

**New Phase I Requirements for Real Estate Transactions:
Implications of the New “All Appropriate Inquiries” Rule**

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I. INTRODUCTION

Effective November 1, 2006, land purchasers who wish to qualify for the innocent landowner defense, bona fide prospective purchaser defense or the contiguous property defense under the Superfund statute, or CERCLA, will be required to comply with the new Environmental Protection Agency (EPA) rule which, for the first time, defines what constitutes “all available inquiries” for purposes of showing that the purchaser had no “reason to know” of a release of hazardous substances before acquiring property. While the rule is designed to afford purchasers a route to CERCLA defenses, it raises issues which buyers and sellers may want to take into consideration in property acquisition for non-CERCLA purposes.

II. TIMELINE

A. January 11, 2002: Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Amendments”) amends Comprehensive Response, Claims and Liability Act of 1980 (“CERCLA”).

B. EPA is directed to write a rule by January 11, 2004, setting forth what constitutes “All Appropriate Inquiries” for purposes of qualifying for the “innocent purchaser” defense to CERCLA liability in property acquisitions.

C. Congress sets “Interim Standards” and final standards for what constitutes “All Appropriate Inquiries” by a purchaser seeking liability protection. *See* Attachment A, CERCLA excerpts, and specifically §9601(35)(B):

1. For property purchased before May 31, 1997:
 - a. Any specialized knowledge/experience on the part of the defendant;
 - b. Relationship of the purchase price to the value of the property, if the property was not contaminated;

- c. Commonly known or reasonably ascertainable information about the property;
- d. Obviousness of the presence/likely presence of contamination at the property;
- e. Ability of defendant to detect the contamination by appropriate inspection.

2. For property purchased on/after May 31, 1997 and until effective date of EPA rule: Procedures of American Society for Testing and Materials (“ASTM”), including document known as “Standard E1527-97,” entitled “Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process,” shall satisfy requirement for “all appropriate inquiries” in 42 U.S.C.A. §9601(35)(B)(i).

3. Under the Brownfields amendment, “all appropriate inquiries” means compliance with clauses (ii) and (iv) of §9601(35)(B), defining “Reason to know.” Clauses (ii) means the EPA rule; Clause (iv) means the interim standards; so after November 1, 2006, the EPA rule controls.

D. November 1, 2006: New rule becomes effective. New rule provides choice between compliance with the rule itself, 40 CFR Part 312, or revised ASTM E1527-05. *See* Attachment D, EPA Rule, 40 CFR §312.11 (“The following industry standards may be used to comply with the requirements set forth in §§312.23 through 312.31: (a) The procedures of ASTM² International Standard E1527-05 entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process...”).

1. The ASTM E1527-05 standard is subject to ASTM copyright. Full copies can be obtained from ASTM, and are highly recommended for anyone contracting for, or reviewing, Phase I assessments. <http://webstore.ansi.org/ansidocstore/astm.asp?source>

² The American Society for Testing and Materials Standards.

=google&adgroup=ASTM&keyword=astm&gclid=C
LCMm4qQ3YUCFRN7NAodQHw_Ow

2. For a fuller explanation of the Rule, see the Federal Register, Tuesday, November 1, 2005, 66070-66113.

III. OTHER IMPLICATIONS OF NEW RULE

A. A person acquiring the environmental site assessment (ASTM E1527-05: “user”; EPA Rule, §312.1(c): “person seeking to establish one of the liability protections under paragraph (b)(1) of this section”) must require an Environmental Professional to conduct an investigation which complies with the Rule, in order to establish that she or he has made “all appropriate inquiries” for purposes of limitations on CERCLA liability. A first step is to be sure that the Environmental Professional is contractually obligated to comply with the Rule.

1. Environmental professional is newly defined. Work must be supervised by person who meets requirements of §312.10(b) definition.

2. Investigation itself must meet requirements of 40 CFR Part 312 or ASTM E1527-05.

3. “User” should consider contractually requiring the designated Environmental Professional to meet the designated standard.

4. Purpose of investigation under Rule (for innocent landowner defense, bonafide prospective purchaser defense, contiguous property owner defense): “to identify conditions indicative of releases or threatened releases, as defined in CERCLA section 101(22), of hazardous substances, as defined in CERCLA section 101(14).” 40 CFR §312.1(c)(1).

5. For the innocent landowner, bonafide prospective purchaser and contiguous property owner defenses, the Rule focuses on “hazardous substances,” not “petroleum products.”

6. ASTM E1527-05 continues the prior practice under this standard of including petroleum products in the investigation.

7. “User” should specify that Environmental Professional will comply with ASTM E1527-05, to include petroleum products.

8. Example: Contract or executed engagement letter might specify: “Company [defined environmental consultant] shall perform an environmental site

assessment of Property [defined] which complies with the requirements of Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process known as ASTM E1527-05.”

B. Buyer and/or seller should consider including a contract provision requiring that an environmental site assessment be performed which complies with ASTM E1527-05. This may offer advantages to both buyer and seller.

1. ASTM E1527-05 provides a road map for disclosures by the seller, who may wish to be able to point out his or her compliance with the requirements.

a. ASTM E1527-05 requires the current owner to permit a site reconnaissance.

b. The current owner must also identify a key site manager “with good knowledge of the uses and physical characteristics of the property” (10.5.1). This interviewee and others are to be asked to be as specific as reasonably feasible in answering questions and to answer in good faith (a defined term) and to the extent of their knowledge (10.6).

c. “Good faith” is defined by the Rule and ASTM E1527-05 as “the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one’s obligations in the conduct or transaction concerned.”

d. The key site manager and the “user” if different from the property owner are to identify “helpful documents” for the EP (10.8), and to state whether copies can and will be provided to the EP:

- (1) Environmental site assessment reports;
- (2) Environmental compliance audit reports;
- (3) Environmental permits (for example, solid waste disposal permits, hazardous waste disposal permits, wastewater permits, NPDES permits, underground injection permits);
- (4) Registrations for underground and above-ground storage tanks;
- (5) Registrations for underground injection systems;
- (6) Material safety data sheets;
- (7) Community right-to-know plan;
- (8) Safety plans, spill prevention plans, etc.;
- (9) hydrogeologic and geotechnical reports;
- (10) regulatory correspondence on environmental matters;
- (11) hazardous waste reports;
- (12) risk assessments;
- (13) recorded activity and use limitations.

2. The “user” also has responsibilities under ASTM E1527-05. For example, the “user” must convey any actual knowledge to the Environmental Professional on several fronts: any specialized knowledge or experience that is material to recognized environmental conditions (6.3); knowledge of any environmental lien or use limitation (6.4); commonly known or reasonably ascertainable information within the community about the property that is material to recognized environmental conditions (6.6); knowledge that a prior site assessment is not accurate (4.8). The “user” is to consider the relationship of the purchase price to the price of the land if the land is not contaminated. The user, like the current owner and key site manager, are asked to identify “helpful documents” (10.8). The requirement that such knowledge be disclosed by the “user” is protective to the seller.

C. To what extent should buyer and seller contract to comply with ASTM E1527-05?

1. Example: The parties could agree that “Seller and buyer shall identify and provide to the Environmental Professional all “Helpful Documents” as listed in ASTM E1527-05,” 10.8.1.

2. Example: The parties could agree that “Seller shall make available for interview a person with good knowledge of the uses and physical characteristics of the property,” 10.5.1, and could further provide that interviewees for the site assessment shall “answer in good faith and to the extent of their knowledge,” 10.6.

IV. CASELAW TO CONSIDER

A. *Warehouse Associates Corporate Centre II, Inc., et al. v. Celotex Corp., et al.*, 2006 WL 1148117 (Tex.App.-Hous. [14th Dist.], rule 53.7(f) motion granted May 15, 2006) (*see* Attachment C). The appellate court found that the seller’s “key site manager” failed to disclose to the Buyer the property’s past use for asbestos shingle manufacture and also failed to disclose a recent discovery of buried shingle waste onsite. Asked to provide prior reports, the seller provided part of a prior report on asbestos-containing material in structures onsite, but not the part of the report that detailed the seller’s use of asbestos in prior manufacturing. In the contract, the seller disclaimed all warranties and was not required to provide prior reports. The buyer was permitted to test and investigate. The buyer sued for common law and statutory fraud and negligent misrepresentation, but not for fraudulent inducement. The trial court

granted summary judgment for the seller based on the contract’s as-is and waiver-of-reliance provisions.

1. The appellate court analyzed the claims in light of *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 160-62 (Tex. 1995) and *Schlumberger Technology Corporation v. Swanson*, 959 S.W.2d 171 (Tex. 1997). The court affirmed summary judgment for the seller on the issue of “impairment of inspection,” relying heavily on the definition of “inspection” (term used in *Prudential*) as meaning a visual inspection, as opposed to an “investigation.” The buyer had had an opportunity to “inspect,” and could have sampled the property. While in *Prudential* the documents which the seller did not produce would not have alerted the buyer to the presence of asbestos in the building at issue, in this case the withheld portion of the report would arguably have alerted the buyer to the past use of asbestos in manufacturing (and, hence, possibly to its presence on the property). However, the court held that the seller had not impaired the buyer’s inspection.

2. The court held, however, that a genuine issue of fact precluded summary judgment on the as-is and waiver-of-reliance provisions.

3. Consider whether the case would come out differently if the contract had: (1) required production of prior reports; (2) required identification and production of “Helpful documents” under 10.8; (3) required compliance by both parties with ASTM E1527-05.

4. Consider whether the appellate court’s analysis of the “impairment of inspection” exception to the as-is clause, under *Prudential*, is realistic in light of the non-sampling nature of the typical Phase I environmental site assessment.

5. Note that the appellate court pointed out that the buyer had not claimed “fraudulent inducement.”

ATTACHMENT A

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 [CERCLA § ____]

(42 U.S.C.A. §§ 9601 to 9675)

CHAPTER 103—COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY

§ 9601. Definitions

(35)(A) The term “contractual relationship”, for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

(B) Reason to know

(i) All appropriate inquiries

To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that—

(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

(II) the defendant took reasonable steps to—

(aa) stop any continuing release;

(bb) prevent any threatened future release; and

(cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

(ii) Standards and practices

Not later than 2 years after January 11, 2002, the Administrator shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under clause (i).

(iii) Criteria

In promulgating regulations that establish the standards and practices referred to in clause (ii), the Administrator shall include each of the following:

(I) The results of an inquiry by an environmental professional.

(II) Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.

(III) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and oc-

cupancies of the real property since the property was first developed.

(IV) Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.

(V) Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records; concerning contamination at or near the facility.

(VI) Visual inspections of the facility and of adjoining properties.

(VII) Specialized knowledge or experience on the part of the defendant.

(VIII) The relationship of the purchase price to the value of the property, if the property was not contaminated.

(IX) Commonly known or reasonably ascertainable information about the property.

(X) 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.

(iv) Interim standards and practices

(I) Property purchased before May 31, 1997

With respect to property purchased before May 31, 1997, in making a determination with respect to a defendant described in clause (i), a court shall take into account—

(aa) any specialized knowledge or experience on the part of the defendant;

(bb) the relationship of the purchase price to the value of the property, if the property was not contaminated;

(cc) commonly known or reasonably ascertainable information about the property;

(dd) the obviousness of the presence or likely presence of contamination at the property; and

(ee) the ability of the defendant to detect the contamination by appropriate inspection.

(II) Property purchased on or after May 31, 1997

With respect to property purchased on or after May 31, 1997, and until the Administrator promulgates the regulations described in clause (ii), the procedures of the American Society for Testing and Materials, including the document known as 'Standard E1527-97', entitled 'Standard Practice for Environmen-

tal Site Assessment: Phase 1 Environmental Site Assessment Process', shall satisfy the requirements in clause (i).

(v) Site inspection and title search

In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

(40) Bona fide prospective purchaser

The term "bona fide prospective purchaser" means a person (or a tenant of a person) that acquires ownership of a facility after the date of the enactment of this paragraph and that establishes each of the following by a preponderance of the evidence:

(A) Disposal prior to acquisition

All disposal of hazardous substances at the facility occurred before the person acquired the facility.

(B) Inquiries

(i) In general

The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with clauses (ii) and (iii).

(ii) Standards and practices

The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) of this section shall be considered to satisfy the requirements of this subparagraph.

(iii) Residential use

In the case of property in residential or other similar use at the time of purchase by a non-governmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) Notices

The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.

(D) Care

The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to—

(i) stop any continuing release;

(ii) prevent any threatened future release;
and

(iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

(E) Cooperation, assistance, and access

The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).

(F) Institutional control

The person—

- (i) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and
- (ii) does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.

(G) Requests; subpoenas

The person complies with any request for information or administrative subpoena issued by the President under this chapter.

(H) No affiliation

The person is not—

- (i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through—
 - (I) any direct or indirect familial relationship; or
 - (II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or
- (ii) the result of a reorganization of a business entity that was potentially liable.

§ 9607. Liability

[CERCLA § 107]

- (a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- (4) any combination of the foregoing paragraphs.

(q) Contiguous properties

(1) Not considered to be an owner or operator

(A) In general

A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not—

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(iii) the person takes reasonable steps to—

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person—

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under this chapter;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) At the time at which the person acquired the property, the person

(I) conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

(B) Demonstration

To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(C) Bona fide prospective purchaser

Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 9601(40) of this title if the person is otherwise described in that section.

(D) Ground water

With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

(2) Effect of law

With respect to a person described in this subsection, nothing in this subsection—

(A) limits any defense to liability that may be available to the person under any other provision of law; or

(B) imposes liability on the person that is not otherwise imposed by subsection (a) of this section.

(3) Assurances

The Administrator may—

(A) issue an assurance that no enforcement action under this chapter will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 9613(f) of this title.

ATTACHMENT B



Comparison of the Final All Appropriate Inquiries Standard and the ASTM E1527-00 Environmental Site Assessment Standard

INTRODUCTION

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Amendments), which amended the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. The Brownfields Amendments require the Environmental Protection Agency (EPA) to develop regulations establishing federal standards and practices for conducting all appropriate inquiries. Congress included in the Brownfields Amendments a list of criteria that the Agency must address in the regulations (section 101(35)(B)(iii) of CERCLA).

Subtitle B of Title II of the Brownfields Amendments revised the liability provisions of CERCLA Section 101(35) by clarifying the requirements necessary to establish the innocent landowner defense under CERCLA. In addition, the Brownfields Amendments amended CERCLA by providing additional liability protections for contiguous property owners and bona fide prospective purchasers. For the first time since the enactment of CERCLA in 1980, a person may purchase property with the knowledge that the property is contaminated without being held potentially liable for the cleanup of the contamination. To claim protection from liability, a prospective property owner must comply with the statutory requirements for obtaining the contiguous property owner or bona fide prospective purchaser liability defenses. Among these is the requirement to, prior to the date of acquisition of the property, undertake "all appropriate inquiries" into prior ownership and uses of a property.

The all appropriate inquiries requirements are applicable to any public or private party who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. In addition, parties receiving grants to conduct characterizations or assessments of brownfields properties under EPA's Brownfields Grant program must conduct the property characterization and assessment in compliance with the all appropriate inquiries requirements.

The purpose of this document is to present a comparison of the all appropriate inquiries requirements included in the final federal regulations and the requirements of the interim standard, the ASTM E1527-00 standard for Phase I environmental site assessments. The ASTM E1527-00 standard is the most prevalent industry standard for conducting Phase I environmental site assessments. This document highlights the main differences between the requirements of the final regulation and the ASTM E1527-00 standard for Phase I environmental site assessments.

Please note that in conjunction with the development of EPA's final rule setting federal standards for the conduct of all appropriate inquiries, ASTM International updated its E1527-00 standard. The new ASTM E1527-05 Phase I Environmental Site Assessment Standard is consistent and compliant with EPA's final rule and may be used to comply with the provisions of the all appropriate inquiries final rule. The differences outlined below apply only to the ASTM E1527-00 standard and are provided to assist the regulatory community in understanding the incremental differences between the requirements of the final rule and the previous ASTM

E1527 standard, which was the interim standard designated by the Brownfields Law. The differences discussed below are not applicable to the newly revised ASTM E1527-05 standard.

CROSSWALK LINKING THE FINAL AAI STANDARD AND THE ASTM E1527-00

To facilitate comparison between the two standards, Exhibit 1 presents a crosswalk linking the sections of all appropriate inquiries final rule with the relevant or corresponding sections of the ASTM E1527-00 standard, the interim standard that will remain in place until the effective date of the final rule. The first column in Exhibit 1 provides a list of the major activities required by the final rule. The second column in Exhibit 1 provides citations to the applicable sections of the regulation where the requirements are discussed. The third column in Exhibit 1 presents the corresponding sections of the ASTM E1527-00 standard. The fourth column in Exhibit 1 provides references to corresponding sections of the revised ASTM standard, ASTM E1527-05.

COMPARISON OF THE FINAL AAI STANDARD AND THE ASTM E1527-00 STANDARD

The final rule setting federal standards for conducting all appropriate inquiries includes requirements that correspond to all the major activities that are currently performed as part of environmental due diligence under the ASTM E1527-00 standard, such as site reconnaissance, record review, interviews, and documentation of environmental conditions. The final rule, however, enhances the inquiries by extending the scope of some of the environmental due diligence activities. In addition, the final rule establishes a more stringent definition of an environmental professional than the ASTM E1527-00 standard. The key differences between the two standards are summarized in Exhibit 2.

Each of the activities presented in Exhibit 2 is addressed in more depth in the sections following Exhibit 2.

