

## Qs & As on the Final Rule Making on all Appropriate Inquires

### **Q1. What is All Appropriate Inquiries and Why is it Required Under the Brownfields Amendments (to CERCLA)?**

**A1.** All appropriate inquiries is the process used by prospective purchasers to evaluate: (1) potential environmental contamination on, at, in or to a parcel of real property; and (2) a prospective purchaser's potential liability for such contamination. The final rule provides standards and practices for conducting all appropriate inquiries. The final rule will increase certainty regarding liability protection, improve information about environmental conditions of properties, increase the number and quality of cleanups, and reduce the use of greenfields.

Congress mandated that EPA develop these standards to ensure that prospective purchasers make sufficient efforts to identify actual and potential releases of hazardous substances at a property before acquisition. The requirement to conduct all appropriate inquiries is one of several statutory criteria required of prospective property owners who wish to claim protection from CERCLA liability, including those purchasers who may seek an innocent landowner defense on the basis that they did not know and had no reason to know of contamination prior to purchase.

### **Q2. What Are the Federal Standards for Conducting “All Appropriate Inquiries?”**

**A2.** On November 1, 2005, EPA published final federal standards governing the conduct of all appropriate inquiries in the Federal Register (70 FR 66070). The federal standards will be codified at 40 CFR 312. Parties wishing to establish protection from CERCLA liability as a bona fide prospective purchaser, innocent landowner, or contiguous property owner, must conduct all appropriate inquiries prior to acquiring a property. Parties receiving EPA brownfields grants to characterize or assess brownfields properties also must comply with the federal standards for all appropriate inquiries.

### **Q3. When is the Effective Date of the Final Rule?**

**A3.** The final rule is effective on November 1, 2006—one year after being published in the Federal Register.

### **Q4. What is the Applicable Standard for All Appropriate Inquiry Until the Final Rule takes Effect?**

**A4.** Until the effective date of the final rule, the federal interim standard established by Congress in the Brownfields Amendments remains in effect. The interim standard includes the procedures of ASTM International's (ASTM) Standard E1527-97 or E1527-00 (both entitled “Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process”). The interim standard became effective as of January 11, 2002 and applies to properties purchased on or after May 31, 1997. Prior to the effective date of the final rule (November 1, 2006), parties also may comply with the requirements for all appropriate inquiries by following the provisions of the final rule or using the ASTM E1527-05 standard.

### **Q5. Who is Affected by the All Appropriate Inquiries Final Rule?**

**A.5.** The final all appropriate inquiries requirements are applicable to any party who may wish, either at the time of purchase of a property or at any time subsequent to purchase, claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner.

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Parties who receive grants under the EPA's Brownfields Grant program to assess or characterize properties must comply with the all appropriate inquiries standards.

### **Q6. What is the Scope of the Final Rule?**

**A6.** In the case of persons claiming one of the CERCLA landowner liability protections, the scope of the final rule includes the conduct of all appropriate inquiries for the purpose of identifying conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the property.

In the case of persons receiving federal brownfields grants to conduct site characterizations or assessments, the scope of the all appropriate inquiries rule may include other pollutants and contaminants or petroleum and petroleum products.

### **Q7. When Must All Appropriate Inquiries Be Conducted?**

**A7.** All appropriate inquiries must be conducted or updated within one year prior to the date of acquisition of a property. If all appropriate inquiries are conducted more than 180 days prior to the acquisition date, certain aspects of the inquiries must be updated.

### **Q8. What Specific Activities Does the Rule Require?**

**A8.** Many of the activities required by the regulation must be conducted by, or under the supervision or responsible charge of, an individual who qualifies as an environmental professional as defined in the final rule. The inquiry conducted by an environmental professional must include:

- interviews with past and present owners, operators and occupants;
- reviews of historical sources of information;
- reviews of federal, state, tribal and local government records;
- visual inspections of the facility and adjoining properties;
- consideration of commonly known or reasonably ascertainable information; and
- assessment of the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate investigation.

Additional inquiries that must be conducted by or for the prospective landowner or grantee include:

- searches for environmental cleanup liens filed or recorded under federal, tribal, state or local law;
- an assessment of any specialized knowledge or experience of the prospective landowner (or grantee);
- an assessment of the relationship of the purchase price to the fair market value of the property, if the property was not contaminated; and
- consideration of commonly known or reasonably ascertainable information (joint responsibility with environmental professional).

