

SUPERFUND REGULATIONS EFFECTIVE NOVEMBER 1, 2006

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The Comprehensive Environmental Response, Compensation and Recovery Act ("CERCLA"), more commonly known as the "Superfund Act", imposes responsibility for clean-up of hazardous substances upon owners of contaminated real estate. An owner may be held responsible for costs of clean-up even if the owner had *nothing* to do with causing the contamination, and even if the owner does not know about the contamination.

An important defense to an owner's liability under CERCLA is known as the "innocent landowner" defense. An owner who can establish that he is an "innocent landowner" will not be held responsible for clean-up.

Under CERCLA, an "innocent landowner" is a person who undertook "all appropriate inquiries" upon acquisition of real estate to determine if it was contaminated. The meaning of the term "all appropriate inquiries" has evolved over the last several years. Recently, a procedure known as the ASTM E1527-00 Standard for Phase I Environmental Site Assessments was followed by those seeking to become "innocent landowners".¹

Under a 2002 Congressional mandate, however, new regulations recently were enacted by the United States Environmental Protection Agency ("EPA") that define "all appropriate inquiries".² Now, in order to qualify for the "innocent landowner" defense, an owner, prior to acquisition of property, must undertake "all appropriate inquiries" into prior ownership and uses of the property in accordance with the new regulations,³ which became effective November 1, 2006.

¹ The term "ASTM" means American Society for Testing and Materials.

² There is a revised standard, ASTM E1527-05, that is consistent with the final EPA regulations regarding "all appropriate inquiries".

³ Owners receiving grants under EPA's Brownfields grant program, designed to allow development of contaminated locations, must

The final regulations require that a report be prepared documenting results of the owner's "all appropriate inquiries". The regulations do not specify the structure, format or length of the report. However, it must be prepared by a "qualified professional". A "qualified professional" is an individual who, in the eyes of the EPA, possesses specific information, training and experience necessary to spot conditions indicative of potential releases of hazardous substances. Specifically, a "qualified professional" must have a state-issued certification or license and three years of relevant full-time work experience or a baccalaureate degree or higher in science or engineering and five years of relevant full-time work experience or ten years of relevant full-time work experience. Relevant experience means participation in environmental analyses, investigations and remediation.

In the report, the "qualified professional" must make two declarations: first, that he is a "qualified professional"; and second, that "all appropriate inquiries" were carried out in accordance with the requirements of the final regulations.

The regulations require that, as part of his "all appropriate inquiries", the "qualified professional" must interview persons, such as current and past facility managers, past owners, operators or occupants of real estate, and employees of the same to inquire about current and past uses of the real estate. The "qualified professional" also is required to review all commonly known and reasonably ascertainable information about the real estate. A review of government records, and information obtained (if reasonable to do so) from newspapers, local governmental officials, community organizations and websites should be reviewed.

Information obtained and included in the report must include current and past uses of the real estate, current and past uses of hazardous substances, waste management activities, engineering controls, institutional controls, and information about nearby real estate. Environmental clean-up liens must be searched

conduct characterizations and assessments in compliance with the new "all appropriate inquiries" regulations.

and reported upon. The "qualified professional" also must examine historical sources, such as aerial photographs, fire insurance maps, building department records, chain of title documents and land use records regarding the property. It is up to the "qualified professional" to decide how far back in the records that he should examine.

In the report, the "qualified professional" must identify data gaps that remain after the conduct of all required investigations. In the report, he must identify the source of information consulted to address data gaps and comment on the significance of the data gaps with regard to his ability to identify conditions indicative of contamination. For example, if the "qualified professional" cannot obtain access to the real estate, he must document efforts to gain access, as well as his use of other sources of information to determine the existence of potential contamination. He also must express an opinion about the significance of his failure to conduct an on-site visual inspection.

In conducting the review of the real estate, the "qualified professional" must consider the relationship between the purchase price and fair market value of the real estate if it were not contaminated, and consult with the prospective owner as to whether or not the difference in purchase price and fair market value is due to the actual or potential presence of contamination. If the prospective owner does not comment upon this information, the "qualified professional", in the report, must treat the lack of information as a data gap and comment on whether the data gap may impact his ability to identify conditions indicative of environmental contamination.

Regarding the use of prior environmental assessments in preparation of the report, outdated or possibly stale information may not be relied upon by an owner seeking to qualify as an "innocent landowner". In general, information in a prior Phase I environmental assessment report may be used if the investigation was completed less than 180 days prior to the date that the owner acquires the real estate.

"All appropriate inquiries" must be conducted within one (1) year prior to the acquisition of his property. However, certain components of such inquiries must be conducted or updated within 180 days prior to acquisition of the real estate. These components include interviews with past

and present owners, operators and occupants, searches for reported environmental clean-up liens, reviews of state and local governmental records, visual inspections of the property, as well as the declaration of the "qualified professional".

To summarize, if a potential owner of real estate wants to attempt to qualify as an "innocent landowner" under the new "all appropriate inquiries" regulations, it is imperative that he retain a "qualified professional" and thoroughly check the professional's credentials and experience. The report prepared by the "qualified professional" also must contain all information required by the EPA regulations.