Exhibit 1: Crosswalk between the All Appropriate Inquiries Rule and the ASTM E1527-00 Standard

Definitions and Requirements	Final AAI Standard ¹	ASTM E1527-00	ASTM E1527-05
Purpose	312.1(a)	1.1	1.1, 6.7
Applicability	312.1(b)	4.1, 4.2	4.1, 4.2, 4.5.3
Scope	312.1(c)	1	1
Disclosure Obligations	312.1(d)	Not specified	Not specified
Definition of Abandoned Property	312.10	Not defined	3.2.1
Definition of Adjoining Properties	312.10	3.3.2	3.2.4
Definition of Data Gap	312.10	Not defined	3.2.20
Definition of Environmental Professional	312.10	3.3.12	3.2.29; Appendix X2
Definition of Relevant Experience	312.10	Not defined	Appendix X2
Definition of Good Faith	312.10	Not defined	3.2.35
Definition of Institutional Controls	312.10	3.2.17	3.2.42
References	312.11	2	2
List of Components in All Appropriate Inquiries	312.20(a)	6	6, 7
Shelf Life of the Written Report	312.20(a)-(b)	4.6, 4.7	4.6, 4.7
Reports Prepared for Third Parties	312.20(c)-(d)	4.7	4.7
Objectives	312.20(e)	6.1	7.1
Contaminants of Concern	312.20(e)	1.1	1.1
Performance Factors	312.20(f)	7.1	8.1
Data Gaps	312.20(g)	7.3.2	12.7
Interview with Current and Past Owners and Occupants of the Subject Property	312.23(b), 312.23(c)	9	10
Interview with Neighboring or Nearby Property Owners or Occupants in the Case of Inquiries Conducted at Abandoned Properties	312.23(d)	Not specified	10.5.5
Review of Historical Sources: Suggested Sources	312.24(a)	7.3.4	8.3.4
Review of Historical Sources: Period to Be Covered	312.24(b)	7.3.2	8.3.2
Searches for Recorded Cleanup Liens	312.25	5.2, 7.3.4.4	6.2, 6.4, 8.3.4.4, 10.8.1.10
Records of Activity and Use Limitations (e.g., Engineering and Institutional Controls)	312.26	5.2	8.3.4.4
Government Records Review: List of Records	312.26(a), 312.26(b)	7.2	8.2
Government Records Review: Search Distance	312.26(c), 312.26(d)	7.1.2, 7.2	8.1.2
Site Visit: Requirements	312.27(a), 312.27(b)	8	9
Site Visit: Limitations	312.27(c)	8.2.4	9.2.4, 9.4
Specialized Knowledge or Experience	312.28	5.3	6.3, 12.3
The Relationship of the Purchase Price to the Value of the Property	312.29	5.4	6.5
Commonly Known or Reasonably Ascertainable Information about the Property	312.30	7.1.4	4.1, 6.6,
The Degree of Obviousness of the Presence or Likely Presence of Contamination	312.31	11.6, 11.7	12.6, 12.8, X.3
Signed Declarations to Be Included in the Written Report	312.21(d)	11.7, 11.11	12.12, 12.13

¹ Citations in column 2 are to Title 40 of the Code of Federal Regulations (e.g. 40 C.F.R. § 312.20).

Exhibit 2: Summary of Main Differences between the Final All Appropriate Inquiries Regulation and the ASTM E1527-00 Standard

Main Differences	Final AAI Standard	ASTM E1527-00
Definition of Environmental Professional	<ul style="list-style-type: none"> Specific certification/license, education, and experience requirements Applies only to individuals supervising all appropriate inquiries 	<ul style="list-style-type: none"> No specific certification, licensing, education, or experience requirements Applies to all individuals involved in conducting all appropriate inquiries
Interview with Current Owner and Occupants of the Subject Property	Mandatory	A reasonable attempt must be made to interview key site manager and reasonable number of occupants
Interview with Past Owner and Occupants	Interviews with past owners and occupants must be conducted as necessary to achieve the objectives and performance factors in §§ 312.20(e)-(f)	Not required, but must inquire about past uses of the subject property when interviewing current owner and occupants
Interview with Neighboring or Nearby Property Owners or Occupants	Mandatory at abandoned properties	Discretionary
Review of Historical Sources: period to be covered	From the present back to when the property first contained structures or was used for residential, agricultural, commercial, industrial or governmental purposes	All obvious uses from the present back to the property's first obvious developed use or 1940, whichever is earlier
Records of Activity and Use Limitations (e.g., Engineering and Institutional Controls) and Environmental Cleanup Liens	<ul style="list-style-type: none"> No requirement as to who is responsible for the search Scope of environmental cleanup lien search includes those liens filed or recorded under federal, state, tribal or local law 	<ul style="list-style-type: none"> User's responsibility The search results must be reported to the environmental professional Scope of environmental cleanup lien search is limited to reasonably ascertainable land title records
Government Records Review	<ul style="list-style-type: none"> Federal, state, tribal, and local Records 	<ul style="list-style-type: none"> Federal and state records Local records/sources at the discretion of the environmental professional
Site Inspection	<ul style="list-style-type: none"> Visual inspection of subject property and adjoining properties required Limited exemption with specific requirements if the subject property cannot be visually inspected 	<ul style="list-style-type: none"> Visual inspection of subject property required. No exemption. No specific requirement to inspect adjoining properties; only to report anything actually observed
Contaminants of Concern	<u>Parties seeking CERCLA defense:</u> <ul style="list-style-type: none"> CERCLA hazardous substances <u>EPA Brownfields Grant recipients:</u> <ul style="list-style-type: none"> CERCLA hazardous substances, pollutants or contaminants petroleum/petroleum products controlled substances 	CERCLA hazardous substances and petroleum products
Data Gaps	Requires identification of sources consulted to address data gaps and comments on significance of data gap with regard to the ability of the environmental professional to identify conditions indicative of releases and threatened releases	<ul style="list-style-type: none"> Generally discretionary; Sources that revealed no findings must be documented.
Shelf Life of the Written Report	One year, with some updates required after 180 days	Updates of specific activities recommended after 180 days

RESULTS OF INQUIRIES BY AN ENVIRONMENTAL PROFESSIONAL (§ 312.21)

Definition of Environmental Professional

To ensure the quality of all appropriate inquiries investigations, the final rule defines specific qualifications for environmental professionals. The rule requires that the person who supervises or oversees the conduct of the all appropriate inquiries, or the Phase I environmental site assessment, meet the final rule's qualifications for an environmental professional. The rule does not require that all individuals involved in conducting the all appropriate inquiries investigations qualify as an environmental professional

The definition of an environmental professional provided in the final rule differs from the qualifications included in the ASTM E1527-00 standard. Unlike the ASTM E1527-00 standard, the final rule on all appropriate inquiries imposes specific educational, certification or licensing, and relevant experience requirements for the environmental professional tasked with overseeing the assessment. The final rule requires that the environmental professional qualifications be met by the person supervising the conduct of all appropriate inquiries investigation. The environmental professional qualifications under the two standards are summarized in Exhibit 3.

The all appropriate inquiries final rule does not preclude a person lacking the proper certification or license or sufficient education and relevant experience from participating in the conduct of all appropriate inquiries investigations. A person who does not qualify as an environmental professional under the regulatory definition may assist in the conduct of all appropriate inquiries if he or she is under the supervision or responsible charge of a person who meets the qualifications of an environmental professional. For example, a person lacking the required certification or license or education and relevant experience may perform the individual activities required by the final rule, provided that a qualified environmental professional oversees his or her work.

Exhibit 3: Required Qualifications for an Environmental Professional

	ALL APPROPRIATE INQUIRIES FINAL RULE	ASTM E1527-00
Definition	A person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases (per Section 312.1(c)) on, at, in or to a property, sufficient to meet the objectives and performance factors in Section 312.20(e) and (f) (Section 3.10).	A person possessing sufficient training and experience necessary to conduct a site reconnaissance, interviews, and other activities in accordance with [the ASTM standard], and from the information generated by such activities, having the ability to develop opinions and conclusions regarding recognized environmental conditions in connection with the property in question. An individual's status as an environmental professional may be limited to the type of assessment to be performed or to specific segments of the assessment for which the professional is responsible. (Section 3.3.12).
Certification/License, Education and Relevant Experience Requirements	<p>Hold a current Professional Engineer's or Professional Geologist's license and have the equivalent of <i>three</i> years of full-time relevant experience</p> <p style="text-align: center;">OR</p> <p>Hold a current registration from a state, tribe, U.S. territory, or the Commonwealth of Puerto Rico and have the equivalent of <i>three</i> years of full-time relevant experience</p> <p style="text-align: center;">OR</p> <p>Be licensed or certified by the federal government, a state, tribe, U.S. territory, or the Commonwealth of Puerto Rico to perform environmental inquiries as defined by the AAI rule (Section 312.21) and have the equivalent of <i>three</i> years of full-time relevant experience</p> <p><i>A person who does not hold a relevant license or certificate may still qualify as an environmental professional if he/she</i></p> <p>Have a Baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and have the equivalent of <i>five</i> years of full-time relevant experience</p> <p><i>A person who does not have a relevant license or certificate and does not hold a university degree in a discipline of engineering or science can qualify as an environmental professional if he/she</i></p> <p>Has the equivalent of <i>ten</i> years of full-time relevant experience</p>	No requirements
Additional Requirements	Remain current in his/her field through participation in continuing education or other relevant activities	None

Documentation of the Results of the All Appropriate Inquiries

Under both the all appropriate inquiries final rule and the ASTM E1527-00 standard, the results of the Phase I investigation must be documented in a written report. Like the ASTM E1527-00, the all appropriate inquiries final rule does not specify the structure, format, or length of the final report documenting the results of the inquiries. The ASTM E1527-00 standard provides a recommended report format; the all appropriate inquiries final rule does not include any requirements for the report format.

The all appropriate inquiries rule requires that the written report include two signed declarations by the environmental professional. One declaration must state that the environmental professional meets the qualifications for environmental professionals included in the final rule (see 40 CFR 312.10). The environmental professional is not required to include in the written report any documentation corroborating the qualifications statement (*e.g.*, a copy of a current Professional Geologist's license). The second declaration required to be included in the final report must state that the all appropriate inquiries were carried out in accordance with the requirements of the final rule.

INTERVIEWS WITH PAST AND PRESENT OWNERS, OPERATORS, AND OCCUPANTS (§ 312.23)

The final rule includes requirements to conduct interviews with the current owner(s) and occupant(s) of the subject property, as necessary to meet the objectives and performance factors of the rule, to collect information on past uses and ownerships of the property, and to identify potential conditions that may indicate the presence of releases or threatened releases of hazardous substances² at the subject property. The ASTM E1527-00 standard does not require that interviews be conducted with past owners or occupants of a property; the standard only suggests that current owners be questioned about past uses and ownership.

The all appropriate inquiries final rule requires that additional interviews be conducted with parties such as current and past facility managers, past owners, operators or occupants of the property, and employees of past and current occupants of the subject property, as necessary to meet the objectives and performance factors of the final rule (*see* 40 CFR 312.20(e) - (f)). The final rule allows the environmental professional to use his or her discretion to determine whether such interviews are necessary. Under the ASTM E1527-00 standard, the environmental professional must inquire about the past uses of the subject property when interviewing the current property owner and key site manager.

The all appropriate inquiries final rule goes beyond the ASTM E1527-00 by requiring interviews with owners and occupants of neighboring and nearby properties in cases where the subject property is abandoned and there is evidence of potential unauthorized uses or uncontrolled access. Such interviews could help gather information that may not be available from any other source, given that no owner or occupant of the subject property can be identified to provide information on the uses and ownerships of the property.

² Individuals conducting all appropriate inquiries as part of an EPA Brownfields Assessment grant must also include pollutants, contaminants, petroleum and petroleum products, and controlled substances in the scope of the inquiry as required by their cooperative agreement with EPA.

REVIEWS OF HISTORICAL SOURCES OF INFORMATION (§ 312.24)

Historical Sources

The all appropriate inquiries final rule requires that environmental site assessments include reviews of historical sources of information about the property. The purpose is to ensure that a continuous record of land uses is assembled to create a comprehensive review of the potential for releases of hazardous substances at the property. The all appropriate inquiries rule, as well as ASTM E1527-00 standard, does not require that any specific historic document be reviewed nor does it specify the minimum number of records to be reviewed. The records that may be reviewed include, but are not limited to, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records. Historical sources of information should be reviewed as necessary to meet the objectives and performance factors of the final rule.

Research Timeframe

The all appropriate inquiries rule requires that historical documents be reviewed as far back in time as the property contained structures or the property was used for agricultural, residential, commercial, industrial, or governmental purposes. The final rule allows for the environmental professional to apply professional judgment to determining how far back in time it is necessary to review historical records, subject to the objectives and performance factors of the rule. In comparison, ASTM E1527-00 requires that all obvious uses of the property be identified from the present back to the property's obvious first developed use, or back to 1940, whichever is earlier. For example, if a property was first used in 1960, under the ASTM E1527-00 standard, the environmental professional must review historical sources of information going back to 1940. Under the all appropriate inquiries final rule, historical sources of information must be reviewed only as far back as 1960.

Research Interval

Under the ASTM E1527-00 standard, the research interval is specified as a function of the property use. Intervals of less than five years or more than five years are not required if the property use remains unchanged. For example, if historical records show the same property use in 1940 and 1960, it is not necessary to obtain and review additional historical records to ascertain the property use in the interim period. The all appropriate inquiries rule does not specify or give guidance on the research interval for reviewing historical records. Accordingly, the environmental professional must exercise professional judgment to determine the most appropriate research interval.

Review of Historical Information Pertinent to Surrounding Area

The ASTM E1527-00 standard requires that the uses of properties surrounding the subject property should be identified in the report if the information is revealed in the course of researching the subject property (e.g., if the aerial photographs show the area beyond the subject property boundaries). Although the all appropriate inquiries rule does not contain the same requirement, the objectives and performance factors of the rule do include within the scope of the types of information that should be collected the environmental conditions of adjoining or nearby properties.

SEARCHES FOR RECORDED ENVIRONMENTAL CLEANUP LIENS (§ 312.25)

The all appropriate inquiries rule requires that environmental site assessments include searches for environmental cleanup liens against the subject property that are filed or recorded under federal, state, tribal, or local laws. The objective of this requirement is to identify liens placed upon the property that indicate that environmental response actions were taken to address past releases at, on, or to the subject property. The ASTM E1527-00 standard also requires a search for environmental cleanup liens, although the scope of the search is limited to reasonably ascertainable recorded land title records.

The all appropriate inquiries rule differs from the ASTM E1527-00 standard with respect to the party responsible for conducting the search for environmental cleanup liens. Under the ASTM E1527-00 standard, the user, or prospective property owner, is responsible for the environmental cleanup lien search and is required to provide the results of the search to the environmental professional. The all appropriate inquiries rule allows that either the prospective property owner or the environmental professional may conduct the search. If the search is performed by the prospective property owner and the property owner does not provide the search results to the environmental professional, the environmental professional should treat the lack of information as a data gap and should comment on the significance of the data gap on his or her ability to identify conditions indicative of releases or threatened releases.

REVIEWS OF FEDERAL, STATE, TRIBAL AND LOCAL GOVERNMENT RECORDS (§ 312.26)

The all appropriate inquiries final rule requires that environmental site assessments include a review of federal, state, tribal, and local government records and specifies the minimum search distance for each record. The type of records and the minimum search distances do not differ significantly from the requirements included in the ASTM E1527-00 standard, in the case of federal and state government records. Both the ASTM E1527-00 standard and the all appropriate inquiries final rule allow the environmental professional to exercise discretion to modify the minimum search distance for a particular record type, based upon enumerated factors. The ASTM E1527-00 standard does not allow for the reduction of search distance for the federal NPL site list and the federal RCRA TSD list. In the case of both standards, the reason(s) for any such modification must be documented in the written report.

The all appropriate inquiries final rule goes beyond the requirements of the ASTM E1527-00 standard by requiring that records maintained by tribal and local governmental agencies be

reviewed. The ASTM E1527-00 standard lists local governmental records as supplemental sources to be consulted at the discretion of the environmental professional.

The all appropriate inquiries regulation also places more emphasis on institutional and engineering controls than the ASTM E1527-00 standard. Under the ASTM E1527-00 standard, the user is responsible for identifying institutional and engineering controls found in reasonably ascertainable recorded land title records and is required to provide the results of such searches to the environmental professional. The ASTM E1527-00 standard does not explicitly require that the search results be documented in the written report. The all appropriate inquiries regulation allows for the search for institutional and engineering controls to be performed by either the prospective property owner or the environmental professional. If the search is performed by the prospective property owner and the results of the search are not provided to the environmental professional, the environmental professional should treat the lack of information as a data gap and should comment on the significance of the data gap on his or her ability to identify conditions indicative of releases or threatened releases.

VISUAL INSPECTIONS OF THE FACILITY AND OF ADJOINING PROPERTIES (§312.27)

The all appropriate inquiries final rule requires that environmental site assessments include an on-site visual inspection of the subject property and facilities and improvements on the subject property. The all appropriate inquiries rule does not extend the scope of the subject property visual inspection beyond the current ASTM E1527-00 requirements.

