reviewed may include aerial photos, fire insurance maps (such as Sanborn maps), building department records, chain of title documents and land use records.[20] Although not mentioned in the AAI Rule, other good sources of historical records to determine prior land use are old telephone books and City or County business directories. Current and former owners, operators and occupants, and neighbors of the property also must be interviewed.

Government records or databases must be consulted for both the subject property and adjoining properties. For the property being acquired, the EP will review federal, state, local and tribal records and databases for: records of reported releases or threatened releases; records of activities, conditions or incidents likely to cause or contribute to a release; the EPA's CERCLIS database; public health department records; Emergency Response Notification System records; and registries or publicly available lists of engineering or institutional controls.[21]

For nearby or adjoining properties, the EP must review federal, state, local and tribal government records or databases to search for reported releases and the distances between these releases and the subject parcel. EPs also hunt for records of sites on the NPL or RCRA corrective action facilities located within one mile and records of leaking USTs within one-half mile of the property. They determine whether the property is within one-half mile of a site now removed from the NPL, a site formerly on the EPA's CERCLIS database, where the EPA has determined no further action is needed, or on a registry or other publicly available list of sites having engineering controls in place.[22]

Records of permitted waste management activities on adjoining properties, such as RCRA generator, storage, treatment and disposal facilities and storage tanks, are also sought. The distance between the property that is the subject of the transaction and the nearby or adjoining property may be changed, if the EP determines an alternative distance is more appropriate to determine if the subject property may be contaminated. If the EP varies the distance for his records search, he must document the rationale behind this change and include an explanation in his written report.[23]

A visual site inspection of the property being purchased and its adjoining property is required, as is a search for any recorded environmental liens. The EP, however, only needs to look for liens recorded against the subject property, not for any adjoining property. Other criteria to be evaluated by the EP is any specialized knowledge of the acquirer,[24] the relationship of the purchase price to the property's expected fair market value,[25] other commonly known or reasonably ascertainable information about the

property[26] and the degree of obviousness of the presence or likely presence of contamination.[27]

The AAI must be completed not earlier than one year before the date of the property's acquisition.[28] However, certain aspects of the investigation, including the visual site inspection, the records search and the interviews of past and current occupants or neighbors, must be updated if they were performed more than 180 days prior to closing.

Once the EP completes this investigation, he must document his findings in a written report. At a minimum, this report must include his opinion of whether the investigation has "identified any conditions indicative of releases or threatened releases of hazardous substances … on, at, in, or to the subject property, [and] an identification of [any] data gaps."[29] The data gaps identified or the conclusions drawn by the EP in his report may suggest it would be prudent to take field samples and have them analyzed by a qualified laboratory to better appreciate the nature and extent of the potential contamination present at the site. However, nothing in the AAI Rule requires the BFPP to perform a more in-depth, "Phase 2" investigation, which may include soil, air, surface or groundwater sampling.

Keeping the Liability Exemption

Once the investigation is complete, there are certain requirements that every landowner must meet in order to maintain the CERCLA liability exemption.

First, the landowner cannot have caused or contributed to the release or threatened release of a hazardous substance, pollutant or contaminant.[30] The landowner cannot otherwise be a PRP themselves or be affiliated with one.[31] Moreover, all BFPPs, innocent and contiguous landowners must comply with a number of "continuing obligations" for managing their sites. They must provide full cooperation, assistance and access to anyone performing the cleanup action[32]and must respect any land use restrictions or controls.[33] They must comply with any EPA information request or subpoena.[34] The BFPP and contiguous landowners must also provide all legally required notices documenting the discovery of the contamination.[35]

Depending on what the EP finds during his investigation, the property owner also may have to undertake affirmative actions to address the contamination. The statute requires landowners to exercise appropriate care or take "reasonable steps" to stop any continuing release from the property, to prevent any threatened releases at or from the site in the future, and to prevent or limit any human, environmental or natural resource exposure to any previously released hazardous substance.[36] Examples of reasonable steps may include erecting fencing to keep trespassers from entering the property, continuing to operate a previously installed pump-and-treat system to remediate contaminated groundwater, or agreeing not to drill or use wells at or near the property as a drinking water source.

