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Avoiding Liability for Contamination: EPA's New "All Appropriate Inquiry" Standards

By John G. Nevius, Esq., P.E.

No one wants to buy into a Superfund site. However, when buying or investing in property you can never be absolutely certain of what's in the ground. So how do you protect yourself? What does it take to meet a due diligence requirement? When have you done enough? It just got clearer.

The Environmental Protection Agency (EPA) recently published a final rule establishing an "all appropriate inquiry" (AAI) standard. The rule addresses minimum due diligence for so-called innocent or contiguous landowners as well as bona fide prospective purchasers seeking liability protection from the reach of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, commonly known as Superfund). The AAI Rule will take effect on November 1, 2006, but can be utilized now!

Background

On January 11, 2002, President Bush signed into law the Small Business Amendments Liability Relief and Brownfields Revitalization Act. The act provided for protections from liability under CERCLA for purchasers of properties ultimately found to be contaminated by hazardous substances. Hazardous substances are expressly defined under CERCLA and generally include a broad range of things, but do not include standard petroleum products. To qualify for the act's protections, prospective purchasers must take reasonably diligent steps, including undertaking all appropriate inquiry to determine whether property may be contaminated.

Environmental professionals hired to undertake all appropriate environmental inquiries must now conduct interviews with a wider range of individuals than they would have had to under the prior American Society of Testing and Materials (ASTM) "Phase 1" guidelines. They must also undertake a more thorough visual inspection of properties adjoining the subject property, review a broader array of governmental records and expressly acknowledge areas of uncertainty that may have an effect on their conclusions.

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AIA Form Agreements: Are They Fair to Owners?

By Larry Bartelemucci

When a real property owner retains an architect or contractor to perform work related to its property, the owner is often presented with a "standard" form agreement drafted by the American Institute of Architects (AIA). This is usually accompanied by reassurances that the "independently drafted" agreement is well-known, widely used and addresses both parties' interests fairly. Understandably, this sounds appealing to many owners looking to start their projects as soon as possible, and the agreement is eventually signed after a quick review, without revision. However, upon a closer look, owners will discover that they are at a distinct disadvantage under the standard agreement.

AIA form agreements are not as impartial and balanced as they may appear. First, the AIA is an organization that, according to its website, represents "the professional interests of America's architects," and the form agreements reflect such interests. In addition, AIA form agreements have been subject to numerous revisions since the first forms were introduced, and each revision has shifted the balance away from owners and towards architects and contractors. This continuing shift is partly due to the Association of General Contractors collaborating with the AIA in

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preparing several form agreements. As expected, this has resulted in form agreements that tend to favor the architect and contractor over the owner, as will be demonstrated by the two examples below.

Examples of Imbalance:

1. AIA Document A107, the "Abbreviated Standard Form of Agreement Between Owner and Contractor for Construction Projects of a Limited Scope," is the form agreement most frequently entered into by owners and contractors for smaller projects. A key clause in document A107 addresses progress payments made to the contractor during its performance of the work. The subject section is short and simple – contractor submits payment application, application is reviewed by architect, and contractor is paid (with interest on late payments, of course). But the process is not that simple, and so this section's deficiencies arise not necessarily from what is included, but instead from what is missing. For example, the owner should also receive conditional releases from subcontractors with each application, so that the owner is protected against improper liens that may be filed against its property by unpaid or otherwise disgruntled subcontractors.

   Also conspicuously absent from this section is any mention of "retainage." Retainage is an amount withheld from each payment to the contractor for the purpose of providing security for later costs chargeable to the contractor. Recovery of retainage is a very strong incentive for a contractor to perform the work properly, and is an essential tool to ensure that improper work is corrected and the project is finished. Retainage is an almost universally accepted industry norm, and its absence from document A107 speaks volumes concerning the interests being protected by the form agreement.

2. AIA Document B141 is the "Standard Form of Agreement Between Owner and Architect." It also requires substantial revision in order to protect the owner's interests. One of the most important clauses in document B141 deals with "additional services" performed by the architect. When

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Investigation and Assessment of Potential Environmental Liability

The whole idea of AAIs is for a prospective purchaser to investigate potential environmental contamination and assess and minimize future potential liability. Under the prior ASTM Phase I standard, identification of "recognized environmental conditions" (RECs) was required: "the presence or likely presence of any hazardous substances … on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances … into structures on the property or into the ground, ground water, or surface water of the property." An REC would not include an insignificant or *de minimis* condition.

The new AAI rule replaces the REC concept with the "identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property." The AAI rule, however, also includes a *de minimis* exception where hazardous substance concentrations "generally would not pose a threat to human health or the environment."

Conducting an Environmental Inquiry

The new AAI rule requires that the environmental professional's inquiry be conducted "within one year prior to the date of acquisition of the subject property." The environmental professional must prepare a written report documenting the results of the environmental inquiry which must include:

- Interviews with past and present site owners, operators and/or occupants;
- A review of historical sources of information;
- A review of federal, state, tribal, and local government records;
- Visual inspections;
- Consideration of commonly known or reasonably ascertainable information within the local community about the subject property; and
- Consideration of how obvious the presence or likely presence of contamination is or may be.

If the property has multiple occupants, the environmental professional must interview the major occupants, as well as all occupants likely to use, store, treat, handle, or dispose of hazardous substances, or who have likely done so in the past. To the extent necessary to identify conditions indicative of "releases or threatened releases" of hazardous substances, the environmental professional must also interview one or more of the following

persons: 1) current and past facility managers with relevant knowledge of uses and physical characteristics of the property; 2) past owners, operators or occupants of the subject property; or 3) employees of current and past occupants of the subject property.