With respect to adjoining properties, the requirements of the ASTM E1527-00 standard and the all appropriate inquiries rule differ. The all appropriate inquiries rule requires that the environmental professional perform a visual inspection of such properties from the subject property line, public rights-of-way, or another vantage point. The ASTM E1527-00 standard does not explicitly require a visual inspection of adjoining properties. However, the ASTM E1527-00 standard states that current and past uses of adjoining properties should be identified in the Phase I ESA report if such uses are visually or physically observed during the subject property visit, or are identified in the interviews or record reviews, if they are likely to indicate recognized environmental conditions.

In the cases where on-site access to the subject property cannot be obtained to conduct the visual inspection of the subject property, the ASTM E1527-00 standard does not provide for an alternative course of action. The failure to conduct the on-site visual inspection must be documented in the Phase I report as a limitation. In contrast, the all appropriate inquiries rule provides for a limited exemption to the on-site visual inspection requirement and imposes specific documentation and inspection requirements in that situation. The all appropriate inquiries regulation requires that the environmental professional do the following:

- Visually inspect the subject property via another method (e.g., aerial imagery) or from an alternate vantage point (e.g., walk the property line);
- Document efforts taken to gain access to the subject property;

- Document the use of other sources of information to determine the existence of potential environmental contamination; and
- Express an opinion about the significance of the failure to conduct an on-site visual inspection on the ability of the environmental professional to identify conditions indicative of releases or threatened releases.

SPECIALIZED KNOWLEDGE OR EXPERIENCE ON THE PART OF THE DEFENDANT (§ 312.28)

Under the ASTM E1527-00 standard, the user, or prospective property owner, is required to disclose to the environmental professional any specialized knowledge of the subject property and surrounding areas that is material to recognized environmental conditions in connection with the subject property. The all appropriate inquiries final rule requires that any specialized knowledge held by the prospective property owner be documented or taken into account during the inquiries. However, the prospective property owner is not required to provide this information to the environmental professional. If the information is not provided to the environmental professional, the environmental professional should treat the lack of information as a data gap and should comment on the significance of the data gap on his or her ability to identify conditions indicative of releases or threatened releases.

THE RELATIONSHIP OF THE PURCHASE PRICE TO THE VALUE OF THE PROPERTY, IF THE PROPERTY WERE NOT CONTAMINATED (§ 312.29)

Both the all appropriate inquiries final rule and the ASTM E1527-00 standard require that the user, or prospective property owner, consider the relationship of the purchase price and the fair market value of the property, if the property were not contaminated. The ASTM E1527-00 standard, however, only requires this comparison if the user has actual knowledge that the purchase price is significantly less than that of comparable properties. In cases where the purchase price paid for the subject property does not reflect the fair market value of the subject property if it were not contaminated, the ASTM E1527-00 standard and the all appropriate inquiries final rule impose slightly different requirements. The ASTM E1527-00 standard requires that the user identify an explanation for the difference between price and value and make a written record of such explanation. The all appropriate inquiries final rule requires that the prospective property owner consider whether or not the difference in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances. Neither standard explicitly states that documentation of a discrepancy or difference between the price and value of the property must be included in the final report. Under the all appropriate inquiries final rule, if the prospective property owner does not provide information regarding the relationship of the purchase price of the subject property to its fair market value to the environmental professional, the environmental professional should treat the lack of such information as a data gap and should comment on the significance that the data gap may have on his or her ability to identify conditions indicative of releases or threatened releases.

COMMONLY KNOWN OR REASONABLY ASCERTAINABLE INFORMATION ABOUT THE PROPERTY (§ 312.30)

Under the all appropriate inquiries final rule, the prospective property owner and environmental professional are required to take into account, during the conduct of all the required inquiries or activities, commonly known or reasonably ascertainable information about the subject property. In addition to the information sources consulted during the conduct of the historical records searches, the review of government records, and the required interviews, such information may be obtained from a variety of sources, including newspapers, local government officials, community organizations, and websites, among others. Commonly known and reasonably ascertainable information must be pursued to the extent necessary to achieve the objectives and performance factors of the final rule. Although the ASTM E1527-00 standard does not explicitly include such a requirement, it is up to the environmental professional to determine if any source, other than those identified as “standard sources” should be reviewed to obtain necessary information about the environmental conditions of the subject property.

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 (§ 312.31)

The all appropriate inquiries regulation requires that the prospective property owner and environmental professional take into account information collected during the inquiries in considering the degree of obviousness of the presence or likely presence of hazardous substances on, at, in, or to the subject property. They should also take into account the information collected during the inquiries in considering the ability to detect contamination by appropriate investigation. These requirements are consistent with the ASTM E1527-00 requirements. The all appropriate inquiries rule, however, requires that the environmental professional also provide in the written report an opinion regarding additional appropriate investigation that may be necessary, if any. The opinion could include activities or considerations outside the scope of the all appropriate inquiries investigation that might help the prospective property owner to more fully characterize environmental conditions on the property. The ASTM E1527-00 standard does not explicitly require that such an opinion be included in the final report.

ADDITIONAL REQUIREMENTS (§ 312.20)

Recognized Environmental Conditions – Inclusion of Petroleum Releases

Unlike the ASTM E1527-00 standard, the all appropriate inquiries final rule does not require that the environmental professional consider releases and threatened releases of petroleum and petroleum products in the scope of all environmental site assessments.

Under the all appropriate inquiries final rule, if the environmental site assessments are being conducted for the purpose of qualifying for one of the three CERCLA liability protections, the environmental professional must seek to identify conditions indicative of releases and threatened releases of hazardous substances, if any. The scope of the investigation may include the identification of potential petroleum releases that do not include hazardous substances at the discretion of the prospective property owner and environmental professional.

In cases where the all appropriate inquiries investigation is being funded by a federal brownfields assessment grant, where the scope of the grant or cooperative agreement includes the assessment of releases or threatened releases of petroleum and petroleum products, the environmental professional must include petroleum and petroleum products within the scope of the all appropriate inquiries investigation. Certain federal brownfields grants may also include requirements to assess a property for the presence or potential presence of controlled substances.

Data Gaps

The all appropriate inquiries rule requires a more extensive documentation of data gaps than was required under the ASTM E1527-00 standard. The all appropriate inquiries rule requires that the environmental professional: (1) identify data gaps that remain after the conduct of all required activities; (2) identify the sources of information consulted to address such data gaps; and (3) comment upon the significance of such data gaps with regard to his or her ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the property. The ASTM E1527-00 standard requires that the environmental professional document sources that revealed no findings. Additional data gaps or limitations were not required to be identified and documented.

Shelf Life

Under the all appropriate inquiries final rule, a prospective property owner may use a Phase I ESA report without having to update any information collected as part of the inquiry:

- If the all appropriate inquiries investigation was completed less than 180 days prior to the date of acquisition of the property; or
- If the Phase I ESA report was prepared as part of a previous all appropriate inquiries investigation and was completed less than 180 days prior to the date of acquisition of the property.

This provision is consistent with the ASTM E1527-00 standard.

Under the all appropriate inquiries final rule, a prospective property owner may use a previously conducted Phase I ESA report:

- If the Phase I ESA report was prepared as part of a previous all appropriate inquiries investigation for the same property; and
- If the information was collected or updated within one year prior to the date of acquisition of the property; and
- Certain aspects of the previously conducted report are conducted or updated within 180 days prior to the date of acquisition of the property. These aspects include the interviews, on-site visual inspection, the historical records review, and the search for environmental liens.

Under the all appropriate inquiries final rule, information collected from previously completed all appropriate inquiries investigations of the subject property can be used as sources of

information even when they are more than a year old as long as all information is reviewed for accuracy and is updated to reflect current conditions and current property-specific information.

In all cases, the analysis of the relationship of the purchase price of the subject property to the fair market value of the property, if it were not contaminated, must reflect the current property transaction. In addition, the assessment of specialized knowledge must be reflective of the prospective property owner seeking the liability protection or the brownfields grantee.

ATTACHMENT C

--- S.W.3d ---, 2006 WL 1148117 (Tex.App.-Hous. (14 Dist.))

(Cite as: 2006 WL 1148117 (Tex.App.-Hous. (14 Dist.)))

H

Briefs and Other Related Documents

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas,
Houston (14th Dist.).
WAREHOUSE ASSOCIATES CORPORATE
CENTRE II, INC., Warehouse Associates Corporate
Centre Post Oak, Ltd., and Warehouse Associates
Development, Inc., Appellants

v.

CELOTEX CORPORATION, Lecil M. Colburn,
and David Murry, Appellees.
No. 14-03-01444-CV.

March 30, 2006.

Background: Purchaser of property that asphalt shingle manufacturing plant formerly resided on brought action against vendor, alleging common law fraud, negligent misrepresentation, and statutory fraud in regards to vendor's failure to mention possible asbestos contamination in soil. The District Court, Harris County, granted vendor summary judgment based on as-is and waiver-of-reliance provisions of contract. Purchaser appealed.

Holdings: The Houston Court of Appeals, Fourteenth District, Kem Thompson Frost, J., held that:

(1) as-is and waiver-of-reliance clauses in contract did not preclude purchaser from bringing action for fraud;

(2) genuine issues of material fact existed as to whether vendor fraudulently concealed asbestos contamination; and

(3) vendor's alleged fraudulent misrepresentations did not impair purchaser's ability to inspect property. Reversed and remanded.

[1] Fraud ⚡36

184k36 Most Cited Cases

The purpose of the contract between vendor and purchaser regarding the purchase of property that formerly contained an asphalt shingle manufacturing plant was not to definitively end a dispute in which the parties had been embroiled, and thus, the as-is and waiver-of-reliance clauses in contract did not preclude purchaser from bringing action for fraud against vendor if vendor fraudulently concealed information from purchaser or if vendor impaired purchaser's inspection of property.

[2] Judgment ⚡181(29)

228k181(29) Most Cited Cases

Genuine issues of material fact existed as to whether vendor knew that property's soil was contaminated with asbestos and whether vendor induced purchaser to enter into purchase agreement by concealing asbestos contamination, precluding summary judgment on purchaser's fraud action against vendor based on as-is and waiver-of-reliance provisions of contract.

[3] Fraud ⚡36

184k36 Most Cited Cases

To trigger the impairment-of-inspection exception to the enforcement of as-is and waiver-of-reliance provisions in a contract, the seller, by its conduct, must impair, obstruct, or interfere with the buyer's exercise of its contractual right to carefully view, observe, and physically examine the property; conduct by the seller that impairs, obstructs, or interferes with the buyer's ability to obtain

--- S.W.3d ---, 2006 WL 1148117 (Tex.App.-Hous. (14 Dist.))

(Cite as: 2006 WL 1148117 (Tex.App.-Hous. (14 Dist.)))

information regarding the property does not trigger this exception.

[3] Vendor and Purchaser ⇨36(2)

400k36(2) Most Cited Cases

To trigger the impairment-of-inspection exception to the enforcement of as-is and waiver-of-reliance provisions in a contract, the seller, by its conduct, must impair, obstruct, or interfere with the buyer's exercise of its contractual right to carefully view, observe, and physically examine the property; conduct by the seller that impairs, obstructs, or interferes with the buyer's ability to obtain information regarding the property does not trigger this exception.

[4] Fraud ⇨36

184k36 Most Cited Cases

A court analyzes the impairment-of-inspection exception to the enforcement of as-is and waiver-of-reliance provisions in a contract separately from the fraudulent-inducement exception.

[4] Vendor and Purchaser ⇨36(2)

400k36(2) Most Cited Cases

A court analyzes the impairment-of-inspection exception to the enforcement of as-is and waiver-of-reliance provisions in a contract separately from the fraudulent-inducement exception.

[5] Vendor and Purchaser ⇨36(2)

400k36(2) Most Cited Cases

If, in the absence of duress or fraudulent inducement, a sophisticated buyer and seller freely enter into an as-is real estate sales transaction in which the buyer agrees not to rely upon any warranty by the seller, other than seller's warranty of title in the deed, or upon the seller's statements or representations or upon any other information provided by the seller, then it would not be reasonable to refuse enforcement of the parties' agreement based on the buyer's alleged reliance on the seller's statements in conducting the buyer's inspection.

[6] Vendor and Purchaser ⇨36(2)

400k36(2) Most Cited Cases

Vendor's alleged fraudulent misrepresentations regarding the condition and prior use of property did not impair purchaser's ability to inspect property, and thus, the impairment-of-inspection exception did not provide a basis to bar enforcement of as-is purchase agreement, where purchaser had access to the property, it was free to take whatever soil and water samples it wanted, and had the ability to test soil for asbestos contamination.

[7] Estoppel ⇨12

156k12 Most Cited Cases

[7] Estoppel ⇨78(1)

156k78(1) Most Cited Cases

The doctrines of estoppel by contract or by deed apply only in the absence of fraud.

On Appeal from the 127th District Court, Harris County, Texas, Trial Court Cause No. 01-11968.

Neil Kenton Alexander, for Warehouse Associates Corporate Centre II, Inc., Warehouse Associates Corporate Centre Post Oak, Ltd., and Warehouse Associates Development, Inc.

John Ellis O'Neill, for Celotex Corporation, Lecil M. Colburn, and David Murry.

Panel consists of Justices FOWLER, FROST, and SEYMORE.

OPINION

KEM THOMPSON FROST, Justice.

*1 This case arises out of the sale of real property under a contract that contains as-is and waiver-of-reliance provisions. After the sale, the buyer discovered asbestos in the soil on the property and brought suit against the seller and its employees alleging common law fraud, statutory fraud, and negligent misrepresentation. The main issue on appeal is whether the trial court correctly granted summary judgment based on the contract's as-is and waiver-of-reliance provisions. We first discuss the effect of the Texas Supreme Court's

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decision in *Schlumberger Tech. Corp. v. Swanson* on its prior opinion in *Prudential Ins. Co. of America v. Jefferson Assocs., Ltd.* We then conclude that the trial court erred in granting summary judgment as to the fraudulent-inducement exception to the enforceability of the as-is and waiver-of-reliance provisions because the summary-judgment evidence raises a fact issue as to whether the seller's alleged fraudulent representations or concealment of information induced the buyer to enter into this contract. However, we also conclude that the summary-judgment evidence proves as a matter of law that the seller did not impair, obstruct, or interfere with the buyer's inspection of the property, which, if proved, would have defeated enforceability of the as-is and waiver-of-reliance provisions in the sales contract. Because there is a fact issue as to the fraudulent-inducement exception, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This dispute between sophisticated parties involves approximately twelve acres of land at 1400 North Post Oak Road in Houston, Texas (the "Property"). Appellee Celotex Corporation operated an asphalt shingle manufacturing plant on the Property for a number of years until 1998, when Celotex permanently closed the plant. Celotex decided to sell the Property and retained Cushman & Wakefield as its real-estate broker. While Cushman & Wakefield was entertaining bids for the Property, Warehouse Associates [FN1] asked Cushman & Wakefield for any documents that Celotex had regarding the Property. In response, Celotex forwarded part of a 1996 environmental report prepared for Celotex. The part of this report Celotex produced indicates that there had been asbestos issues relating to the buildings on the Property but indicates nothing about asbestos contamination in the soil or use of asbestos in the manufacturing process on the Property, as opposed to asbestos in building materials in the structures on the Property. Celotex did not give Warehouse Associates the part of the report stating that

asbestos previously had been used in the manufacturing process at the plant on the Property.

Contract for the Sale of the Property

After receiving various offers and inquiries, on January 24, 2000, Celotex entered into a written contract with appellant Warehouse Associates Development, Inc. for the sale of the Property (the "Contract"). The Contract provided for a purchase price of \$3.25 per square foot, or a total of approximately \$1.7 million. The Contract recited that Celotex had begun demolition of all existing structures on the Property down to the slab level and that Celotex would use its best efforts to cause such demolition work to be completed as soon as possible. Celotex agreed to send a notice to Warehouse Associates upon completion of this demolition work. Under the Contract, Warehouse Associates was allowed to inspect the Property within sixty days from the date Celotex gave notice that it had completed this demolition work. During this sixty-day inspection period, Warehouse Associates had the right to terminate the Contract by written notice if its inspections revealed conditions unsatisfactory to it in its sole discretion.

Seller's Disclaimer of Warranties, Promises, Covenants, and Guaranties

*2 In the Contract, the parties agreed that, other than the warranties of title contained in the deed, Celotex did not make and was specifically disclaiming any representations, warranties, promises, covenants, or guaranties of any kind. The Contract imposed no obligation on Celotex to provide documents or records relating to the Property's condition. Warehouse Associates, however, was entitled to conduct inspections, tests, and investigations as it deemed necessary to determine the suitability of the Property for its intended use. Unless Warehouse Associates terminated the Contract before the inspection period expired, Warehouse Associates would be obligated to close the transaction, and, upon closing, Warehouse Associates would assume all existing and future liabilities associated with the ownership, use, and possession of the Property, including any liabilities imposed by local, state, or federal environmental laws or regulations.

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Buyer's Right to Inspect and Waiver of Reliance

In the Contract, Warehouse Associates, as the buyer, acknowledged that it had the opportunity to inspect the Property and agreed that it was relying solely on its own inspection and investigation of the Property and not on any information from Celotex. The parties also agreed that the sale of the Property at closing would be on an "as is, where is" condition and basis "with all faults." On February 10, 2000, Celotex gave notice that it had completed demolition of the buildings down to the slabs, triggering the buyer's sixty-day inspection period that ended on April 10, 2000.

Occurrences After Commencement of Inspection Period

On the day that the inspection period began, Celotex's contractor was excavating soil on the Property and found what appeared to the contractor to be raw, friable asbestos buried in the ground. The contractor contacted appellee Lecil M. Colburn, Celotex's Director of Environmental Affairs and chairman of a Celotex committee formed to sell various Celotex properties. The contractor asked Colburn what to do and Colburn instructed the contractor to leave that area of the Property alone and to backfill the excavated area, indicating the matter would be addressed at a later date. The contractor had one employee, wearing a respirator, backfill the excavation as quickly as possible.

