

# EnviroData®

## ***Environmental Information for the Real Estate Community***

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### **New ASTM Standard To The Rescue: Don't Be Liable For Prior Contamination At Your Property**

#### Background:

Since 1980 (CERCLA), owners of real estate have been liable for the cleanup of contamination caused by prior owners and users of the property (Joint and Several Liability). The far-reaching effects of this law have now been curtailed with the enactment of the Brownfields Amendments in January 2002, and more specifically, the EPA "All Appropriate Inquiries" (AAI) which went into effect in November 2006.

The new owner will no longer be held to be a potentially liable party if the new owner performed an AAI prior to taking title. The liability protections are applicable regardless of whether the new owner did not know about prior contamination (Innocent Purchaser), or did in fact know about prior contamination (Bona Fide Protective Purchaser). The liability protection is also effective if the contamination never originated on-site, but rather migrated from off-site (Contiguous Property Owner).

#### So What's the Problem?

Performing "All Appropriate Inquiries (AAI)" is not enough to block potential liability for cleanup of contamination which exists at the property when taking title. The law also requires that the new property owner comply with any "Continuing Obligations" that may apply. The problem is that neither the law nor the EPA has in the past defined what constitutes "Continuing Obligations."

#### ASTM Rescues Landowners

ASTM will shortly be releasing a new "Standard Guide for Identifying and Complying With Continuing Obligations on Real Property Impacted by Chemicals of Concern." This Standard will help landowners further protect themselves against environmental liability by addressing "Continuing Obligations" with a defensible industry standard.

The new ASTM Standard was developed with the participation and blessing of the U.S. EPA. The ASTM Committee also included representation from the environmental consultant community, commercial and industrial property owners, and related sectors.

#### What Are Continuing Obligations?

In order for a new property owner to be free of potential liability for contamination caused by others, the new property owner does have to prevent or limit human, environmental, or natural resource exposure to such prior hazardous substances releases. This includes, for example, disposing or emptying leaking containers, and/or otherwise limiting exposures to chemicals of concern currently present at the property.

The value to landowners of complying with the applicable Continuing Obligations that may apply is that the landowner would no longer be responsible for the big dollar expenditures associated with contamination cleanup. Such big dollar expenditures, which the new property owner would not be responsible for, could include removing source material, buried drums, preventing migration of uncontained groundwater containing chemicals of concern, preventing the leaching of chemicals of concern from soil into the groundwater, etc.

## How To Determine “Continuing Obligations”

To define the Continuing Obligations that may be applicable to your site, it would be prudent to hire the services of a Professional Engineer (P.E.), Professional Geologist (P.G.), or other state certified environmental professional (e.g. State of Ohio VAP Certified Professional).

For new real estate transactions going forward, it would be best to identify the Continuing Obligations together with the Phase I/AAI environmental assessment. This way, the new property owner will know with relative certainty what obligations – and associated costs – come with the property (in order to avoid the big dollar potential liabilities that might otherwise apply).

For real estate already bought and owned, the Continuing Obligations can be assessed at any time (as opposed to the Phase I/AAI which must have been done prior to taking title).

Remember that the liability protections only apply to properties purchased after January 11, 2002, and only if a Phase I/AAI Appropriate Inquiries was done prior to taking title.

There is no specific requirement to perform a Phase II investigation. If the new use of the property is industrial in nature (including the use of hazardous chemicals), then a Phase II is usually necessary in order to be able to distinguish and document the contamination caused by prior owners and users of the property. If the new use of the property is benign, and if there are no blatant contamination issues evident at the property, then a Phase II would usually not be necessary. However, where residual chemicals of concern may pose an unacceptable risk to human health and the environment for the intended use of the property (and this would include the zoning and intended demographics), then a Phase II or other further environmental investigations may be prudent.

Finally, “Continuing Obligations” requirements would also include complying with any institutional controls or land use restrictions (zoning, covenants, easements, consent decrees, etc.), providing full cooperation, assistance, and access to government paid-for response actions, complying with CERCLA information requests, and providing any applicable legally required notices with respect to the discovery or release of any hazardous substances.

While all the above may appear daunting, it doesn’t have to be. Hire an environmental consultant who understands “All Appropriate Inquiries” and “Continuing Obligations” and you will likely not be liable for the big dollars of cleaning up the contamination caused by prior owners or users of your property.

*Barry A. Cik is a member of the ASTM Committee drafting the new Standard Guide with the participation of the U.S. EPA.*