In seeking to define what is meant by the term "environmental professional," EPA ultimately adopted a range of acceptable qualifications, including various combinations of licensure, experience and education. The environmental professional's written report must include a statement certifying that the author meets this definition. However, the environmental inquiry need only be conducted "under the supervision or responsible charge of, an environmental professional."

The prospective purchaser, however, cannot simply turn everything over to a designated environmental professional. He or she must search or cause a search to be conducted of environmental cleanup liens against the subject property. The prospective purchaser also is obligated to give consideration to specialized knowledge of the subject property, the surrounding area, any other relevant experience, the relationship of the purchase price of the subject property to its value if it were not contaminated and commonly known or reasonably ascertainable information within the local community.

Meeting the requirements of EPA's new AAI rule simply makes sense whether or not contamination is

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Anderson Kill & Olick Client Atlas Performing Arts Center Named Finalist for *Washington Business Journal's* "Best Real Estate Deals 2005"

Atlas Performing Arts Center has been recognized by the *Washington Business Journal* as a finalist for the "Best Real Estate Deals 2005." The Center is being honored in the "financing" category for concluding a multi-tier debt and equity financing in the summer of 2005 to renovate an abandoned 1930's art moderne movie theater into a versatile performing arts center. The $20 million financing combined loans, grants and historic and new markets tax credits in a unique application of tax credit financing for non-profit development. The Center is expected to spur redevelopment of an economically depressed urban neighborhood. Finalists will be honored and winners announced at an awards dinner on April 27. Tom Petty, a partner in Anderson Kill's Washington, D.C.office, represented the Center in the transaction. For more information, please visit our website at www.andersonkill.com or contact Tom Petty at tpetty@andersonkill.com or (202) 218-0041.

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additional services are performed, the architect receives extra compensation in addition to the agreed-upon fixed fee. Accordingly, additional services should include only those unusual or unanticipated services that the architect may be required to perform over and above those "basic services" required for every project. While this is a straight-forward goal, document B141 has deviated from that goal. Several categories of architectural services that should be included in the architect's base fee are instead listed as additional services, thus entitling the architect to extra compensation, and placing unanticipated strains on the owner's budget.

One such service that document B141 improperly characterizes as an additional service is the architect's analysis of the owner's programming needs for the project. Such analysis is essential to make certain that the architect's design conforms to the owner's needs. Numerous other design responsibilities traditionally regarded as basic services have been recharacterized to the owner's detriment. Each must be scrutinized by an owner to ensure that the owner's expectations are reflected in the ultimate design of the project.

What to Do?

So what can an owner do to make sure that its interests are adequately protected? If an owner is presented with an AIA form and chooses to use it, such forms must be amended to level the playing field. A better solution, however, is for an owner to utilize its own manuscript agreement. Manuscript agreements allow owners to avoid uphill negotiations, and can be tailored to the owner's particular needs and circumstances. Anderson Kill & Olick has attorneys with extensive experience in both AIA and manuscript construction agreements.

thought to exist and likely will become increasingly common as a standardized real estate valuation and assessment tool.

Continuing Obligations

Prospective purchasers should also be aware that conducting AAI is only the first step in obtaining liability protection under CERCLA, a point that EPA made consistently throughout the promulgation process and in the preamble to the AAI rule. The act also imposes subsequent obligations, including: 1) complying with land use restrictions and ensuring the continuing effectiveness and integrity of institutional controls; 2) taking "reasonable steps" to prevent future potential releases of hazardous substances; and 3) complying with any CERCLA authorized government requests or demands and providing legally required notices (such as notifications of releases of hazardous substances).

Conclusion

The new AAI standards go further than the prior ASTM guidelines and have the advantage of being final EPA rules promulgated pursuant to federal law. Properly undertaking all appropriate inquiry should go a long way toward alleviating the uncertainty associated with property contamination and potential Superfund liability. Real estate professionals of all stripes would be well-advised to become more familiar with this important new development — no pun intended.

John G. Nevius is a shareholder in the New York office of Anderson Kill & Olick, P.C. and a registered professional engineer. Mr. Nevius successfully has resolved and litigated numerous insurance coverage actions on behalf of policyholders and provides advice and technical expertise on a wide range of environmental and insurance matters. Mr. Nevius can be reached at (212) 278-1508 or jnevius@andersonkill.com.

Larry Bartelemucci is an attorney in the New York office of Anderson Kill & Olick, PC. Mr. Bartelemucci has extensive experience in the area of construction law, where he has drafted and negotiated owner-builder, construction management, architect and design-build agreements. Mr. Bartelemucci has represented clients in both litigation and arbitration settings on a variety of construction and non-construction matters. Mr. Bartelemucci can be reached at (212) 278-1883 or lbartelemucci@andersonkill.com.

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Editorial
Thomas A. Neufeld, Editor, (212) 278-1840 or tneufeld@andersonkill.com

Real Estate & Construction Group, Co-Chairs
Arnold L. Bartfeld, New York, (212) 278-1511 or abartfeld@andersonkill.com
John B. Berringer, Newark, (973) 642-5133 or jberringer@andersonkill.com

The firm has offices in New York, Chicago, Greenwich, Newark, Philadelphia, and Washington, D.C.