During the relevant period, HBC Engineering, Inc. ("HBC") inspected the Property and conducted a Phase I Environmental Site Assessment of the Property. HBC had discussions about the Property with Colburn and with David Murry, a shipping supervisor for Celotex. HBC did not specifically ask Colburn about asbestos, and Colburn said nothing to HBC about asbestos or the recent discovery of suspected asbestos-containing material buried in the ground on the Property. Colburn listed the major raw materials Celotex had used in its shingle-manufacturing process without mentioning asbestos. He also stated his belief that Celotex's predecessor had used a similar shingle-manufacturing process. At the end of his interview with Colburn, an HBC representative asked Colburn if he was aware of any other

environmental concerns, and Colburn said nothing about the suspected asbestos-containing material recently discovered on the Property or about the possibility of asbestos being buried in the soil on the Property. HBC also conducted an environmental site investigation that included analysis of soil and groundwater samples taken from the Property. HBC did not test the soil for the presence of asbestos. In its reports to the buyer, HBC did not mention anything about any contamination of the soil on the Property due to asbestos.

Buyer's Discovery After the Sale

*3 Warehouse Associates did not exercise its right to terminate the Contract during the inspection period. On May 24, 2000, the sale closed and Celotex conveyed title to the Property to appellant Warehouse Associates Corporate Centre Post Oak, Ltd. by a special warranty deed that contains the same waiver-of-reliance and as-is language as the Contract. In August 2000, a contractor demolishing the concrete slabs discovered asbestos-containing material in the soil on the Property. An expert analyzed soil borings and detected more than one percent asbestos in forty-four of seventy soil borings from sites across the Property. This expert concluded that the Property has extensive, widespread asbestos-containing material in the soil to a depth of at least thirteen feet below the ground surface.

Claims and Counterclaims

Appellants Warehouse Associates Corporate Centre II, Inc., Warehouse Associates Corporate Centre Post Oak, Ltd., and Warehouse Associates Development, Inc. (collectively referred to herein as "Warehouse Associates") filed claims against appellees Celotex, Colburn, and Murry (the "Celotex Parties"), alleging damage claims for common law fraud, negligent misrepresentation, and statutory fraud under section 27.01 of the Texas Business and Commerce Code. Warehouse Associates also sought the equitable remedy of rescission of the transaction, as well as punitive damages and attorney's fees. The Celotex Parties counterclaimed against Warehouse Associates asserting various claims.

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Motions for Summary Judgment

Warehouse Associates filed a motion for summary judgment seeking dismissal of the Celotex Parties' counterclaims. The Celotex Parties filed a seventy-page traditional motion for summary judgment, as well as more than 1,700 pages of summary-judgment evidence. In their motion, the Celotex Parties asserted the following independent grounds in support of a take-nothing judgment in their favor:

- (1) As a matter of law, Warehouse Associates may not assert it relied upon the Celotex Parties' representations because Warehouse Associates conducted its own independent investigation of the environmental condition of the Property and the Celotex Parties did not interfere with this investigation in any manner.
- (2) The waiver-of-reliance and as-is language in the Contract and the deed negate the essential element of reliance as a matter of law.
- (3) Warehouse Associates's claims are barred by the doctrines of estoppel by contract and estoppel by deed.

The trial court granted a take-nothing summary judgment in favor of the Celotex Parties as to all of Warehouse Associates's claims. [FN2] The trial court also granted Warehouse Associates's motion for summary judgment and dismissed all of the Celotex Parties' counterclaims, except the counterclaim seeking attorney's fees, expenses, and costs under a provision in the Contract allowing such recovery to the prevailing parties in any claim or controversy relating to the Contract. [FN3] Subsequently, the trial court granted summary judgment in favor of the Celotex Parties on this counterclaim, awarding them more than \$2,000,000 in attorney's fees, expenses, and costs. The trial court signed a final judgment setting out all of its summary-judgment rulings.

*4 Although Warehouse Associates has appealed the dismissal of its claims, the Celotex Parties have not appealed the trial court's dismissal of their counterclaims or the trial court's denial of their request for summary judgment compelling Warehouse Associates to accept Celotex's tender to buy back the Property.

II. ISSUES PRESENTED

Warehouse Associates presents the following issues for appellate review:

- (1) Is a seller of real property who (a) knowingly conceals and intentionally fails to disclose environmental hazards to a buyer and (b) interferes with the buyer's investigation of the property nevertheless immunized from fraud and misrepresentation claims because the sales contract and warranty deed contain an "as is--no reliance" clause?
- (2) Is a seller of real property who (a) actively conceals or purposefully fails to disclose material information about the environmental condition of the property or (b) provides misleading information to the buyer immunized from fraud and misrepresentation claims because the buyer undertook investigation of the Property?
- (3) Does the doctrine of estoppel by contract or deed apply to a fraudulently induced contract or deed?
- (4) May a buyer recover lost profits when a seller has fraudulently induced the sale of commercial property?

III. STANDARD OF REVIEW

In reviewing a traditional motion for summary judgment, we take as true all evidence favorable to the nonmovant, and we make all reasonable inferences in the nonmovant's favor. *Dolcefino v. Randolph*, 19 S.W.3d 906, 916 (Tex.App.- Houston [14th Dist.] 2000, pet. denied). If the movant's motion and summary-judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *Id.* Because the trial court did not specify the grounds upon which it granted a take-nothing summary judgment in favor of the Celotex Parties, Warehouse Associates must show that each independent ground alleged in the motion for summary judgment is insufficient to support the judgment granted. *See Caldwell v. Curioni*, 125 S.W.3d 784, 789 (Tex.App.-Dallas 2004, pet. denied).

IV. ANALYSIS

A. To what extent, if any, did *Schlumberger*

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Technology Corp. v. Swanson change the legal standard used in *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.* to determine whether the as-is and waiver-of-reliance language defeats the buyer's fraud claims as a matter of law?

In *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, the Texas Supreme Court limited the enforceability of as-is and waiver-of-reliance language to exclude situations in which (1) the buyer was induced to enter into the contract containing that language by a fraudulent representation or concealment of information by the seller or (2) the seller engaged in conduct that impaired, obstructed, or interfered with the buyer's inspection of the property being sold. [FN4] See 896 S.W.2d 156, 160-62 (Tex.1995). In this opinion, we refer to these exceptions as the "fraudulent-inducement exception" and the "impairment-of-inspection exception," respectively. Before determining if the summary-judgment evidence raises fact issues as to these "Prudential exceptions," we address the Celotex Parties' argument under *Schlumberger Technology Corp. v. Swanson* that the as-is and waiver-of-reliance language in the Contract is enforceable even if such fact issues exist. 959 S.W.2d 171 (Tex.1997). After carefully reviewing *Schlumberger*, we are compelled by the Texas Supreme Court's analysis in that case to disagree with this argument. The *Schlumberger* court's analysis leads us to conclude that the two *Prudential* exceptions still stand, subject to a small exception to the fraudulent-inducement exception carved out by *Schlumberger*, which does not apply in the instant case.

*5 In *Schlumberger*, Schlumberger Technology Corporation wanted to buy the Swansons' interest in an underwater diamond mining operation. See *id.* at 173-74. After becoming embroiled in a dispute with Schlumberger over their interest's value, the Swansons agreed to a price and sold their interest to Schlumberger. See *id.* at 174. As part of this sale, the Swansons executed a release specifically noting the dispute as to the interest's value, providing for a release of all of the Swansons' claims regarding this

interest, and containing a waiver-of-reliance provision. See *id.* at 180. The Swansons later sued Schlumberger, asserting that Schlumberger fraudulently induced them to enter into this transaction. See *id.* at 174.

In discussing the enforceability of the waiver-of-reliance provision, the Texas Supreme Court began with a presumption that, as found by the jury, Schlumberger had fraudulently induced the Swansons to enter into the transaction and sign the release. See *id.* at 174, 178. The Texas Supreme Court rejected Schlumberger's argument that, as long as the releasing party was represented by counsel in an arms-length transaction, a waiver-of-reliance provision in a release bars a claim that the releasing party was fraudulently induced to sign the release. See *id.* at 175, 178. The *Schlumberger* court observed that some Texas Supreme Court precedents hold that a release can be set aside upon proof of fraudulent inducement, even if the release contains a waiver-of-reliance provision. See *id.* at 178. However, the *Schlumberger* court also acknowledged that other cases reached the opposite result. See *id.* at 178-79. The Texas Supreme Court then stated that it resolved these two conflicting lines of authority in *Dallas Farm Machinery Co. v. Reaves*, a case decided four decades earlier, in which it adhered to the former line of cases that refuse to enforce fraudulently induced waiver-of-reliance provisions. See *id.* at 179 (discussing *Dallas Farm Machinery Co. v. Reaves*, 158 Tex. 1, 307 S.W.2d 233 (Tex.1957)). The *Schlumberger* court observed that the holding in *Dallas Farm Machinery* brought Texas law into harmony with the great weight of authority, the Restatement of Contracts, and the views of eminent legal scholars. See *id.*

After seeming to embrace *Dallas Farm Machinery Co.*, the *Schlumberger* court then stated that juxtaposed against this authority is a competing concern--the ability of the parties to fully and finally resolve disputes between them. See *id.* Reasoning that parties should be able to bargain for and execute a release barring all further disputes, the *Schlumberger* court opined that circumstances should exist under which a contracting party can

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clearly and specifically disclaim reliance on misrepresentations of another party so as to defeat a claim of fraudulent inducement as a matter of law. *See id.* The *Schlumberger* court then gave as an example, a disclaimer of reliance conclusively negating the element of reliance, which is essential to a fraudulent inducement claim. To illustrate this example, the *Schlumberger* court cited *Prudential Insurance Co.*, 896 S.W.2d at 161-62, and *Estes v. Hartford Accident & Indemnity Co.*, 46 S.W.2d 413, 417-18 (Tex.Civ.App.-El Paso 1932, writ ref'd). *See id.* Though the *Prudential* case did enforce waiver-of-reliance language in a contract, the part of that opinion cited by the *Schlumberger* court cites *Dallas Farm Machinery Co.* and notes that such language is not enforceable against a buyer induced to enter into the contract by the seller's fraudulent representation or concealment of information. *See Prudential Ins. Co.*, 896 S.W.2d at 161-62. The other Texas Supreme Court precedent cited by the *Schlumberger* court, *Estes v. Hartford Accident & Indemnity Co.*, held that the record contained no evidence of reliance on the alleged fraudulent misrepresentation that allegedly induced a party to sign a release. *See Estes*, 46 S.W.2d at 417-18. However, there is no mention in *Estes* that the release contained a waiver-of-reliance clause, and the court states that the release would not be enforceable if the releasor had proved fraud upon which he relied in signing the release. *See id.* at 417.

*6 The *Schlumberger* court described the circumstances in which waiver-of-reliance language would negate proof of fraudulent inducement as follows:

The contract and the circumstances surrounding its formation determine whether the disclaimer of reliance is binding. Because the parties were attempting to put an end to their deal, and had become embroiled in a dispute over the feasibility and value of the project, we conclude that the disclaimer of reliance the Swansons gave conclusively negates the element of reliance. *Schlumberger Tech. Corp.*, 959 S.W.2d at 179-80 (citations omitted).

The *Schlumberger* court found it significant that, throughout the negotiations that led to the execution

of the release, the parties disagreed about the value of the Swansons' interest. *See id.* at 180. The *Schlumberger* court stated that the sole purpose of the release was to end the dispute as to the value of the commercial project once and for all. *See id.* Noting that the Swansons unequivocally disclaimed reliance upon representations by Schlumberger about the project's value, the *Schlumberger* court concluded that, in light of this language and in this context, the Swansons must have intended to forego reliance on any representations about the value of the project, given that this was the very dispute the release was supposed to resolve. *See id.*

In concluding, the *Schlumberger* court emphasized that a waiver-of-reliance clause will not always bar a fraudulent-inducement claim and noted that the *Prudential* case had identified some circumstances in which an as-is clause would not preclude a fraudulent-inducement claim. *See id.* (citing *Prudential Ins. Co.*, 896 S.W.2d at 162). Again, the part of *Prudential* cited by the *Schlumberger* court includes a citation to *Dallas Farm Machinery Co.* and states that the buyer would not have been bound by the as-is provision (which contained waiver-of-reliance language) if it had been induced to enter into the contract by the fraudulent representation or concealment of information by the seller. *See id.*; *Prudential Ins. Co. of Am.*, 896 S.W.2d at 162. After indicating that the *Prudential* exceptions are still valid, the *Schlumberger* court stated, "We conclude *only* that on this record, the disclaimer of reliance conclusively negates as a matter of law the element of reliance on representations about the feasibility and value of the sea-diamond mining project needed to support the Swansons' claim of fraudulent inducement." *See id.* at 181 (emphasis added).

The *Prudential* court set forth two exceptions to the enforceability of as-is or waiver-of-reliance language in a contract. [FN5] *See Prudential Ins. Co. of Am.*, 896 S.W.2d at 162. One of these exceptions is inducement of the complaining party to enter into the contract by the fraudulent representation or concealment of information by the party seeking to enforce the contractual language. *See id.* The *Schlumberger* court indicated that both

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exceptions from *Prudential* are still valid but also held that under the circumstances shown by the record in *Schlumberger*, fraudulent inducement did not prevent enforcement of the waiver-of-reliance language in the release between Schlumberger and the Swansons. See *Schlumberger Tech. Corp.*, 959 S.W.2d at 179-81.

*7 *Schlumberger* allowed a party to enforce a waiver-of-reliance clause even though the court presumed, as found by the jury, that the party in question fraudulently induced the other parties to enter into the contract containing that clause. See *id.* at 175, 178-81. If we were to read *Schlumberger* broadly, this holding likely would be applied in many cases based on such commonly existing factors as (1) an arm's length transaction between sophisticated parties represented by counsel and (2) waiver-of-reliance language that clearly and unequivocally covers the specific representations on which the complaining party allegedly relied. However, the *Schlumberger* court itself stated that an arm's length transaction between parties represented by counsel is not enough to enforce a waiver-of-reliance clause. See *id.* at 175, 178. Furthermore, a broad reading of *Schlumberger* effectively would overrule the *Prudential* fraudulent-inducement exception that *Schlumberger* and many other authorities indicate is still good law. See *Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.*, 161 S.W.3d 482, 487, 490 & n. 32 (Tex.2005) (holding that quitclaim deed containing as-is language did not violate Texas Securities Act but citing the two *Prudential* exceptions and stating that analysis would be different if there were evidence of fraudulent inducement); *Schlumberger Tech. Corp.*, 959 S.W.2d at 181; *Kane v. Nxcoss Motorcars, Inc.*, No. 01-04-00547-CV, 2005 WL 497484, at *6-7 (Tex.App.-Houston [1st Dist.] Mar. 3, 2005, no pet.) (holding in memorandum opinion that trial court erred in granting summary judgment based on as-is clause because of fact issues as to fraudulent-inducement exception under *Prudential*); *Bynum v. Prudential Residential Services, Ltd. P'ship*, 129 S.W.3d 781, 787-92 (Tex.App.-Houston [1st Dist.] 2004, pet. denied) (applying *Prudential* exceptions to contract containing both waiver-of-reliance and as-is

language and determining that summary-judgment evidence did not raise a fact issue as to these exceptions); *Nelson v. Najm*, 127 S.W.3d 170, 173, 175-76 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) (applying *Prudential* analysis to contract containing both waiver-of-reliance and as-is language and determining that such language did not bar fraud claims because there was evidence that seller fraudulently induced buyer to enter into contract by fraudulent concealment). *Schlumberger* expressly preserves the *Prudential* exceptions while, at the same time, on the facts "in [the *Schlumberger*] record," it forecloses application of the fraudulent-inducement exception from *Prudential*. We must reconcile these two aspects of *Schlumberger* to discern its application in this case.

[1] Upon careful consideration of the entire opinion in *Schlumberger*, we conclude that the decisive factor in the case was the contracting parties' mutual intent to definitively resolve a long-running dispute in which they had been embroiled. [FN6] The *Schlumberger* court held that the fraudulent-inducement exception from *Prudential* does not apply to waiver-of-reliance language (1) that clearly and unequivocally disclaims reliance on the specific representations that are the basis of the claims in question, (2) in a contract whose purpose is to definitively end a dispute in which the contracting parties have been embroiled, (3) in an arm's length transaction between sophisticated parties represented by counsel. [FN7] See *Schlumberger Tech. Corp.*, 959 S.W.2d at 179-81. Because the Contract's purpose was not to definitively end a dispute in which Celotex and Warehouse Associates had been embroiled, this case does not fall within the scope of *Schlumberger*, and therefore, the two *Prudential* exceptions provide the legal standard. [FN8]

B. Is there a genuine issue of material fact as to the two *Prudential* exceptions?

*8 In their traditional motion for summary judgment, the Celotex Parties asserted that the following waiver-of-reliance and as-is language in the Contract and the deed negates reliance by Warehouse Associates as a matter of law:

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OTHER THAN THE WARRANTIES OF TITLE CONTAINED IN THE DEED, PURCHASER ACKNOWLEDGES AND AGREES THAT SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO (A) THE NATURE, QUALITY OR CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY, (B) THE INCOME TO BE DERIVED FROM THE PROPERTY, (C) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH PURCHASER MAY CONDUCT THEREON, (D) THE COMPLIANCE OF OR BY THE PROPERTY OR ITS OPERATION WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY ... (E) THE HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY, OR (F) ANY OTHER MATTER WITH RESPECT TO THE PROPERTY, AND SPECIFICALLY THAT SELLER HAS NOT MADE, AND DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS REGARDING SOLID WASTE, AS DEFINED BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGULATIONS AT 40 C.F.R., PART 261, OR THE DISPOSAL OR EXISTENCE, IN OR ON THE PROPERTY, OF ANY HAZARDOUS SUBSTANCE, AS DEFINED BY THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980, AS AMENDED, AND APPLICABLE STATE LAWS, AND REGULATIONS PROMULGATED THEREUNDER. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT

HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE PROPERTY, PURCHASER IS RELYING SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY THE SELLER. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT ANY INFORMATION [sic] PROVIDED OR TO BE PROVIDED WITH RESPECT TO THE PROPERTY WAS OBTAINED FROM A VARIETY OF SOURCES AND THAT SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT THE SALE OF THE PROPERTY AT CLOSING SHALL BE MADE ON AN "AS IS, WHERE IS" CONDITION AND BASIS "WITH ALL FAULTS[.]" (hereinafter the "Contract Language").