Shortcomings of the AAI Rule

Although meeting the criteria of the AAI Rule may provide comfort against CERCLA liability claims, it is not a panacea for all potential liabilities associated with a contaminated parcel. Compliance with the Rule does not provide liability exemptions for releases that cause violations of other federal environmental laws, such as RCRA, the Clean Water Act[37] or the Clean Air Act.[38] The Rule also does nothing to extinguish the landowner's liability for violations of state environmental laws, local nuisance ordinances or common law tort claim. The landowner may also have to obtain any federal, state or local permits to perform a cleanup on his site.

Another major caveat is that the BFPP or innocent landowner is on his own in determining whether he complied with the AAI Rule. The EPA does not review the EP's report and will not provide an advisory opinion on whether the CERCLA liability exemption attaches.

Perhaps more important, neither Congress nor the EPA has defined what constitutes reasonable steps. The EPA has attempted to enunciate a reasonable steps standard in its March 2003 "Common Elements" Guidance,[39] but it unfortunately falls short of establishing a bright-line test. Although the EPA has said it does not believe landowners have to implement soil

THE ENVIRONMENTAL PROFESSIONAL

The qualifications of an Environmental Professional (EP) are detailed in the AAI Rule itself.

An EP is "a person who possesses sufficient specific education, training and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the objectives and performance factors" of the AAI Rule.[1]

The EP must either:

- **hold a Professional Engineer's or Professional Geologist's license or registration issued by a state, tribal or territorial government and have three years of full-time relevant experience, or**
- **be licensed or certified by the federal, state, tribal or territorial government to conduct AAIs and have three years of full-time relevant experience.**

Without a license, registration or certification, an EP must have either:

- **a bachelor's or higher degree in an engineering or science discipline and the equivalent of five years of full-time relevant experience, or**
- **10 years of full-time relevant experience.**

"Relevant experience" is further defined as "participation in the performance of AAIs, environmental site assessments or other site investigations … which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions."[2]

1. *See* 40 C.F.R. § 312.10, 70 Fed.Reg. at 66,108. 2. *Id.*

removal or groundwater treatment requirements to the same level as Superfund-liable parties,[40] there is no definitive answer to the question of how much remediation a landowner must undertake to meet the vague reasonable steps standard.

The EPA maintains that reasonable steps are determined on a site-specific, fact-specific basis, but its guidance opines that a BFPP may have a greater duty to implement more elaborate reasonable steps than other types of landowners, because the BFPP buys the property with the knowledge that it is contaminated and can plan accordingly.[41]

Knowing that the reasonable steps standard is a moving target, the EPA has expressed a willingness to provide certain landowners—those with sites where a substantial federal interest[42] is involved and where the EPA has sufficient information—a list of the steps the EPA believes are "reasonable" in light of the site's characteristics.[43] Given these unknowns, the definition of reasonable steps is one topic that is expected to spawn further litigation.

Federal Enforcement Bar

Though most environmental and real estate practitioners know about the AAI Rule, they often overlook a key provision from the 2002 Brownfields Amendments that may give their clients another avenue for eliminating or minimizing their potential environmental liabilities. Specifically, the definition of "eligible response site" may provide some liability protections beyond meeting the criteria of the AAI Rule alone.

"Eligible Response sites" are defined as brownfield *and* leaking UST sites being addressed under a state program.[437] Pursuant to new Section 128 of CERCLA,[45] the EPA may not take any CERCLA enforcement action at these "eligible response sites" if a person is conducting or has completed a cleanup of a release that might otherwise be addressed under CERCLA, provided the cleanup is in compliance with the applicable state program and public health and the environment is protected. This means the EPA is barred from ordering a party to perform a CERCLA cleanup on the property or from taking such action itself and seeking to recover its response costs at these sites.

