

Nixon Peabody LLP

Affordable Housing Law Alert

Developments in Affordable Housing Law

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EPA's Final "All Appropriate Inquiry" Rule Changes Owner Liability/Environmental Due Diligence Standards

Background

By now, most property owners are familiar with the need to conduct so-called Phase I environmental assessments before acquiring property. These assessments are performed under technical guidance issued in 2000 by the American Society for Testing and Methods ("ASTM"). On November 1, 2005, the United States Environmental Protection Agency ("EPA") issued the Final Rule Standards and Practices for All Appropriate Inquiries (the "Rule"). 70 Fed. Reg. 66070. The Rule adopts the revised 2005 version of the ASTM Phase I standard (E-1527-05) (the "2005 Standard"), makes the old 2000 ASTM standard obsolete, and sets forth the regulatory "standards and practices" for conducting "all appropriate inquiries" into a property's previous ownership and operations.

Specifically, the Rule establishes the level of environmental due diligence required of landowners wishing to qualify for certain protections from strict liability for cleanup costs under CERCLA. In order to qualify for liability exemptions as an innocent landowner, contiguous property owner, and bona fide prospective purchaser, property buyers will now have to adhere to the Rule's "all appropriate inquiries" standards and practices as well as other statutory criteria. For the full text of the Rule and other materials relating to the Rule, please see the EPA's All Appropriate Inquiry Rulemaking Website: <http://www.epa.gov/swerosps/bf/regneg.htm>.

The Impact of the Rule

These new Rule dramatically changes the nature and extent of Phase I environmental assessments and environmental due diligence generally. Among these changes:

- The Rule imposes heightened professional qualification requirements on persons conducting Phase I assessments. The Rule takes into account academic and field



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experience and sets forth certain minimum qualifications. Buyers need to make sure that, as a condition to employment, environmental experts performing Phase I environmental assessments certify that they meet these requirements.

- The investigation performed by the environmental professional must be fully documented, including preparation of a formal “environmental opinion” that identifies any conditions that indicate a release or threatened release of hazardous substances on, at, in or to the subject property. The opinion must also identify any “data gaps” that affect the environmental professional’s ability to render such an opinion.
- The necessary investigation must be conducted or updated within one year prior to the date of the property acquisition. Certain components of the investigation, such as searches with past and present owners and operators and searches of environmental lien records, must be updated within 180 days prior to the acquisition date.

Rule’s Effects

The Rule will have far-reaching effects on most large-scale real estate transactions, including most transactions involving multifamily housing developments. Aside from the regulatory impact, however, lenders will expect that new Phase I environmental assessments will comply with the 2005 Standard, so it is important that persons contemplating the sale or acquisition of multifamily property immediately become familiar with the Rule and the 2005 Standard. The Rule’s inevitable impact will be to increase due diligence costs and time frames and it is likely to drive more Phase II investigations.

For More Information

Nixon Peabody attorneys and in-house technical professionals have the experience necessary to guide you through all environmental due diligence matters involving affordable housing. If you have any questions or require further information regarding these or any other matters, please contact:

Jean McCreary, Esq.	585-263-1611	jmccreary@nixonpeabody.com
Trisha Smith, Esq.	516-832-7572	tsmith@nixonpeabody.com
James Kerouac, Esq.	603-628-4096	jkerouac@nixonpeabody.com
Harry Kelly, Esq.	202-585-8712	hkelly@nixonpeabody.com

Affordable Housing Team

Please feel free to call or e-mail (*emailname@nixonpeabody.com*) any of the Affordable Housing team members listed below.

ATTORNEY	E-MAIL NAME	PHONE
Paul E. Bouton	pbouton	617-345-1240
Arlo M. Chase	achase	212-940-3758
David P. Corsi	dcorsi	415-984-8426
Gary R. Eisenman	geisenman	212-940-3722
Harry J. Kelly	hkelly	202-585-8712
John L. Kelly	jkelly	212-940-3790
Randall Kelly	rkelly	202-585-8760
Joseph Lynch	jjlynch	212-940-3717
Richard M. Price	rprice	202-585-8716
Michael H. Reardon	mreardon	202-585-8304
Anthony D. Ruvolo	aruvolo	202-585-8820
Jeffrey W. Sacks	jsacks	617-345-1056
Alexandra Stefanovic	astefanovic	202-585-8158
Monica H. Sussman	msussman	202-585-8833
Patrice Harris Talbott	ptalbott	202-585-8729
Dwayne M. Toliver	dtoliver	202-585-8852
Stephen J. Wallace	swallace	202-585-8714
Justine E. Wilcox	jwilcox	202-585-8745

Visit www.nixonpeabody.com

Albany, NY
30 South Pearl Street
518-427-2650

Boston, MA
100 Summer Street
617-345-1000

Buffalo, NY
40 Fountain Plaza, Suite 500
716-853-8100

Garden City, NY
990 Stewart Avenue
516-832-7500

Hartford, CT
185 Asylum Street
860-275-6820

Los Angeles, CA
555 West 5th Street, 46th Floor
213-533-1050

Manchester, NH
889 Elm Street
603-628-4000

New York, NY
437 Madison Avenue
212-940-3000

Orange County, CA
2040 Main Street, Suite 850
949-475-6900

Palm Beach Gardens, FL
4400 PGA Boulevard, Suite 900
561-626-3011

Philadelphia, PA
1818 Market Street
215-246-3520

Providence, RI
One Citizens Plaza
401-454-1000

Rochester, NY
1100 Clinton Square
585-263-1000

San Francisco, CA
Two Embarcadero Center
415-984-8200

Washington, DC
401 9th Street, N.W., Suite 900
202-585-8000