Warehouse Associates asserts the summary-judgment evidence raises a genuine issue of material fact as to the two *Prudential* exceptions (fraudulent-inducement and impairment-of-inspection) to the enforceability of this Contract Language. As discussed above, the existence of fact issues as to either one of these *Prudential* exceptions would preclude summary judgment based on the Contract Language. See *Geodyne Energy Income Prod. P'ship I-E*, 161 S.W.3d at 487, 490 & n. 32; *Schlumberger Tech. Corp.*, 959 S.W.2d at 181; *Prudential Ins. Co. of Am.*, 896 S.W.2d at 162.

1. Fraudulent Inducement

*9 [2] Warehouse Associates does not complain of fraudulent inducement as to the presence of asbestos in the building materials used in the structures that were demolished and removed by Celotex. Warehouse Associates asserts that the abatement of asbestos in these structures did not cause them concern because it was Celotex's responsibility to remove this asbestos before closing. Warehouse Associates asserts that asbestos in building materials in the structures did not alert it to the presence of asbestos buried in the soil on the

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Property.

Under the applicable standard of review, the following summary-judgment evidence creates a genuine issue of fact as to whether Celotex actually knew that asbestos was in the soil on the Property:

. An August 14, 1999 Celotex memorandum regarding the status of demolition and environmental activities and costs at the Property based on two meetings with Colburn that states that "[t]he environmental work required relates to 1) Asbestos in the ground...."

. A handwritten document regarding "Site Clean-Up" at the Property appears to project costs of cleaning up "On Site Soils" at \$1.5 million and notes, "This is removal of some materials--not total removal of asbestos containing materials."

. An internal Celotex budget shows that, for fiscal year 1999, Celotex budgeted \$1.5 million for remediation of the soil on the Property, separate from amounts budgeted for demolition of the structures, remediation of drums and tank contents, removal of a tank farm and remediation of the soil thereunder, and in-building asbestos removal.

. Joe Vela, who worked at the plant on the Property from 1951-91, testified that some Celotex employees, including some of the managers, in the 1980s and 1990s knew that asbestos-containing shingle pieces had been dumped in the ground on the Property and knew that the plant on the Property had manufactured asbestos-containing material.

. In negotiating the contract with its real-estate broker, Cushman & Wakefield, Celotex removed from the draft contract a sentence in which Celotex represented that it had no knowledge of toxic, contaminated, or hazardous substances or conditions except as it had informed Cushman & Wakefield in writing. Celotex replaced this language with a sentence stating that Celotex represents that it will share information relating to the environmental status of its properties.

Under the applicable standard of review, we also conclude that there is a genuine issue of fact as to whether Celotex induced Warehouse Associates to

enter into the Contract by alleged fraudulent misrepresentation or concealment of asbestos contamination in the soil on the Property. We reach this conclusion based on the following summary-judgment evidence:

. On October 28, 1999, Celotex's broker sent Warehouse Associates a document that it had received from Celotex--part of a 1996 environmental assessment done for Celotex. In the cover letter that accompanied this document, the broker stated, "as you will see from this report, there does not appear to be any major environmental issues that would have an adverse effect on the property." The attached document showed that asbestos was present in building materials used in the structures on the Property. However, this assessment did not mention asbestos contamination in the soil on the Property and did not mention that asbestos had ever been used as a raw material in the manufacture of any product on the Property. Celotex did not give Warehouse Associates the part of this assessment stating that, in the past, asbestos had been used in the manufacturing process to make roofing products on the Property and that the manufacturing process typically generated waste that included "reject shingles." Celotex's broker in this transaction testified that, if Celotex had given him the part of this report that referred to asbestos being used in the manufacturing process on the Property, he would have disclosed it to Warehouse Associates because it pertains to the Property and should have been revealed to Warehouse Associates.

*10 . In response to Warehouse Associates's request for a site map of the Property, instead of producing a detailed 1988 map of the Property that Celotex had in its possession, Cushman & Wakefield made a simpler map based on the 1988 map and produced the new map to Warehouse Associates before Warehouse Associates signed the Contract. The new map omitted many details about the structures and past activities on the Property, including one notation indicating that asbestos siding was manufactured on the Property. Joe Vela used the term "asbestos siding" to refer to asbestos roofing shingles.

. Thomas Martens, Manager of Environmental

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Services for HBC's Houston office, testified that Murry of Celotex told him on January 6, 2000, that Celotex had manufactured asphaltic roofing shingles on the Property for a number of years (Martens thought he said about twenty or thirty years). Murry stated that the raw materials used in this manufacturing process were a paper-type material, a tar-like asphaltic material, and a granular sand-like material. Murry told Martens that, before Celotex occupied the Property, there was another shingle-manufacturing company that conducted manufacturing operations on the Property and that those operations were similar to those of Celotex. Martens described his conversations with Murry and Colburn to David R. David of Warehouse Associates in "fair detail," including the description of the manufacturing process.

. Colburn testified that, if he were buying a property, he would want to know the history of the plant and also would want to know if asbestos had ever been used in manufacturing in any way in that plant. Colburn also testified that during its ownership of the Property, Celotex had manufactured "asbestos roofing" and that a "mat material" containing asbestos fiber was used in the manufacturing of shingles on the Property at some time in the past.

. David, an authorized representative of Warehouse Associates, testified in his affidavit that (1) Warehouse Associates had no knowledge concerning the presence of asbestos or asbestos-containing materials in the soils on the Property until August 2000; (2) before that time, the only knowledge Warehouse Associates had was of asbestos in the structures on the Property; however, under the Contract, those structures and the asbestos-containing materials therein were to be completely removed and remediated before the closing of the sale; (3) at no time before August 2000, was Warehouse Associates aware of asbestos contamination in the soil on the Property.

. Martens of HBC testified that asbestos-containing materials are often found in buildings but that the presence of asbestos-containing materials in buildings does not raise a suspicion that asbestos is in the soil.

The Celotex Parties assert that Warehouse Associates knew about the use and presence of asbestos on the Property before closing. However, knowledge of the presence of asbestos-containing materials in the structures to be removed by Celotex before closing does not equate with knowledge of asbestos contamination that would remain in the ground after closing or with knowledge that asbestos previously had been used as a raw material in the manufacturing process on the Property. The Celotex Parties emphasize that the purchase price under the Contract allegedly was set at approximately half the Property's fair market value if it were uncontaminated, because Warehouse Associates allegedly knew that there was significant contamination on the Property. In support of this argument, the Celotex Parties cite an April 27, 2000 appraisal of the Property done for Warehouse Associates's lender that valued the Property at \$3,465,000, presuming no environmental contamination. This appraisal, which was completed after the inspection period under the Contract had expired, states that, according to a representative of Warehouse Associates, the Property "was believed to be contaminated and priced accordingly." At her deposition, the lender's appraiser could not recall the individual at Warehouse Associates to whom she referred in this statement. The appraiser also stated that, from what she recalled, the contamination to which she referred was contamination that had to do with the buildings on the Property that were being demolished. The summary-judgment evidence does not prove as a matter of law that Warehouse Associates and Celotex discounted the Property's market value by fifty percent based on environmental contamination. Rather, it includes testimony by Celotex's own real-estate broker stating that, with the structures, storage tanks, and equipment removed and presuming no contamination, he believed the "full market price" for the Property was approximately three dollars per square foot, which would yield a value of approximately \$1,613,000. Under this valuation, Warehouse Associates paid either fair market value or more than fair market value for the Property, presuming it was not contaminated.

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*11 The Celotex Parties also cite a one-page bankruptcy petition as well as deeds and corporate records sent by the title company to Warehouse Associates's lawyer, who received these documents on April 18, 2000. The Celotex Parties assert that these documents show that the Property had been owned by an asbestos manufacturer and corporate predecessor of Celotex. Warehouse Associates did not receive these documents until after the inspection period had expired. These documents show that Celotex filed bankruptcy but do not reflect why it did so. Although the documents show that the Property had been owned by the Philip Carey Manufacturing Company, they do not state that Philip Carey or any other company manufactured asbestos products. [FN9] The Celotex Parties also assert that HBC's report shows that Warehouse Associates knew that asbestos was commonly used in asphalt shingles; however, the part of the HBC report cited states only that asbestos was commonly used in construction materials. It does not refer to asphalt shingles. [FN10]

The Celotex Parties also assert that the common use of asbestos in asphalt products, including Celotex products, is a matter of common knowledge. The parts of the record the Celotex Parties cite do not support this proposition, and the summary-judgment evidence does not show as a matter of law that this information is common knowledge.

In sum, the summary-judgment evidence raises a genuine issue of fact as to the *Prudential* fraudulent-inducement exception to the enforcement of the Contract Language. See *Kane*, 2005 WL 497484, at *6-7 (holding that trial court erred in granting summary judgment based on as-is clause because of fact issues as to fraudulent-inducement exception under *Prudential*); *Nelson*, 127 S.W.3d at 175-76 (concluding sufficient evidence supported trial court's ruling that as-is and waiver-of-reliance provisions should not be enforced based on evidence that seller fraudulently induced buyer to enter into contract by concealment of existence of underground waste oil storage tank). Therefore, the trial court erred in granting summary judgment as to

this issue, and we sustain Warehouse Associates's first issue to this extent.

2. Impairment of Inspection

Before we address the evidence regarding impairment of inspection, we must determine the scope of this *Prudential* exception. In its briefing, Warehouse Associates describes this exception broadly, stating that it applies if "[a] seller ... interferes with the buyer's *investigation* of the property." [FN11] As explained below, we construe this exception more narrowly in accordance with the language used by the Texas Supreme Court and in a manner that recognizes the distinct purpose for this exception.

We begin by examining the language used by the *Prudential* court to describe this exception:

[A] buyer is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct. A seller cannot obstruct an *inspection* for defects in his property and still insist that the buyer take it "as is".

*12 *Prudential Ins. Co. of Am.*, 896 S.W.2d at 162 (emphasis added).

The only case we have found that actually analyzes the proper application of this exception is *Prudential* itself. [FN12] See *id.* at 163. In *Prudential*, the buyer asserted the seller had "interfered with his investigation" by withholding plans and specifications the buyer had requested. See *id.* The *Prudential* court stated that withholding such plans and specifications could not have interfered with the buyer's inspection. It noted that the withheld plans and specifications did not mention if an asbestos-containing material was used in the construction of the building and that the only way to determine whether the building contained asbestos was to "inspect the premises." See *id.* According to the *Prudential* court, the buyer did not claim that the seller had interfered with his inspection in any way. See *id.* By this statement, the *Prudential* court recognized a distinction between an inspection of the property and an investigation of that property. The *Prudential* court noted that the buyer was asserting that the seller had interfered with its

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investigation of the property by withholding information about the property but that this assertion was not equivalent to an assertion that the seller had interfered with the buyer's *inspection* of the property. *See id.*

[3] This distinction is consistent with the plain meaning of these words; "inspect" focuses on a careful physical examination, whereas "investigation" includes a physical examination as well as a gathering of information through research and study. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1170 (1993 ed.) (defining "inspect" as "to view closely and critically (as in order to ascertain quality or state, detect errors, or otherwise appraise); examine with care: SCRUTINIZE" and defining "inspection" as "the act or process of inspecting: a strict or close examination ... the examination of articles of commerce to determine their fitness for transportation or sale"); *id.* at 1189 (defining "investigate" as "to observe or study closely: inquire into systematically: EXAMINE, SCRUTINIZE" and defining "investigation" as "the act or process of investigating: detailed examination: STUDY, RESEARCH"). In the absence of further guidance from the Texas Supreme Court, we conclude that the *Prudential* court intended the second *Prudential* exception to apply to a seller's conduct that impairs, obstructs, or interferes with a buyer's *inspection* of the property being sold but not to conduct that impairs, obstructs, or interferes with a buyer's *investigation* of that property. *See id.*; *Prudential Ins. Co. of Am.*, 896 S.W.2d at 162-63. Therefore, to trigger the impairment-of-inspection exception, the seller, by its conduct, must impair, obstruct, or interfere with the buyer's exercise of its contractual right to carefully view, observe, and physically examine the property. Conduct by the seller that impairs, obstructs, or interferes with the buyer's ability to obtain information regarding the property does not trigger this exception.

*13 [4] It is important to recognize that, in analyzing the applicability of the impairment-of-inspection exception, we presume there was no fraudulent inducement of any party to

enter into the contract containing the as-is or waiver-of-reliance language. In other fact patterns, conduct that allegedly fraudulently induced a party to enter into the contract may be mixed with conduct that allegedly impaired a party's ability to inspect the property before entering into the contract. However, no such facts are contained in the record before us. Whatever the fact pattern may be, we still analyze the impairment-of-inspection exception separately from the fraudulent-inducement exception. *See Prudential Ins. Co. of Am.*, 896 S.W.2d at 162-63. Although Warehouse Associates asserts that both exceptions apply in this case, in analyzing the impairment-of-inspection exception, we presume that there has been no fraudulent inducement to enter into the contract.

[5] If, in the absence of duress or fraudulent inducement, a sophisticated buyer and seller freely enter into an as-is real estate sales transaction in which the buyer agrees not to rely upon any warranty by the seller (other than seller's warranty of title in the deed) or upon the seller's statements or representations or upon any other information provided by the seller, then it would not be reasonable to refuse enforcement of the parties' agreement based on the buyer's alleged reliance on the seller's statements in conducting the buyer's inspection. If statements upon which the buyer is not supposed to rely alone are sufficient to constitute impairment of inspection in a transaction involving sophisticated parties, then the exception would swallow the rule and render the waiver-of-reliance language and the "as is" nature of the transaction meaningless. In this case, sophisticated parties, represented by counsel, structured an arm's length commercial transaction in a way that allocated the risk of discovering adverse property conditions entirely to the buyer, and the parties placed the burden of inspecting the property for such conditions entirely on the buyer. Under these circumstances, it is reasonable to enforce these contractual provisions. Likewise, it would be reasonable to refuse enforcement of these contractual provisions if the seller engaged in conduct that impaired, obstructed, or interfered with the buyer's exercise of its contractual right to

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carefully view, observe, or physically examine the property.

This interpretation follows from the *Prudential* court's analysis of whether the impairment-of-inspection exception applied in that case. See *Prudential Ins. Co. of Am.*, 896 S.W.2d at 162-63. This interpretation is also faithful to the precise meaning of the words our high court used to define the standard. See *Prudential Ins. Co. of Am.*, 896 S.W.2d at 162 (stating that the buyer is not bound by as-is and waiver-of-reliance language "if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct") (emphasis added). And, importantly, this interpretation also makes sense in the context of these types of transactions.

*14 [6] Turning to the summary-judgment evidence, Warehouse Associates asserts there is a genuine issue of fact as to the impairment-of-inspection exception based on summary-judgment evidence showing the following:

- . Celotex knew that, on February 10, 2000, while performing an excavation, Eagle Construction & Environmental Services, Inc. ("Eagle") had uncovered what appeared to Eagle's employee to be a large ball of raw asbestos buried in the ground on the Property.

- . When asked by Eagle what to do with this suspected asbestos-containing material, Celotex instructed Eagle "backfill the excavation," that is, to cover the material with dirt and leave that area alone.

- . Celotex knew asbestos waste had been buried in the soil on the Property, and Colburn knew that Eagle recently had discovered suspected asbestos-containing material, yet Colburn did not mention the issue of asbestos in the soil to HBC. Colburn stated that he was not aware of any environmental concerns other than those he had discussed. Colburn told HBC that, to his knowledge, there was no hazardous waste or any kind of contamination on the ground.

- . Celotex knew that in the past asbestos had been used in the manufacturing process in the plant on the Property. However, Murry told HBC (1) the

only product Celotex manufactured on the Property was asphaltic roofing shingles; (2) the wastes associated with the process were "dumpster-type of waste" that did not need to be listed on a manifest for disposing of regulated materials; (3) Celotex's manufacturing was similar throughout the tenure of Celotex's operation for twenty to thirty years; (4) this manufacturing process did not really generate any waste except for what went into "dumpsters or roll-off boxes"; and (5) the company that previously operated the site also made asphaltic roofing materials in a manner similar to Celotex.

- . Celotex did not give HBC or Warehouse Associates the 1988 plant map and the part of the 1996 environmental assessment that indicate that asbestos had been used in the manufacturing process on the Property in the past.