### **Q9. How Does this Rulemaking Benefit Prospective Purchasers of Property?**

**A9.** The final rule clearly lays out the standards that prospective purchasers must follow to meet the all appropriate inquiries requirements under CERCLA. Satisfying these requirements is one of the threshold criteria for obtaining protection from Superfund liability. The final rule provides clarity and direction for how to conduct all appropriate inquiries, as directed by Congress in the Brownfields Amendments to CERCLA.

**Q10. How Does the Final Rule Differ from the Proposed Rule?**

**A10.** The final rule differs from the proposed rule in that EPA modified the proposed definition of an environmental professional to allow individuals without college degrees but having ten years of full-time relevant experience to qualify as environmental professionals. EPA also modified the requirement to search for institutional controls. The final rule requires that such searches only be conducted for the subject property, and not for nearby and adjoining properties. The final rule also clarifies that all appropriate inquiries must be conducted or updated within one year prior to the date of acquisition of the property.

**Q11. How Does the Final Rule Compare to the Interim Standard?**

**A11.** The final federal standards build upon the structure and content of the ASTM Phase I Environmental Site Assessment Standard (the E1527 standard). The final rule includes an expanded definition of environmental professional and requires that most activities be conducted by or under the supervision of an environmental professional. In addition, the final rule requires that prospective purchasers of abandoned properties interview neighboring property owners to obtain information on past uses and ownership of the abandoned property. A more detailed comparison of the final rule and the interim standard (the ASTM E1527 standard) is included in the document titled “Comparison of the Final All Appropriate Inquiries Standard and the ASTM E1527-00 Environmental Site Assessment Standard” and is available at [www.epa.gov/brownfields](http://www.epa.gov/brownfields).

**Q12. Who Qualifies as an “Environmental Professional” for the Purposes of the All Appropriate Inquiries Final Rule?**

**A12.** To ensure the quality of all appropriate inquiries, the final rule includes specific educational and experience requirements for an environmental professional. The definition applies only to persons overseeing the conduct of all appropriate inquiries for the specific purposes outlined in the final rule. The final rule defines an environmental professional as someone who possesses sufficient specific education, training, and experience to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to a property sufficient to meet the objectives and performance factors of the rule. In addition, an environmental professional must have:

- A state or tribal issued certification or license and three years of relevant full-time work experience; or
- A Baccalaureate or higher degree in science or engineering and five years of relevant full-time work experience; or
- Ten years of relevant full-time work experience.

**Q13. May Persons Who Do Not Qualify as Environmental Professionals Participate in the Conduct of All Appropriate Inquiries?**

**A13.** Individuals who do not meet the requirements for an environmental professional may still participate in the conduct of all appropriate inquiries. However, they must work under the supervision or responsible charge of an individual who does meet the requirements for an environmental professional.

**Q14. Once a Property Owner Complies with the All Appropriate Inquiries Requirements Is He or She Protected from Liability under CERCLA?**

**A14.** No. Conducting all appropriate inquiries prior to acquiring a property is only one requirement for establishing protection from liability under CERCLA as an innocent landowner, bona fide prospective

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purchaser, or contiguous landowner. CERCLA also requires that property owners comply with certain “continuing obligations” after purchasing a property to maintain protection from liability. The continuing obligations include such activities as taking reasonable steps to stop continuing releases and prevent future releases (see CERCLA Sections 101(35)(B), 101(40)(C)-(G), and 107(q)(1)).

**Q15. Is a Prospective Property Owner Required to Conduct a Formal Appraisal of a Property to Comply with the Requirements of 40 CFR 312.29, “The Relationship of the Purchase Price to the Value of the Property, If the Property Was Not Contaminated?”**

**A15.** The rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion. Although there may be value in conducting an appraisal, a formal appraisal is not necessary for the prospective landowner or grantee to make a general determination of whether the price paid for a property reflects its fair market value. In the case of many property transactions, a formal appraisal may be conducted for other purposes (*e.g.*, to establish the value of the property for the purposes of establishing the conditions of a mortgage or to provide information of relevance where a windfall lien may be filed). In cases where the results of a formal property appraisal are available, the appraisal results may serve as an excellent source of information on the fair market value of the property.

In cases where the results of a formal appraisal are not available, the determination of fair market value may be made by comparing the price paid for a particular property to prices paid for similar properties located in the same vicinity as the subject property, or by consulting a real estate expert familiar with properties in the general locality and who may be able to provide a comparability analysis. The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property generally is reflective of its fair market value. Significant differences in the purchase price and fair market value of a property should be noted and the reasons for any differences also should be noted.

