

Environmental control

Minimizing the risks of acquiring brownfields

The U.S. Environmental Protection Agency (EPA) recently published a new rule for conducting All Appropriate Inquiry (AAI), a process for evaluating environmental conditions and assessing the potential liability for contamination at a property (that is, due diligence). The new AAI rule became effective Nov. 1.

Prior to AAI final rule, the standard for conducting environmental due diligence was the American Society for Testing Materials (ASTM) Standard E1527 Phase I Environmental Site Assessment.

"The objective of the ASTM Phase I is to determine any environmental conditions that would indicate a release or a threatened release of hazardous substances on a property," says Terrence S. Finn, a partner with the Environmental, Health & Safety Group at Roetzel & Andress, L.P.A. "A party must perform AAI in order to take advantage of important liability defenses that are available under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)."

Smart Business spoke with Finn about EPA requirements and the funding available to redevelop brownfields.

What is the significance of CERCLA to property owners and operators?

Under CERCLA, owners and operators can be jointly, severally and retroactively liable for the cleanup of hazardous substances released on their property. This means a current owner may be liable for the entire cleanup costs associated with contamination at a property — even if the contamination occurred before the current owner purchased that property.

However, CERCLA does provide for defenses to liability, including a defense for parties that qualify as innocent owners, bona fide prospective purchasers and contiguous property owners. However, in order to qualify for these defenses, a party must perform AAI prior to acquiring the property.

What are the new AAI requirements?

In general, AAI includes an inquiry by an environmental professional consisting of



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interviews with the past and present owners, operators, and occupants; reviews of historical sources of information and government records; visual inspections of the property; commonly known or reasonably ascertainable information; and the obviousness of the presence or likely presence of contamination, as well as the ability to detect contamination.

Additional inquiries that must be conducted under AAI include searches for environmental cleanup liens; specialized knowledge or experience of the prospective landowner; an assessment of the relationship of the purchase price to the fair market value of the property if the property was not contaminated; and any commonly known or reasonably ascertainable information.

The AAI process must be conducted or updated within one year of the date of acquisition of a property. If AAI is conducted more than 180 days prior to acquisition, certain aspects of the inquiry must be updated.

Although the requirements under the EPA's new AAI rule are similar to the 2000 ASTM standard, some additional requirements apply.

For example, the new AAI rule requires documentation of significant data gaps or uncertainties. Unlike the 2000 ASTM

requirements, interviewing the current property owner or occupants is mandatory under the new rule. AAI also requires interviews with neighboring property owners if the subject property is abandoned. The previous standard included such interviews only at the environmental professional's discretion. AAI also includes specific educational and experience requirements for an environmental professional to ensure quality completion of AAI.

What funds are available to redevelop brownfields?

The Ohio Jobs Ready Sites (JRS) Program is a \$2 billion public works and economic development bond package that includes \$150 million in bond proceeds. Established in 2005, JRS is intended to create an inventory of large, regional end-use development sites. Sites do not need an identified end-user to be eligible for JRS funding. JRS is a competitive program administered by the Ohio Department of Development (ODOD).

JRS grant funds totaling \$150 million are to be awarded over the next seven years. The maximum grant available per project is \$5 million. Grants cannot exceed 75 percent of the total project costs, and a local match equal to at least 25 percent of the total costs to improve the site is also required. Grants will be distributed on a reimbursement basis and are subject to audit.

In addition to JRS, ODOD has recently announced initiation of Round 4 of the Clean Ohio Revitalization Fund (CORF). A competitive program with project match and eligibility requirements similar to JRS, CORF is part of the \$400 million Clean Ohio Fund, which provides grants of up to \$3 million per project related to the acquisition, demolition, remediation and infrastructure improvements of Ohio brownfields. These improvements, in turn, make Ohio's brownfields properties economically viable.

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