- . Celotex refused to agree to remove the concrete slabs that remained after removal of the structures from the Property.

Almost all of the evidence cited by Warehouse Associates shows alleged fraudulent misrepresentations or nondisclosures of information by Celotex concerning the condition or prior use of the Property. As discussed above, even presuming the truth of all such evidence, this proof does not raise a fact issue as to Celotex's alleged impairment of Warehouse Associates's inspection of the Property. See *Prudential Ins. Co. of Am.*, 896 S.W.2d at 162-63. Celotex's failure to gratuitously remove the concrete slabs under the structures it had demolished and removed did not impair Warehouse Associates's inspection. The parties agreed in the Contract that the concrete slabs would be left in place. The summary-judgment evidence does not reflect that it was impossible for Warehouse Associates to test the soil under these slabs. In any event, these slabs were a preexisting part of the Property, and Celotex's failure to remove them cannot constitute an impairment of Warehouse Associates's inspection. Celotex's instruction to its contractor to backfill the excavation containing the suspected asbestos-containing material returned the Property to its prior condition before the contractor began excavating. There is no evidence that Celotex

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removed any suspected asbestos-containing material from the soil, and Warehouse Associates was free to test any part of the Property, including this particular material. In fact, near the end of the inspection period, Celotex gave HBC a map showing areas of the Property that had been backfilled. HBC did not attempt to take soil samples from these areas.

***15 Warehouse Associates** does not assert on appeal that Celotex impaired, obstructed, or interfered with its ability to carefully view, observe, and physically examine the Property. The summary-judgment evidence shows that Warehouse Associates and HBC had access to the Property and were free to take whatever soil and water samples they wanted to take for testing. [FN12] The record shows that, if Warehouse Associates or its contractor had tested seventy soil borings taken from all over the Property for asbestos, as was done after the closing of the sale, Warehouse Associates would have discovered the asbestos contamination in the soil. Celotex did not impair Warehouse Associates's ability to perform such testing. Warehouse Associates and its contractor chose not to do so. Warehouse Associates argues that Colburn made fraudulent misrepresentations and failed to disclose material facts to HBC, allegedly knowing that HBC would rely upon this information in deciding what type of soil testing to do in its inspection. Although there is evidence to the contrary, [FN13] even presuming that this is true, such fraudulent conduct would not have impaired Warehouse Associates's ability to view, observe, and physically examine the Property. As discussed above, under the applicable legal standard, we do not consider the impact of any alleged statements by the seller regarding the condition of the Property on the buyer's decision as to what kind of inspection to undertake. Consistent with the context of a sale on an "as is" basis with a waiver-of-reliance provision in the contract, in determining the applicability of the impairment-of-inspection exception, we consider only the impact of the seller's conduct on the buyer's actual inspection of the property's condition.

Except for the warranty of title contained in the

deed, Warehouse Associates agreed not to rely upon any statements by Celotex regarding the Property, and it bargained for the opportunity to conduct an independent investigation and inspection before closing the sale. The scope of this investigation and inspection was solely Warehouse Associates's decision. As a practical matter, Warehouse Associates could choose to rely upon or be influenced by Celotex's statements in deciding the scope of its environmental testing and inspection; however, if it chose to do so, it did so at its peril and that decision provides no basis to avoid enforcement of the Contract Language. As the buyer, Warehouse Associates had to decide the nature and scope of its environmental investigation and inspection because it is the one who either had to accept the property "as is" or decline to proceed with the transaction, without relying on anything Celotex said. Under the Contract, Celotex had no obligation to furnish any documents or records regarding the Property and made no warranties, representations, covenants, or promises regarding the Property's condition. Given the structure of this transaction and the sophistication of the parties, in assessing whether Celotex impaired the inspection, it is not appropriate to focus on whether Celotex's statements impacted Warehouse Associates's decision-making process as to the depth and breadth of the inspection; the parties agreed that decision was for Warehouse Associates to make, with Warehouse Associates assuming the risks of opting for a less thorough, less expensive, and less time-consuming inspection of the Property.

***16 In sum, Warehouse Associates** does not assert, and the record does not show, a fact issue as to whether Celotex impaired, obstructed, or interfered with Warehouse Associates's exercise of its contractual right to carefully view, observe, and physically examine the Property. We conclude that the summary-judgment evidence proved as a matter of law that Celotex did not engage in conduct that impaired, obstructed, or interfered with Warehouse Associates's inspection of the Property. Therefore, the impairment-of-inspection exception provides no basis to bar enforcement of the Contract Language. Accordingly, we overrule Warehouse Associates's first issue to the extent it alleges the

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summary-judgment evidence raises a genuine issue of fact as to the impairment-of-inspection exception.

C. Does Warehouse Associates's independent investigation of the Property's condition preclude its assertion that it was induced to enter into the Contract by a fraudulent representation or concealment of information by Celotex?

In the trial court and on appeal, the Celotex Parties also have argued, without relying on the Contract Language, that Warehouse Associates's claims fail as a matter of law under *Bartlett v. Schmidt* because Warehouse Associates undertook its own investigation of the Property's environmental condition. See 33 S.W.3d 35, 37-38 (Tex.App.-Corpus Christi 2000, pet. denied). In *Bartlett*, the court relies primarily on *Marcus v. Kinabrew*, 438 S.W.2d 431, 432 (Tex.Civ.App.-Tyler 1969, no writ). See *Bartlett*, 33 S.W.3d at 38. *Bartlett* did not involve as-is or waiver-of-reliance language, and it did not cite *Prudential* or *Schlumberger*. See *id.* To the extent that *Bartlett*, *Marcus*, or the cases cited therein hold that a buyer's independent investigation, without more, is sufficient as a matter of law to defeat an assertion that the seller fraudulently induced the buyer to enter into the contract, these cases are contrary to *Prudential*, *Schlumberger*, and the cases cited therein. See *Schlumberger Tech. Corp.*, 959 S.W.2d at 179- 81; *Prudential Ins. Co. of Am.*, 896 S.W.2d at 162-63. Therefore, the trial court erred if it granted summary judgment based on this ground of the Celotex Parties' motion. Accordingly, we sustain Warehouse Associates's second issue to this extent.

D. Did the trial court err in granting summary judgment based on the doctrines of estoppel by contract and estoppel by deed?

[7] The Celotex Parties also moved for summary judgment based on the doctrines of estoppel by contract and estoppel by deed. The Celotex Parties assert that, under these doctrines, the terms of the Contract bind Warehouse Associates so that Warehouse Associates cannot take a position inconsistent with these terms. First, the Texas

Supreme Court has indicated that, if either of the two *Prudential* exceptions apply, a party may take a position inconsistent with the waiver-of-reliance and as-is language in that party's contract. See *Prudential Ins. Co.*, 896 S.W.2d at 162. Second, the doctrines of estoppel by contract or by deed apply only in the absence of fraud. See, e.g., *Masterson v. Bouldin*, 151 S.W.2d 301, 307 (Tex.Civ.App.-Eastland 1941, writ ref'd) (stating that "If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, *in the absence of fraud ...* ") (emphasis added, quotations omitted). Because the summary-judgment evidence raises fact issues as to the fraudulent-inducement exception under *Prudential*, we conclude the trial court erred to the extent it based its summary judgment on the doctrines of estoppel by contract and estoppel by deed. Accordingly, we sustain Warehouse Associates's third issue.

V. CONCLUSION

*17 Based on the record before this court, we conclude that this case does not fall within the scope of *Schlumberger Technology Corp. v. Swanson*. After carefully reviewing the summary-judgment evidence under the applicable standard of review, we conclude that there is a genuine issue of fact as to whether Warehouse Associates was induced to enter into the Contract by Celotex's alleged fraudulent misrepresentation or concealment of asbestos contamination in the soil on the Property. Based on *Prudential*, we conclude that the impairment-of-inspection exception is limited to conduct by the seller that impairs, obstructs, or interferes with the buyer's exercise of its contractual right to carefully view, observe, and physically examine the property. Under the applicable standard of review, we conclude that the summary-judgment evidence proves as a matter of law that Celotex did not engage in such conduct. The Celotex Parties argue that, absent reliance upon the Contract Language, Warehouse Associates's claims fail as a matter of law under *Bartlett v. Schmidt*. This argument lacks merit and does not provide a basis for this court to affirm the trial court's judgment. Because of the genuine issue of

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fact as to the fraudulent-inducement exception, the trial court erred in enforcing the Contract language as a matter of law and in granting summary judgment based on the doctrines of estoppel by contract and estoppel by deed.

In its fourth issue, Warehouse Associates argues that the Celotex Parties were not entitled to partial summary judgment limiting Warehouse Associates's potential damage recovery based on various arguments the Celotex Parties asserted in their summary-judgment motion. However, in its final judgment, the trial court granted the Celotex Parties' "Motion for Partial and Full Summary Judgment that Plaintiffs take nothing on all their claims." (emphasis added). In this judgment, the trial court ordered that Warehouse Associates take nothing and that its claims be dismissed with prejudice. In the part of the motion for summary judgment attacked in Warehouse Associates's fourth issue, the Celotex Parties asserted various ways in which they claimed Warehouse Associates's damages would be limited even if liability were established. For example, they asserted that Warehouse Associates could not recover lost profits. The Celotex Parties did not argue that, upon a finding of fraud, Warehouse Associates would not be entitled to rescind the Contract. [FN14] The Celotex Parties did not assert that Warehouse Associates suffered no damages at all as a matter of law. Because the grounds in this part of the motion do not seek a take-nothing judgment against Warehouse Associates, they are not independent grounds for the take-nothing summary judgment granted by the trial court. Therefore, we need not and do not consider these issues on appeal. Accordingly, we do not reach Warehouse Associates's fourth issue.

In accordance with our rulings in this appeal, we reverse the trial court's judgment and remand this case to the trial court for further proceedings consistent with this opinion.

FN1. Most of the summary-judgment evidence does not distinguish between the three appellants, all of which have "Warehouse Associates" in their names.

Warehouse Associates Development, Inc. is a party to the contract for sale of the Property. Warehouse Associates Corporate Centre Post Oak, Ltd. is the grantee in the deed from Celotex. Because the distinctions among the corporate entities are not relevant to the issues on appeal, for convenience, we refer to the appellants collectively as "Warehouse Associates," unless otherwise specified. Even though we refer to three entities, we use the singular noun, "Warehouse Associates."

FN2. The Celotex Parties also sought a partial summary judgment requiring Warehouse Associates to accept Celotex's tender to buy back the Property for the amount paid by Warehouse Associates plus interest, without prejudice to the pending claims in this case and without admitting that the Celotex Parties engaged in any actionable conduct. The trial court denied the Celotex Parties' motion for summary judgment in this regard, and the Celotex Parties have not appealed this ruling.

FN3. A deputy district clerk apparently faxed the orders reflecting these rulings to counsel along with a fax cover sheet describing the trial court's rulings. The fax cover sheet was signed by the clerk but not signed by the trial court. On appeal, the Celotex Parties assert that this fax cover sheet conveys the trial court's summary-judgment rulings. We disagree. A letter is not the proper method for apprising the parties of summary-judgment rulings. *Shannon v. Tex. Gen. Indem. Co.*, 889 S.W.2d 662, 664 (Tex.App.-Houston [14th Dist.] 1994, no writ). Therefore, we do not consider the fax cover sheet and instead base our review on the trial court's summary-judgment orders and final judgment.

FN4. The Prudential court also recognized

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that other aspects of a transaction may make as-is or waiver-of-reliance language unenforceable. See *Prudential Ins. Co.*, 896 S.W.2d at 162. The *Prudential* court indicated that, even absent fraudulent inducement or impairment of inspection, such language still may not be enforceable based on consideration of the totality of the circumstances, including such factors as (1) the sophistication of the parties and whether they were represented by counsel, (2) whether the contract was an arm's length transaction, (3) the relative bargaining power of the parties and whether the contractual language was freely negotiated, and (4) whether that language was an important part of the parties' bargain, not simply added in a "boilerplate" provision. See *id.* Although this possible basis for invalidating the Contract's language is not at issue in this appeal, we note that the two *Prudential* exceptions at issue in this case are not the only potential grounds for invalidating such language. See *id.*

FN5. The Celotex Parties argue that *Prudential* applies only to as-is language and not to waiver-of-reliance language. We disagree. Although the *Prudential* court referred to the contract language at issue in that case as an " 'as is' provision," the provision in question contained both waiver-of-reliance and as-is language. See *Prudential Ins. Co.*, 896 S.W.2d at 160-61. Therefore, the *Prudential* exceptions apply to both types of language. See *id.* at 161-62; *Bynum v. Prudential Residential Servs., Ltd. P'ship*, 129 S.W.3d 781, 787-92 (Tex.App.-Houston [1st Dist.] 2004, pet. denied) (applying *Prudential* exceptions to contract containing both waiver-of-reliance and as-is language); *Nelson v. Najm*, 127 S.W.3d 170, 173, 175-76 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) (same as *Bynum*).

FN6. The *Schlumberger* court left the

impairment-of-inspection exception from *Prudential* completely intact. See *Schlumberger Tech. Corp.*, 959 S.W.2d at 181; *Prudential Ins. Co.*, 896 S.W.2d at 162.

FN7. The Celotex Parties present policy arguments for a rule that, regardless of any alleged fraudulent inducement, would enforce freely negotiated as-is and waiver-of-reliance provisions in a deliberately negotiated contract between sophisticated parties, so as to bar fraud claims by a buyer who undertook the obligation to inspect property before the sale and who, after having been given the opportunity to do so, elected to purchase the property "as is." Regardless of the merits of these policy arguments, the *Prudential* exceptions still apply, based on the opinions in *Schlumberger* and *Prudential*.

FN8. This holding is consistent with *IKON Office Solutions, Inc. v. Eifert*, in which this court held that *Schlumberger* applied to a contract that sought to end a "lengthy and intense dispute." See 125 S.W.3d 113, 125-28 (Tex.App.-Houston [14th Dist.] 2003, pet. denied). Furthermore, *IKON Office Solutions* did not cite the *Prudential* exceptions or discuss how *Schlumberger* affects these exceptions. See *id.*

FN9. The Celotex Parties assert that Warehouse Associates is charged with knowledge of all information in the "public record," such as documents filed in Celotex's bankruptcy case in Florida, the contents of the Federal Register, documents in public libraries, and documents available from the Texas Department of Health. The only case the Celotex Parties cite for this proposition is *Mooney v. Harlin*, 622 S.W.2d 83 (1981). However, the Texas Supreme Court later clarified that parties are not charged with knowledge of all public records. See *HECI*

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Explor. Co. v. Neel, 982 S.W.2d 881, 886-87 (Tex.1998). The *Mooney* court held that a person interested in an estate admitted to probate is charged with notice of what the will provides and that a claim for fraud based on exclusion from a will must be brought within the applicable limitations period. *See id.* at 887. However, the *Mooney* case cannot fairly be interpreted to mean that parties are charged with knowledge of all public records. *See id.*

FN10. The Celotex Parties also rely on one page of HBC's April 19, 2000 report, which states that "white fluff material" was found at approximately a twelve-foot depth in one of the soil borings done by HBC. The report does not say that this material was asbestos. Although this material's characteristics could have raised suspicions that the material was asbestos, the summary-judgment record does not show that Warehouse Associates learned of the discovery of this material before the end of the inspection period. In any event, even if Warehouse Associates knew during the inspection period that there was white fluff material in one soil boring, this knowledge would not prove as a matter of law that Warehouse Associates knew the soil on the Property was contaminated with asbestos.

FN11. (emphasis added).

FN12. Warehouse Associates cites *Kane* and *Nelson*. *See Kane*, 2005 WL 497484, at *6-8; *Nelson*, 127 S.W.3d at 175-76. Though these cases allude to impairment of inspection, they do not contain any analysis of what constitutes impairment of inspection. *See Kane*, 2005 WL 497484, at *6-8; *Nelson*, 127 S.W.3d at 175-76. *Kane* indicates that the seller's fraudulent misrepresentations regarding the car in question discouraged the buyer from inspecting the car before buying it. *See*

Kane, 2005 WL 497484, at *1, 6-8. Nonetheless, there was a fact issue as to whether those same alleged fraudulent misrepresentations (as well as others) induced the buyer to purchase the car, and the intermediate court based its ruling on the fraudulent-inducement exception. *See id.* In *Nelson*, the court states in passing that the seller thwarted the buyer's attempt to inspect the real property in question and notes that the seller told the buyer that an inspection was unnecessary, a waste of money, and that he had been operating the gas station for thirty years with no problems from the government. *See Nelson*, 127 S.W.3d at 173, 175. Though the buyer apparently took the seller's advice and declined to exercise his right to conduct an environmental inspection, the intermediate court based its decision on the fraudulent-inducement exception and did not analyze whether the impairment-of-inspection exception applied. *See id.* at 175-76. Because the *Nelson* court's focus is not on the impairment issue, it is not clear whether the seller simply discouraged the buyer from choosing to conduct an environmental inspection or whether the seller also denied the buyer access to the property for such an inspection. *See id.* at 173, 175-76.

FN12. Although not asserted by Warehouse Associates on appeal, some summary-judgment evidence indicates that HBC was not able to visit the Property until February 21, 2000 because of ongoing work being performed by Eagle. However, at his deposition, Martens of HBC characterized this situation as a delay or postponement of HBC's appointment to February 21, 2000, rather than as an unsuccessful attempt to visit the Property. Martens did not indicate that this delay caused HBC any problems in its work, and he testified that HBC had full access to the Property on the dates that it visited the

--- S.W.3d ---, 2006 WL 1148117 (Tex.App.-Hous. (14 Dist.))