**Q16. What Are the Requirements with Regard to the Need to Search for Engineering Controls? The Preamble to the Final Rule at 70 FR 66093 and 66094 States that the Search for Both Institutional and Engineering Controls Pertains Only to the Subject Property, but Section 312.26(c)(2)(ii) of the Final Rule, Relating to Searches for Evidence of Contamination from Nearby or Adjoining Properties, Seems to Require a Search for Engineering Controls.**

**A16.** The final rule does not require a search for engineering controls beyond the subject property. However, the final rule does require a search for information about ~~on~~ nearby properties that may have residual contamination that could affect the subject property. The objective of section 312.26(c)(2) is to identify nearby properties that have been identified or regulated by a government entity as properties with environmental concerns. Such properties could have residual contamination contained in place or left unaddressed that may impact the subject property (*e.g.*, limit the use of ground water resources). The records and data bases listed after 312.26(c)(2) as (i), (ii) and (iii) are examples of records or data bases that may be useful sources of information regarding potentially contaminated surrounding properties. The requirement may be satisfied by obtaining the information from as little as one of the three sources listed or by obtaining such information from a different source.

**Q17. What Is the Intent or Meaning of "Equivalent" in the Definition of Environmental Professional Provided in Section 312.10 of the Final Rule (e.g., "Have the *Equivalent* of 10 Years of Full-time Relevant Experience.")? Can One Substitute College Credit or Professional Development Activities for "Relevant Experience?"**

**A17.** The word "equivalent" in the definition of "environmental professional;" provided in the final rule is meant to denote that the years of experience necessary to qualify as an environmental professional do not have to be consecutive, or continuous full-time experience over a single ten- year time period. Thus, persons who work "part time" can reach qualification once they accumulate the equivalent of 10 years of "full-time" experience. For example, if a person works 20 hours per week, he or she would accumulate 10 years of "full-time" experience after working for 20 years.

The use of the term "equivalent" does not mean that the corresponding phrase – "relevant experience" – may be interpreted subjectively. Every year of experience must fall within the definition of "relevant experience" provided in the final rule. College course work or any other experience that does not meet the regulatory definition of "relevant experience" can NOT be substituted. A person must have the necessary years of "full-time relevant experience" to qualify as an environmental professional. An individual with a P.E., P.G. or other state or tribal certification must have 3 years of relevant full-time experience. A person with a college degree must have 5 years of full-time relevant experience. A person without a degree must have 10 years of full-time relevant experience.

**Q18. When a State or Tribal Government Conducts Targeted Brownfields Assessments (TBAs) Using Grants Issued under the Authorities of Section 128 of CERCLA, must the State or Tribe Perform the Assessment in Compliance with the All Appropriate Inquiries Rule?**

**A18.** No. Grants issued to states and tribes under the authorities of Section 128 of CERCLA are not subject to the same restrictions as grants issued under the authorities of Section 104(k). State and tribal governments performing brownfields assessments using grant funds issued under CERCLA Section 128 do not have to conduct the assessments in compliance with the all appropriate inquiries requirements. However, it may be prudent for a state or tribal government to comply with the all appropriate inquiries requirements when conducting a property assessment if there is any reason to believe that the entity for whom the assessment is being performed, or the owner of the property that is being assessed, may in the future apply for a brownfields grant that will be issued under the authorities of CERCLA Section 104(k). To be eligible for a brownfields site-specific assessment grant, a cleanup grant, or a revolving loan fund grant, the grant applicant will have to demonstrate that the applicant, or property owner, is an innocent landowner, a bona fide prospective purchaser, a contiguous property owner, or otherwise protected from liability under CERCLA. To qualify as an innocent landowner, bona fide prospective purchaser, or contiguous property owner, a property owner must conduct all appropriate inquiries prior to purchasing the property. In addition to the above grant scenarios, there may be other circumstances under which compliance with the all appropriate inquiries final rule may be prudent, such as where a state or tribe is conducting the assessment on behalf of an entity who may later wish to claim protection from CERCLA liability. In such cases there is no EPA mandate for compliance, but there may be other compelling reasons to comply voluntarily.

**Contact for Further Information:** Patricia Overmeyer, Office of Brownfields Cleanup and Redevelopment, (202) 566-2774.