

# Landowner Liabilities & “All Appropriate Inquiry”

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*Landowner Liability Protections are available only if a Phase I Environmental Site Assessment was conducted prior to purchasing property*

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## Overview

Under many conditions, land owners can be held responsible for the investigation and clean up costs associated with contamination on their property. This liability exists even if the current property owner did not cause or contribute to the problem or was unaware that the problem existed when the property was purchased. This liability could even extend to cleaning up contamination that came onto their property from adjacent lands.

In 2002, the Small Business Liability Relief and Brownfields Revitalization Act developed certain conditions under which businesses could be protected from these liabilities, termed **Landowner Liability Protections**, or LLPs. One of the key requirements for businesses wishing to be eligible for LLPs is that “all appropriate inquiry” was conducted prior to purchasing the property to determine if known or suspected contamination exists.

In November of 2005, US EPA promulgated its final rule on what level of due diligence is required to fulfill “all appropriate inquiry”. These requirements **become final on November 1, 2006**.

This Regulatory Update provides some basic information on Landowner Liability Protections available and on the requirements for “all appropriate inquiry”.

## Who Should Be Interested?

Businesses that buy or sell property will be directly impacted by the changes to the due diligence requirements. Professionals involved in real estate transactions will also be interested, including commercial and residential real estate brokers and agents, business brokers, and all types of lenders and/or investors.

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### **Activity & Use Restrictions (AULs)**

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*AULs are explicit restrictions on the uses and/or activities that are allowed on a property. The existence of an AUL should be considered an indication that the property is contaminated and not suitable for unrestricted use.*

*“Industrial Use Only” restriction may indicate that contamination was partially cleaned up to meet industrial standards. Restrictions could also limit physical changes to the buildings, parking lots, etc.*

*To be eligible for LLPs, Owners must know and have complied with all AULs*

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## **Landowner Liability Protections**

Three forms of landowner liability protections (LLPs) are defined (see below). It is important to note that these LLPs do not infer that nothing needs to be done to investigate and/or clean up a property - they simply place the financial liability on others, usually the previous landowner or an adjacent landowner. The current landowner will need to cooperate with all activities required on the property, which could include limitations on the use of their property.

### **Innocent landowner:**

Applies to prospective purchasers, governmental agencies acquiring properties through eminent domain or condemnation, or persons acquiring property by inheritance or bequest.

### **Bona fide prospective purchaser:**

Applies to any prospective purchaser; differs from an “innocent landowner” because although both require “all appropriate inquiry” prior to purchase, bona fide prospective purchaser protection can apply even if evidence of contamination is discovered on the property. An innocent landowner protection only applies if there is no evidence found that contamination may exist prior to purchase.

### **Contiguous property owner:**

Applies to property owner who’s property is contaminated due to releases from an adjacent property, owned by a separate party.

## **Conducting “All Appropriate Inquiry”**

On November 1, 2005, USEPA finalized the requirements for due diligence which meet the “all appropriate inquiry” requirement. To be eligible for LLPs, land owners must have completed these requirements prior to purchasing/acquiring the property:

### **1. Complete all User requirements, including:**

- Complete User Questionnaire
- Conduct review of judicial and title records for applicable Activity & Use Restrictions (AULs)
- Demonstrate compliance with any AULs

### **2. Conduct a Phase I Environmental Site Assessment that meets the ASTM E 1527-05 standard.**

## Key Changes To The ESA Requirements

The American Society for Testing & Materials (ASTM) has published a standard method for conducting Phase I ESAs since 1996. In coordination with the US EPA “all appropriate inquiry” requirements, ASTM published a revised method in November 2005.

Although many elements used when conducting an ESA remained similar, here are some key changes:

### Restricted Qualifications on Who Can Conduct ESAs.

The new standard places much more restrictions on who can be considered qualified to conduct ESAs. Industry surveys indicate that approximately 25% of individuals currently preparing ESAs will no longer be considered qualified.

### Increased Emphasis on Activity & Use Restrictions.

Although consideration of Activity & Use Restrictions (AULs) has been included in previous ASTM methods, the 2005 method increases the importance of these restrictions. The method places the responsibility for identifying applicable AULs in title or judicial records on the prospective Buyer. To be eligible for LLPs, a property owner must also demonstrate that they have complied with all AULs.

**Required Interviews With On-site Staff.** In the past, a “good faith effort” was required to interview a **KEY SITE MANAGER**. Under the new ASTM standard, an interview with a key site manager is required.

In addition, the new standard practice requires that the **CURRENT OCCUPANT(S)** also be interviewed. This is particular important for multi-tenant properties.

**Interviewing Past Owners & Occupants.** Until 2005, the ASTM practice did not include any requirements for interviewing **PAST OWNERS & OCCUPANTS** of a property. Under the 2005 standard practice, a good faith effort must be demonstrated that past owners and occupants were identified and interviewed.

### Increased Requirements For Abandoned Properties.

In some cases, properties have been vacant for some time and no current or past Owners or Occupants can be contacted. In this case, the ASTM standard requires that neighbors to be property be contacted for any information on past uses/activities on the property.

Finally, it is important to consider that the ESA process is only one element of environmental due diligence (although it is the only element required for LLPs). Other business risks may be important to a purchaser, which are **not considered as part of the ASTM standard practice**. These issues need to be discussed with the environmental professional conducting the assessment.

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## Useful Links

You can get more information on the LLPs and AAI through these links:

<http://www.epa.gov/brownfields/regneg.htm>

-this page provides US`EPA`s summary of AAI requirements

<http://www.epa.gov/compliance/cleanup/redevelop/>

-this page provides information on LLPs.