(Cite as: 2006 WL 1148117 (Tex.App.-Hous. (14 Dist.)))

Property. Martens testified that HBC visited and inspected the Property on February 21 and 24, 2000, and that HBC did not need to revisit the site after February 24, 2000, to complete its Phase I report. HBC returned to the Property on March 14, 2000, and took soil and water samples.

FN13. For example, Colburn testified at his deposition that he understood that Warehouse Associates was a sophisticated buyer that was doing its own environmental evaluation of the Property and that Warehouse Associates was not relying on any information Celotex provided.

FN14. At times, the Celotex Parties appear to argue that Celotex's offer to Warehouse Associates to buy back the Property is equivalent to the remedy of equitable rescission. Given that such a reconveyance would not affect the validity of the prior conveyance from Celotex, would not resolve the claims in this case, and would not involve a finding that the Celotex Parties committed fraud, we do not view such a repurchase as being equivalent to a rescission remedy based on fraud.

--- S.W.3d ---, 2006 WL 1148117
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END OF DOCUMENT

KEYCITE

HWarehouse Associates Corporate Centre II, Inc. v. Celotex Corp., 2006 WL 1148117 (Tex.App.-Hous. (14 Dist.), Mar 30, 2006) (NO. 14-03-01444-CV)

History
Direct History

- => 1 Warehouse Associates Corporate Centre II, Inc. v. Celotex Corp., 2006 WL 1148117
(Tex.App.-Hous. (14 Dist.) Mar 30, 2006) (NO. 14-03-01444-CV), rule 53.7(f) motion granted
(May 15, 2006)

Court Documents
Dockets (U.S.A.)

Tex.App.-Hous. (14 Dist.)

- 2 WAREHOUSE ASSOCIATES CORPORATE CENTRE II, INC., WAREHOUSE ASSOCIATES
CORPORATE CENTRE POST OAK, LTD., AND WAREHOUSE ASSOCIATES
DEVELOPMENT, INC v. CELOTEX CORPORATION, LECIL M. COLBURN AND DAVID
MURRY, NO. 14-03-01444-CV (Docket) (Tex.App.-Hous. (14 Dist.) Dec. 29, 2003)

ATTACHMENT D

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. Our goal is to ensure that all citizens live in clean and sustainable communities. In response to Executive Order 12898, and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3-17). EPA's brownfields program has a particular emphasis on addressing concerns specific to environmental justice communities. Many of the communities and neighborhoods that are most significantly impacted by brownfields are environmental justice communities. EPA's brownfields program targets such communities for assessment, cleanup, and revitalization. The brownfields program has a long history of working with environmental justice communities and advocates through our technical assistance and grant programs. In addition to the monies awarded to such communities in the form of assessment and cleanup grants, the brownfields program also works with environmental justice communities through our job training grants program. The job training grants provide money to government entities to facilitate the training of persons living in or near brownfields communities to attain skills for conducting site assessments and cleanups.

Given that environmental justice communities are significantly impacted by brownfields, and the federal standards for all appropriate inquiries may play a primary role in encouraging

the assessment and cleanup of brownfields sites, EPA made it a priority to obtain input from representatives of environmental justice interest groups during the development of today's rulemaking. The Negotiated Rulemaking Committee tasked with developing the all appropriate inquiries proposed rule included three representatives from environmental justice advocacy groups. Each representative played a significant role in the negotiations and in the development of the proposed rule. Today's final rule includes no significant changes to the proposed rule and in particular, includes no changes that will significantly or disproportionately impact environmental justice communities.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective November 1, 2006.

List of Subjects in 40 CFR Part 312

Environmental protection, Administrative practice and procedure, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: October 21, 2005.

Stephen L. Johnson,
Administrator.

■ For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended by revising part 312 as follows:

PART 312—INNOCENT LANDOWNERS, STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES

Subpart A—Introduction

Sec.

312.1 Purpose, applicability, scope, and disclosure obligations.

Subpart B—Definitions and References

312.10 Definitions.

312.11 References.

Subpart C—Standards and Practices

312.20 All appropriate inquiries.

312.21 Results of inquiry by an environmental professional.

312.22 Additional inquiries.

312.23 Interviews with past and present owners, operators, and occupants.

312.24 Reviews of historical sources of information.

312.25 Searches for recorded environmental cleanup liens.

312.26 Reviews of federal, state, tribal and local government records.

312.27 Visual inspections of the facility and of adjoining properties.

312.28 Specialized knowledge or experience on the part of the defendant.

312.29 The relationship of the purchase price to the value of the property, if the property was not contaminated.

312.30 Commonly known or reasonably ascertainable information about the property.

312.31 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.

Authority: Section 101(35)(B) of CERCLA, as amended, 42 U.S.C. 9601(35)(B).

PART 312—INNOCENT LANDOWNERS, STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES

Subpart A—Introduction

§ 312.1 Purpose, applicability, scope and disclosure obligations.

(a) *Purpose.* The purpose of this section is to provide standards and practices for "all appropriate inquiries" for the purposes of CERCLA sections 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii).

(b) *Applicability.* The requirements of this part are applicable to:

(1) Persons seeking to establish:

(i) The innocent landowner defense pursuant to CERCLA sections 101(35) and 107(b)(3);

(ii) The bona fide prospective purchaser liability protection pursuant to CERCLA sections 101(40) and 107(r);

(iii) The contiguous property owner liability protection pursuant to CERCLA section 107(q); and

(2) persons conducting site characterization and assessments with the use of a grant awarded under CERCLA section 104(k)(2)(B).

(c) *Scope.* (1) Persons seeking to establish one of the liability protections under paragraph (b)(1) of this section must conduct investigations as required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify

conditions indicative of releases or threatened releases, as defined in CERCLA section 101(22), of hazardous substances, as defined in CERCLA section 101(14).

(2) Persons identified in paragraph (b)(2) of this section must conduct investigations required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify conditions indicative of releases and threatened releases of hazardous substances, as defined in CERCLA section 101(22), and as applicable per the terms and conditions of the grant or cooperative agreement, releases and threatened releases of:

(i) Pollutants and contaminants, as defined in CERCLA section 101(33);

(ii) Petroleum or petroleum products excluded from the definition of "hazardous substance" as defined in CERCLA section 101(14); and

(iii) Controlled substances, as defined in 21 U.S.C. 802.

(d) *Disclosure obligations.* None of the requirements of this part limits or expands disclosure obligations under any federal, state, tribal, or local law, including the requirements under CERCLA sections 101(40)(c) and 107(q)(1)(A)(vii) requiring persons, including environmental professionals, to provide all legally required notices with respect to the discovery of releases of hazardous substances. It is the obligation of each person, including environmental professionals, conducting the inquiry to determine his or her respective disclosure obligations under federal, state, tribal, and local law and to comply with such disclosure requirements.

Subpart B—Definitions and References

§ 312.10 Definitions.

(a) Terms used in this part and not defined below, but defined in either CERCLA or 40 CFR part 300 (the National Oil and Hazardous Substances Pollution Contingency Plan) shall have the definitions provided in CERCLA or 40 CFR part 300.

(b) When used in this part, the following terms have the meanings provided as follows:

Abandoned property means: property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property.

Adjoining properties means: any real property or properties the border of which is (are) shared in part or in whole with that of the subject property, or that would be shared in part or in whole with that of the subject property but for a street, road, or other public thoroughfare separating the properties.

Data gap means: a lack of or inability to obtain information required by the standards and practices listed in subpart C of this part despite good faith efforts by the environmental professional or persons identified under § 312.1(b), as appropriate, to gather such information pursuant to §§ 312.20(e)(1) and 312.20(e)(2).

Date of acquisition or purchase date means: the date on which a person acquires title to the property.

Environmental Professional means:

(1) a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) on, at, in, or to a property, sufficient to meet the objectives and performance factors in § 312.20(e) and (f).

(2) Such a person must:

(i) Hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) and have the equivalent of three (3) years of full-time relevant experience; or

(ii) Be licensed or certified by the federal government, a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or

(iii) Have a Baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and the equivalent of five (5) years of full-time relevant experience; or

(iv) Have the equivalent of ten (10) years of full-time relevant experience.

(3) An environmental professional should remain current in his or her field through participation in continuing education or other activities.

(4) The definition of environmental professional provided above does not preempt state professional licensing or registration requirements such as those for a professional geologist, engineer, or site remediation professional. Before commencing work, a person should determine the applicability of state professional licensing or registration laws to the activities to be undertaken

as part of the inquiry identified in § 312.21(b).

(5) A person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above when conducting such activities.

Relevant experience, as used in the definition of environmental professional in this section, means: participation in the performance of all appropriate inquiries investigations, environmental site assessments, or other site investigations that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) to the subject property.

Good faith means: the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.

Institutional controls means: non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy.

§ 312.11 References.

The following industry standards may be used to comply with the requirements set forth in §§ 312.23 through 312.31:

(a) The procedures of ASTM International Standard E1527-05 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process."

(b) [Reserved]

Subpart C—Standards and Practices

§ 312.20 All appropriate inquiries.

(a) "All appropriate inquiries" pursuant to CERCLA section 101(35)(B) must be conducted within one year prior to the date of acquisition of the subject property and must include:

(1) An inquiry by an environmental professional (as defined in § 312.10), as provided in § 312.21;

(2) The collection of information pursuant to § 312.22 by persons identified under § 312.1(b); and

(3) Searches for recorded environmental cleanup liens, as required in § 312.25.

(b) Notwithstanding paragraph (a) of this section, the following components of the all appropriate inquiries must be conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

(1) Interviews with past and present owners, operators, and occupants (see § 312.23);

(2) Searches for recorded environmental cleanup liens (see § 312.25);

(3) Reviews of federal, tribal, state, and local government records (see § 312.26);

(4) Visual inspections of the facility and of adjoining properties (see § 312.27); and

(5) The declaration by the environmental professional (see § 312.21(d)).

(c) All appropriate inquiries may include the results of and information contained in an inquiry previously conducted by, or on the behalf of, persons identified under § 312.1(b) and who are responsible for the inquiries for the subject property, provided:

(1) Such information was collected during the conduct of all appropriate inquiries in compliance with the requirements of CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii);

(2) Such information was collected or updated within one year prior to the date of acquisition of the subject property;

(3) Notwithstanding paragraph (b)(2) of this section, the following components of the inquiries were conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

(i) Interviews with past and present owners, operators, and occupants (see § 312.23);

(ii) Searches for recorded environmental cleanup liens (see § 312.25);

(iii) Reviews of federal, tribal, state, and local government records (see § 312.26);

(iv) Visual inspections of the facility and of adjoining properties (see § 312.27); and

(v) The declaration by the environmental professional (see § 312.21(d)).

(4) Previously collected information is updated to include relevant changes in the conditions of the property and specialized knowledge, as outlined in § 312.28, of the persons conducting the all appropriate inquiries for the subject property, including persons identified

in § 312.1(b) and the environmental professional, defined in § 312.10.

(d) All appropriate inquiries can include the results of report(s) specified in § 312.21(c), that have been prepared by or for other persons, provided that:

(1) The report(s) meets the objectives and performance factors of this regulation, as specified in paragraphs (e) and (f) of this section; and

(2) The person specified in § 312.1(b) and seeking to use the previously collected information reviews the information and conducts the additional inquiries pursuant to §§ 312.28, 312.29 and 312.30 and the all appropriate inquiries are updated in paragraph (b)(3) of this section, as necessary.

(e) *Objectives.* The standards and practices set forth in this part for All Appropriate Inquiries are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.

(1) In performing the all appropriate inquiries, as defined in this section and provided in the standards and practices set forth in this subpart, the persons identified under § 312.1(b)(1) and the environmental professional, as defined in § 312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances;

(iii) Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;

(iv) Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;

(v) Engineering controls;

(vi) Institutional controls; and

(vii) Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances to the subject property.

(2) In the case of persons identified in § 312.1(b)(2), the standards and practices for All Appropriate Inquiries set forth in this part are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) on, at, in, or to the subject property. In performing the all appropriate inquiries,

as defined in this section and provided in the standards and practices set forth in this subpart, the persons identified under § 312.1(b) and the environmental professional, as defined in § 312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);

(iii) Waste management and disposal activities;

(iv) Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);

(v) Engineering controls;

(vi) Institutional controls; and

(vii) Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) to the subject property.

(f) *Performance factors.* In performing each of the standards and practices set forth in this subpart and to meet the objectives stated in paragraph (e) of this section, the persons identified under § 312.1(b) or the environmental professional as defined in § 312.10 (as appropriate to the particular standard and practice) must seek to:

(1) Gather the information that is required for each standard and practice listed in this subpart that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed; and

(2) Review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice listed in this subpart taking into account information gathered in the course of complying with the other standards and practices of this subpart.

(g) To the extent there are data gaps (as defined in § 312.10) in the information developed as part of the inquiries in paragraph (e) of this section that affect the ability of persons (including the environmental professional) conducting the all

appropriate inquiries to identify conditions indicative of releases or threatened releases in each area of inquiry under each standard and practice such persons should identify such data gaps, identify the sources of information consulted to address such data gaps, and comment upon the significance of such data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of persons identified in § 312.1(b)(2), hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property. Sampling and analysis may be conducted to develop information to address data gaps.

(h) Releases and threatened releases identified as part of the all appropriate inquiries should be noted in the report of the inquiries. These standards and practices however are not intended to require the identification in the written report prepared pursuant to § 312.21(c) of quantities or amounts, either individually or in the aggregate, of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) that because of said quantities and amounts, generally would not pose a threat to human health or the environment.

§ 312.21 Results of inquiry by an environmental professional.

(a) Persons identified under § 312.1(b) must undertake an inquiry, as defined in paragraph (b) of this section, by an environmental professional, or conducted under the supervision or responsible charge of, an environmental professional, as defined in § 312.10. Such inquiry is hereafter referred to as "the inquiry of the environmental professional."

(b) The inquiry of the environmental professional must include the requirements set forth in §§ 312.23 (interviews with past and present owners * * *), 312.24 (reviews of historical sources * * *), 312.26 (reviews of government records), 312.27 (visual inspections), 312.30 (commonly known or reasonably ascertainable information), and 312.31 (degree of obviousness of the presence * * * and the ability to detect the contamination * * *). In addition, the inquiry should take into account information provided to the environmental professional as a result of the additional inquiries conducted by persons identified in § 312.1(b) and in accordance with the requirements of § 312.22.

(c) The results of the inquiry by an environmental professional must be documented in a written report that, at a minimum, includes the following:

(1) An opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property;

(2) An identification of data gaps (as defined in § 312.10) in the information developed as part of the inquiry that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property and comments regarding the significance of such data gaps on the environmental professional's ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases on, at, in, or to the subject property. If there are data gaps such that the environmental professional cannot reach an opinion regarding the identification of conditions indicative of releases and threatened releases, such data gaps must be noted in the environmental professional's opinion in paragraph (c)(1) of this section; and

(3) The qualifications of the environmental professional(s).

(d) The environmental professional must place the following statements in the written document identified in paragraph (c) of this section and sign the document:

"[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in § 312.10 of this part."

"[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312."

§ 312.22 Additional inquiries.

(a) Persons identified under § 312.1(b) must conduct the inquiries listed in

paragraphs (a)(1) through (a)(4) below and may provide the information associated with such inquiries to the environmental professional responsible for conducting the activities listed in § 312.21:

(1) As required by § 312.25 and if not otherwise obtained by the environmental professional, environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law;

(2) As required by § 312.28, specialized knowledge or experience of the person identified in § 312.1(b);

(3) As required by § 312.29, the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated; and

(4) As required by § 312.30, and if not otherwise obtained by the environmental professional, commonly known or reasonably ascertainable information about the subject property.

§ 312.23 Interviews with past and present owners, operators, and occupants.

(a) Interviews with owners, operators, and occupants of the subject property must be conducted for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f).

(b) The inquiry of the environmental professional must include interviewing the current owner and occupant of the subject property. If the property has multiple occupants, the inquiry of the environmental professional shall include interviewing major occupants, as well as those occupants likely to use, store, treat, handle or dispose of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)], or those who have likely done so in the past.

(c) The inquiry of the environmental professional also must include, to the extent necessary to achieve the objectives and performance factors of § 312.20(e) and (f), interviewing one or more of the following persons:

(1) Current and past facility managers with relevant knowledge of uses and physical characteristics of the property;

(2) Past owners, occupants, or operators of the subject property; or

(3) Employees of current and past occupants of the subject property.

(d) In the case of inquiries conducted at "abandoned properties," as defined in § 312.10, where there is evidence of potential unauthorized uses of the subject property or evidence of

uncontrolled access to the subject property, the environmental professional's inquiry must include interviewing one or more (as necessary) owners or occupants of neighboring or nearby properties from which it appears possible to have observed uses of, or releases at, such abandoned properties for the purpose of gathering information necessary to achieve the objectives and performance factors of § 312.20(e) and (f).

§ 312.24 Reviews of historical sources of information.

(a) Historical documents and records must be reviewed for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f). Historical documents and records may include, but are not limited to, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.

(b) Historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes. For the purpose of achieving the objectives and performance factors of § 312.20(e) and (f), the environmental professional may exercise professional judgment in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records.

§ 312.25 Searches for recorded environmental cleanup liens.

(a) All appropriate inquiries must include a search for the existence of environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law.