There are exceptions to this federal enforcement bar. Most notably, the EPA is not barred from taking action if: A state asks the EPA to take action; the contamination migrates across state lines or onto federally owned property; an imminent and substantial endangerment occurs and additional response actions are necessary; or the EPA finds new information or changed conditions unknown to the state at the time it approved the cleanup.[46]

Applying this provision to sites in Arizona, the EPA is barred from acting to address any release or threatened release of hazardous substances, pollutants or contaminants or petroleum products otherwise being addressed under such programs as the Water Quality Act Revolving Fund (WQARF) program,[47] the Voluntary Remediation Program[48] or the UST remedial program.[49] This means that if a party conducts a cleanup of a WQARF site, the EPA may be barred from seeking any costs it may have incurred at that site as well.

There are, however, advantages and disadvantages in addressing a brownfield site under these state programs. One advantage is that the redeveloper may be able to place a Declaration of Environmental Use Restriction (DEUR)[50] on the property to provide notice to future owners or occupants and do nothing else (*i.e.*, he may have no "continuing obligations").

A second advantage is that the redeveloper can obtain a determination from ADEQ that "No Further Action" or remediation is required to ensure that human health or the environment is protected from potential releases from the site.[51] This determination may minimize the redeveloper's liability exposure and may make resale of the property easier in the future. Furthermore, because of the statutorily imposed time frames in the state remediation programs, it may also be quicker and easier to get your client's remediation and redevelopment plan approved by ADEQ than by the EPA. For example, an application submitted under the Voluntary Remediation Program must be reviewed within 60 days by ADEQ or it is deemed complete,[52] whereas the EPA has no similar time constraint in responding to a BFPP's request for a list of "reasonable steps."

There are risks in using the state program and relying on CERCLA's federal enforcement bar. In particular, although the EPA may not bring suit, landowners are not exempt from CERCLA liability or contribution claims being brought by third parties. Also, because a DEUR allows a certain amount of contamination to remain on-site, the future uses of the property may be severely limited. You should weigh these benefits and risks and advise clients accordingly.

Conclusion

Brownfield sites are properties that have the potential to be contaminated because of their prior use. For clients wishing to buy or redevelop a brownfield site, do everything you can to ensure they are not acquiring Superfund liability along with it. No more than one year before the property sale closes, have them comply with the criteria of the AAI Rule. In particular, make sure clients:

- ✓ Hire an Environmental Professional (EP) and check his credentials.
- ✓ Do not allow the information contained in the EP's Report to become stale. If the report is written more than 180 days prior to closing, have the EP update and re-certify it.
- ✓ Know of and decide whether to investigate data gaps. You may want to suggest a more comprehensive, Phase 2 investigation even though it is not required by the AAI Rule.
- ✓ Comply with any continuing obligations, including providing access and cooperation to anyone performing the site remediation.
- ✓ Take "reasonable steps" to prevent further releases. "Reasonable steps"—although undefined by the AAI Rule or statute—may include fencing the property or operating and maintaining existing remediation systems.
- ✓ Ask for help from EPA Region 9 in identifying "reasonable steps."
- ✓ Consider using ADEQ's cleanup programs to address site contamination. Because the EPA cannot take CERCLA enforcement actions at "eligible response sites," landowners may get more "bang for the buck" by remediating and redeveloping a brownfield site using a state program. The cleanup/redevelopment plan may be approved more expeditiously, and ADEQ can provide a determination that "No Further Action" is required.

