

UNDERSTANDING THE USER REQUIREMENTS OF THE NEW EPA ALL APPROPRIATE INQUIRY (AAI) RULE



ENVIRONMENTAL LIABILITY PROTECTION

Wireless carriers and tower companies commonly retain environmental consultants to provide Phase I Environmental Site Assessments as part of their due diligence process. The Phase I Environmental Site Assessment process is designed to allow the User to qualify for certain landowner liability protections (LLPs) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In addition to protection against environmental liability, the wireless telecommunications industry uses the Phase I Assessment process to assess any contamination issues that may impact facility construction and ultimately, the intended use of the property.

NEW EPA REGULATIONS

On November 1, 2006, new Environmental Protection Agency (EPA) Regulations contained in Title 40 CFR Part 312 became effective. The regulations, Standards and Practices for All Appropriate Inquiries, codify all appropriate inquiries (AAI) as required under CERCLA.

USER RESPONSIBILITIES

The AAI rule requires that the User (the party relying on the Phase I) complete certain tasks. The Users responsibilities include:

- Conducting a search for environmental cleanups and activity and use limitations (usually conducted in conjunction with title policy research)
- Identifying whether the relationship of purchase (lease) price to fair market value may be indicative of any possible contamination that may result in CERCLA liability. That is, is the price fair or possibly too low due to some undisclosed environmental issue?
- Documenting any specialized knowledge or experience or any commonly known or reasonably ascertainable information about the property that is of an environmental nature. Local community knowledge of past uses of environmental concern is an example of commonly known information.
- Documenting whether any obvious indicators of contamination are known to the User.

THE IMPORTANCE OF USER COMPLIANCE

The User responsibilities are very important because a failure of the User to meet one or more of these responsibilities could result in forfeiture of CERCLA protection should a claim or action result from future discovery of contamination. Also, any knowledge, documentation or User experience relative to these responsibilities should be disclosed to the Environmental Professional (EP). This disclosure is not required by the AAI rule, but failure to disclose such could result in an inability for the EP to render an opinion as to whether recognized environmental conditions exist on the Property or may result in findings that are inconsistent with actual conditions. Further, disclosure to the EP will commonly result in the disclosed information becoming part of the Phase I report so that the document includes evidence of the User meeting its obligations should a CERCLA liability issue arise at a later date.

Relative to the User requirements, the User should bear in mind that any Phase I older than 1 year old (measured backward from the date of property acquisition/lease) is not valid under the new AAI rule, and as a general rule Phase Is older than 6 months require substantial updates by the EP for the User to retain access to the CERCLA LLPs.

Because the User has specific responsibilities, as discussed above, it is not appropriate for CERCLA liability protection purposes for one User to rely on or use a Phase I prepared for another User unless the new User documents its compliance with the User requirements discussed above and the EP updates the due diligence relative to specialized knowledge of the property.

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This article is a regulatory summary and is not intended to discuss specifically the User requirements of the new EPA AAI rule and is not intended to serve as legal interpretation or advice.

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