—Endnotes on p. 59

 — continued from p. 37

1. *See* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (Jan. 11, 2002).
2. 42 U.S.C. §§ 9601-9675 (2000).
3. *Id*. § 9601(39).
4. *Id*. § 9601(14).
5. *See id*. § 6991e for the contents and procedure for issuing a UST compliance order.
6. *See id*. § 105. Under CERCLA, the EPA is charged with creating a list of the worst contaminated sites in the country and with prioritizing them for cleanup. There are approximately 1,300 final or proposed sites on the NPL.
7. *Id*. § 6901 *et seq*.
8. *Id*. § 9601(39)(B).
9. *See United States v. Conservation Chem. Co*., 619 F. Supp. 162 (D. Mo. 1985).
10. 42 U.S.C. § 9607(a).
11. *See United States v. Shell Oil Co*., 605 F. Supp. 1064 (D. Colo. 1985).
12. *See United States v. Helen Kramer*, 913 F. Supp. 848, 855 (D.N.J. 1995).
13. *See United States v. A & N Cleaners and Launderers, Inc*., 842 F. Supp. 1543, 1547 (S.D.N.Y. 1994), (quoting H.R. REP. NO. 99-962, 99th Cong., 2d Sess., at 187 (1986)).
14. *See* 42 U.S.C. § 9601(35)(B).
15. *Id*. § 9601(40).
16. *Id*. § 9607(q).
17. *Id*. §§ 9601(35)(A) and 9601(40)(A).
18. *See* 40 C.F.R. § 312.20(e) and "Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 66,069, 66,070 (Nov. 1, 2005).
19. The EPA has determined that complying with ASTM's current standard E 1527-05 also satisfies the AAI requirements.
20. *See* 40 C.F.R. § 312.24, 70 Fed. Reg. at 66,111.
21. *Id*. § 312.26(b), 70 Fed. Reg. at 66,111.
22. *Id*. § 312.26(c), 70 Fed. Reg. at 66,111.
23. *Id*. § 312.26(d), 70 Fed. Reg. at 66,111.
24. *Id*. § 312.28, 70 Fed. Reg. at 66,112.
25. *Id*. § 312.29, 70 Fed. Reg. at 66,112.
26. *Id*. § 312.30, 70 Fed. Reg. at 66,112.
27. *Id*. § 312.31, 70 Fed. Reg. at 66,112-66,113.
28. *Id*. § 312.20(c)(3), 70 Fed. Reg. at 66,109.
29. *Id*. § 312.21, 70 Fed. Reg. at 66,110.
30. *See generally* 42 U.S.C. § 9601(35)(D).
31. *See id*. § 9601(35)(A) for innocent landowners, § 9601(40)(H) for bona fide prospective purchasers and § 9607(q)(1)(A)(ii) for the contiguous property owner.
32. *See id*. § 9601(35)(A) for innocent landowners, § 9601(40)(E) for bona fide prospective purchasers and 42 § 9607(q)(1)(A)(iv) for the contiguous property owner.
33. *See id*. § 9601(35)(A) for innocent landowners, § 9601(40)(F) for bona fide prospective purchasers and § 9607(q)(1)(A)(v) for the contiguous property owner.
34. *See generally id*. § 9604(e) for innocent landowners, § 9601(40)(E) for bona fide prospective purchasers and § 9607(q)(1)(A)(vi) for the contiguous property owner.
35. *See id*. § 9601(40)(C) for bona fide prospective purchasers and § 9607(q)(1)(A)(vii) for the contiguous property owner. Although there is no specific CERCLA statutory requirement for innocent landowners to provide these legally required notices, other federal, state or local laws may apply.
36. *See id*. § 9601(35)(B)(i)(II), § 9601(40)(D) and § 9607(q)(1)(A)(iii).
37. 33 U.S.C. § 1251 *et seq*.
38. 42 U.S.C. § 7401 *et seq*.
39. *See* "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability" ("Common Elements"), Mar. 6, 2003.
40. *Id*. at 9-10.
41. *Id*. at 11.
42. A substantial federal interest will occur when EPA is the lead agency for cleanup or the site is a federal facility.
43. *Id*. at 12 and Attachment C.
44. *See* 42 U.S.C. § 9601(41).
45. *See id*. § 9628.
46. *Id*. § 9628(b)(1)(B).
47. *See* A.R.S. § 49-281 through § 49-298.
48. *Id*. § 49-171 *et seq*.
49. *Id*. § 49-1001, *et seq*.
50. *Id*. § 49-152.
51. *See id*. § 49-181 and A.A.C. R18-16-414 (Determination of No Further Action).
52. *See* A.R.S. § 49-174(B).