(b) All information collected regarding the existence of such environmental cleanup liens associated with the subject property by persons to whom this part is applicable per § 312.1(b) and not by an environmental professional, may be provided to the environmental professional or retained by the applicable party.

§ 312.26 Reviews of Federal, State, Tribal, and local government records.

(a) Federal, tribal, state, and local government records or data bases of government records of the subject property and adjoining properties must be reviewed for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f).

(b) With regard to the subject property, the review of federal, tribal, and state government records or data bases of such government records and local government records and data bases of such records should include:

(1) Records of reported releases or threatened releases, including site investigation reports for the subject property;

(2) Records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases as defined in § 312.1(c), including landfill and other disposal unit location records and permits, storage tank records and permits, hazardous waste handler and generator records and permits, federal, tribal and state government listings of sites identified as priority cleanup sites, and spill reporting records;

(3) CERCLIS records;

(4) Public health records;

(5) Emergency Response Notification System records;

(6) Registries or publicly available lists of engineering controls; and

(7) Registries or publicly available lists of institutional controls, including environmental land use restrictions, applicable to the subject property.

(c) With regard to nearby or adjoining properties, the review of federal, tribal, state, and local government records or databases of government records should include the identification of the following:

(1) Properties for which there are government records of reported releases or threatened releases. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) Records of NPL sites or tribal- and state-equivalent sites (one mile);

(ii) RCRA facilities subject to corrective action (one mile);

(iii) Records of federally-registered, or state-permitted or registered, hazardous waste sites identified for investigation or remediation, such as sites enrolled in state and tribal voluntary cleanup programs and tribal- and state-listed brownfields sites (one-half mile);

(iv) Records of leaking underground storage tanks (one-half mile); and

(2) Properties that previously were identified or regulated by a government entity due to environmental concerns at the property. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) Records of delisted NPL sites (one-half mile);

(ii) Registries or publicly available lists of engineering controls (one-half mile); and

(iii) Records of former CERCLIS sites with no further remedial action notices (one-half mile).

(3) Properties for which there are records of federally-permitted, tribal-permitted or registered, or state-permitted or registered waste management activities. Such records or data bases that may contain such records include the following:

(i) Records of RCRA small quantity and large quantity generators (adjoining properties);

(ii) Records of federally-permitted, tribal-permitted, or state-permitted (or registered) landfills and solid waste management facilities (one-half mile); and

(iii) Records of registered storage tanks (adjoining property).

(4) A review of additional government records with regard to sites identified under paragraphs (c)(1) through (c)(3) of this section may be necessary in the judgment of the environmental professional for the purpose of achieving the objectives and performance factors of § 312.20(e) and (f).

(d) The search distance from the subject property boundary for reviewing government records or databases of government records listed in paragraph (c) of this section may be modified based upon the professional judgment of the environmental professional. The rationale for such modifications must be documented by the environmental professional. The environmental professional may consider one or more of the following factors in determining an alternate appropriate search distance:

- (1) The nature and extent of a release;
- (2) Geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment;
- (3) Land use or development densities;
- (4) The property type;
- (5) Existing or past uses of surrounding properties;
- (6) Potential migration pathways (e.g., groundwater flow direction, prevalent wind direction); or
- (7) Other relevant factors.

§ 312.27 Visual inspections of the facility and of adjoining properties.

(a) For the purpose of achieving the objectives and performance factors of § 312.20(e) and (f), the inquiry of the environmental professional must include:

(1) A visual on-site inspection of the subject property and facilities and improvements on the subject property,

including a visual inspection of the areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed. Physical limitations to the visual inspection must be noted.

(2) A visual inspection of adjoining properties, from the subject property line, public rights-of-way, or other vantage point (e.g., aerial photography), including a visual inspection of areas where hazardous substances may be or may have been stored, treated, handled or disposed. Physical limitations to the inspection of adjacent properties must be noted.

(b) Persons conducting site characterization and assessments using a grant awarded under CERCLA section 104(k)(2)(B) must include in the inquiries referenced in § 312.27(a) visual inspections of areas where hazardous substances, and may include, as applicable per the terms and conditions of the grant or cooperative agreement, pollutants and contaminants, petroleum and petroleum products, and controlled substances as defined in 21 U.S.C. 802 may be or may have been used, stored, treated, handled or disposed at the subject property and adjoining properties.

(c) Except as noted in this subsection, a visual on-site inspection of the subject property must be conducted. In the unusual circumstance where an on-site visual inspection of the subject property cannot be performed because of physical limitations, remote and inaccessible location, or other inability to obtain access to the property, provided good faith (as defined in § 312.10) efforts have been taken to obtain such access, an on-site inspection will not be required. The mere refusal of a voluntary seller to provide access to the subject property does not constitute an unusual circumstance. In such unusual circumstances, the inquiry of the environmental professional must include:

(1) Visually inspecting the subject property via another method (such as aerial imagery for large properties), or visually inspecting the subject property from the nearest accessible vantage point (such as the property line or public road for small properties);

(2) Documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful; and

(3) Documentation of other sources of information regarding releases or threatened releases at the subject property that were consulted in accordance with § 312.20(e). Such documentation should include comments by the environmental

professional on the significance of the failure to conduct a visual on-site inspection of the subject property with regard to the ability to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, if any.

§ 312.28 Specialized knowledge or experience on the part of the defendant.

(a) Persons to whom this part is applicable per § 312.1(b) must take into account, their specialized knowledge of the subject property, the area surrounding the subject property, the conditions of adjoining properties, and any other experience relevant to the inquiry, for the purpose of identifying conditions indicative of releases or threatened releases at the subject property, as defined in § 312.1(c).

(b) All appropriate inquiries, as outlined in § 312.20, are not complete unless the results of the inquiries take into account the relevant and applicable specialized knowledge and experience of the persons responsible for undertaking the inquiry (as described in § 312.1(b)).

§ 312.29 The relationship of the purchase price to the value of the property, if the property was not contaminated.

(a) Persons to whom this part is applicable per § 312.1(b) must consider whether the purchase price of the subject property reasonably reflects the fair market value of the property, if the property were not contaminated.

(b) Persons who conclude that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, must consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances.

(c) Persons conducting site characterization and assessments with the use of a grant awarded under CERCLA section 104(k)(2)(B) and who know that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, must consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, or controlled substances as defined in 21 U.S.C. 802.

§ 312.30 Commonly known or reasonably ascertainable information about the property.

(a) Throughout the inquiries, persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting the inquiry must take into account commonly known or reasonably ascertainable information within the local community about the subject property and consider such information when seeking to identify conditions indicative of releases or threatened releases, as set forth in § 312.1(c), at the subject property.

(b) Commonly known information may include information obtained by the person to whom this part applies in § 312.1(b) or by the environmental professional about releases or threatened releases at the subject property that is incidental to the information obtained during the inquiry of the environmental professional.

(c) To the extent necessary to achieve the objectives and performance factors of § 312.20(e) and (f), persons to whom this part is applicable per § 312.1(b) and the environmental professional must gather information from varied sources whose input either individually or taken together may provide commonly known or reasonably ascertainable information about the subject property; the environmental professional may refer to one or more of the following sources of information:

(1) Current owners or occupants of neighboring properties or properties adjacent to the subject property;

(2) Local and state government officials who may have knowledge of, or information related to, the subject property;

(3) Others with knowledge of the subject property; and

(4) Other sources of information (e.g., newspapers, Web sites, community organizations, local libraries and historical societies).

§ 312.31 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.

(a) Persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the degree of obviousness of the presence of releases or threatened releases at the subject property.

(b) Persons to whom this part is applicable per § 312.1(b) and

environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the

ability to detect contamination by appropriate investigation. The inquiry of the environmental professional should include an opinion regarding

additional appropriate investigation, if any.

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ATTACHMENT E



Designation: E 1527 – 05

Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process¹

This standard is issued under the fixed designation E 1527; the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A number in parentheses indicates the year of last reapproval. A superscript epsilon (ε) indicates an editorial change since the last revision or reapproval.

1. Scope

1.1 Purpose—The purpose of this practice is to define good commercial and customary practice in the United States of America for conducting an *environmental site assessment*² of a parcel of *commercial real estate* with respect to the range of contaminants within the scope of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. §9601) and *petroleum products*. As such, this practice is intended to permit a *user* to satisfy one of the requirements to qualify for the *innocent landowner*, *contiguous property owner*, or *bona fide prospective purchaser* limitations on CERCLA liability (hereinafter, the “*landowner liability protections*,” or “*LLPs*”): that is, the practice that constitutes “*all appropriate inquiry* into the previous ownership and uses of the *property* consistent with good commercial or customary practice” as defined at 42 U.S.C. §9601(35)(B). (See Appendix X1 for an outline of CERCLA’s liability and defense provisions.) Controlled substances are not included within the scope of this standard. Persons conducting an *environmental site assessment* as part of an EPA Brownfields Assessment and Characterization Grant awarded under CERCLA 42 U.S.C. §9604(k)(2)(B) must include controlled substances as defined in the Controlled Substances Act (21 U.S.C. §802) within the scope of the assessment investigations to the extent directed in the terms and conditions of the specific grant or cooperative agreement. Additionally, an evaluation of *business environmental risk* associated with a parcel of *commercial real estate* may necessitate investigation beyond that identified in this practice (see Sections 1.3 and 13).

1.1.1 Recognized Environmental Conditions—In defining a standard of good commercial and customary practice for conducting an *environmental site assessment* of a parcel of *property*, the goal of the processes established by this practice is to identify *recognized environmental conditions*. The term

recognized environmental conditions means the presence or likely presence of any *hazardous substances* or *petroleum products* on a *property* under conditions that indicate an existing release, a past release, or a *material threat* of a release of any *hazardous substances* or *petroleum products* into structures on the *property* or into the ground, ground water, or surface water of the *property*. The term includes *hazardous substances* or *petroleum products* even under conditions in compliance with laws. The term is not intended to include *de minimis* conditions that generally do not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies. Conditions determined to be *de minimis* are not *recognized environmental conditions*.

1.1.2 Petroleum Products—*Petroleum products* are included within the scope of this practice because they are of concern with respect to many parcels of *commercial real estate* and current custom and usage is to include an inquiry into the presence of *petroleum products* when doing an *environmental site assessment* of *commercial real estate*. Inclusion of *petroleum products* within the scope of this practice is not based upon the applicability, if any, of CERCLA to *petroleum products*. (See X1.7 for discussion of *petroleum exclusion* to CERCLA liability.)

1.1.3 CERCLA Requirements Other Than Appropriate Inquiry—This practice does not address whether requirements in addition to *all appropriate inquiry* have been met in order to qualify for the *LLPs* (for example, the duties specified in 42 U.S.C. §9607(b)(3)(a) and (b) and cited in Appendix X1, including the continuing obligation not to impede the integrity and effectiveness of *activity and use limitations* (AULs), or the duty to take reasonable steps to prevent releases, or the duty to comply with legally required release reporting obligations).

1.1.4 Other Federal, State, and Local Environmental Laws—This practice does not address requirements of any state or local laws or of any federal laws other than the *all appropriate inquiry* provisions of the *LLPs*. *Users* are cautioned that federal, state, and local laws may impose environmental assessment obligations that are beyond the scope of this practice. *Users* should also be aware that there are likely to be other legal obligations with regard to *hazardous substances* or

¹ This practice is under the jurisdiction of ASTM Committee E50 on Environmental Assessment and is the direct responsibility of Subcommittee E50.02 on Commercial Real Estate Transactions.

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² All definitions, descriptions of terms, and acronyms are defined in Section 3. Whenever terms defined in 3.2 are used in this practice, they are in *italics*.

petroleum products discovered on the property that are not addressed in this practice and that may pose risks of civil and/or criminal sanctions for non-compliance.

1.1.5 Documentation—The scope of this practice includes research and reporting requirements that support the user's ability to qualify for the LLPs. As such, sufficient documentation of all sources, records, and resources utilized in conducting the inquiry required by this practice must be provided in the written report (refer to 8.1.8 and 12.2).

1.2 Objectives—Objectives guiding the development of this practice are (1) to synthesize and put in writing good commercial and customary practice for *environmental site assessments* for *commercial real estate*, (2) to facilitate high quality, standardized *environmental site assessments*, (3) to ensure that the standard of *all appropriate inquiry* is practical and reasonable, and (4) to clarify an industry standard for *all appropriate inquiry* in an effort to guide legal interpretation of the LLPs.

1.3 Considerations Beyond Scope—The use of this practice is strictly limited to the scope set forth in this section. Section 13 of this practice identifies, for informational purposes, certain environmental conditions (not an all-inclusive list) that may exist on a property that are beyond the scope of this practice but may warrant consideration by parties to a *commercial real estate transaction*. The need to include an investigation of any such conditions in the *environmental professional's* scope of services should be evaluated based upon, among other factors, the nature of the property and the reasons for performing the assessment (for example, a more comprehensive evaluation of *business environmental risk*) and should be agreed upon between the user and *environmental professional* as additional services beyond the scope of this practice prior to initiation of the *environmental site assessment* process.

1.4 Organization of This Practice—This practice has thirteen sections and four appendixes. Section 1 is the Scope. Section 2 is Referenced Documents. Section 3, Terminology, has definitions of terms not unique to this practice, descriptions of terms unique to this practice, and acronyms. Section 4 is Significance and Use of this practice. Section 5 provides discussion regarding *activity and use limitations*. Section 6 describes *User's Responsibilities*. Sections 7-12 are the main body of the *Phase I Environmental Site Assessment*, including evaluation and report preparation. Section 13 provides additional information regarding non-scope considerations (see 1.3). The appendixes are included for information and are not part of the procedures prescribed in this practice. Appendix X1 explains the liability and defense provisions of CERCLA that will assist the user in understanding the user's responsibilities under CERCLA; it also contains other important information regarding CERCLA, the *Brownfields Amendments*, and this practice. Appendix X2 provides the definition of the *environmental professional* responsible for the *Phase I Environmental Site Assessment*, as required in the "All Appropriate Inquiry" Final Rule (40 C.F.R. Part 312). Appendix X3 provides an optional User Questionnaire to assist the user and the *environmental professional* in gathering information from the user that may be material to identifying *recognized environmental con-*

ditions. Appendix X4 provides a recommended table of contents and report format for a *Phase I Environmental Site Assessment*.

1.5 This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use.

1.6 This practice offers a set of instructions for performing one or more specific operations. This document cannot replace education or experience and should be used in conjunction with professional judgment. Not all aspects of this practice may be applicable in all circumstances. This ASTM standard is not intended to represent or replace the standard of care by which the adequacy of a given professional service must be judged, nor should this document be applied without consideration of a project's many unique aspects. The word "Standard" in the title means only that the document has been approved through the ASTM consensus process.

2. Referenced Documents

2.1 ASTM Standards:³

E 1528 Guide for Environmental Site Assessments: Transaction Screen Process

E 2091 Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls

2.2 Federal Statutes:

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund"), as amended by Superfund Amendments and Reauthorization Act of 1986 ("SARA") and Small Business Liability Relief and Brownfields Revitalization Act of 2002 ("Brownfields Amendments"), 42 U.S.C. §§9601 *et seq.*

Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. §§11001 *et seq.*

Freedom of Information Act, 5 U.S.C. §552, as amended by Public Law No. 104-231, 110 Stat. 3048

Resource Conservation and Recovery Act (sometimes also referred to as the Solid Waste Disposal Act), as amended ("RCRA"), 42 U.S.C. §6901 *et seq.*

2.3 USEPA Documents:

"All Appropriate Inquiry" Final Rule, 40 C.F.R. Part 312 Chapter 1 EPA, Subchapter J-Superfund, Emergency Planning, and Community Right-To-Know Programs, 40 C.F.R. Parts 300-399

National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300

2.4 Other Federal Agency Document:

OSHA Hazard Communication Regulation, 29 C.F.R. §1910.1200

³ For referenced ASTM standards, visit the ASTM website, www.astm.org, or contact ASTM Customer Service at service@astm.org. For *Annual Book of ASTM Standards* volume information, refer to the standard's Document Summary page on the ASTM website.

3. Terminology

3.1 This section provides definitions, descriptions of terms, and a list of acronyms for many of the words used in this practice. The terms are an integral part of this practice and are critical to an understanding of the practice and its use.

3.2 Definitions:

3.2.1 *abandoned property*—property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property.

3.2.2 *activity and use limitations*—legal or physical restrictions or limitations on the use of, or access to, a site or facility: (1) to reduce or eliminate potential exposure to *hazardous substances* or *petroleum products* in the soil or ground water on the property, or (2) to prevent activities that could interfere with the effectiveness of a response action, in order to ensure maintenance of a condition of no significant risk to public health or the environment. These legal or physical restrictions, which may include institutional and/or *engineering controls*, are intended to prevent adverse impacts to individuals or populations that may be exposed to *hazardous substances* and *petroleum products* in the soil or ground water on the property.⁴

3.2.3 *actual knowledge*—the knowledge actually possessed by an individual who is a real person, rather than an entity. *Actual knowledge* is to be distinguished from constructive knowledge that is knowledge imputed to an individual or entity.

3.2.4 *adjoining properties*—any real property or properties the border of which is contiguous or partially contiguous with that of the property, or that would be contiguous or partially contiguous with that of the property but for a street, road, or other public thoroughfare separating them.

3.2.5 *aerial photographs*—photographs taken from an aerial platform with sufficient resolution to allow identification of development and activities of areas encompassing the property. *Aerial photographs* are often available from government agencies or private collections unique to a local area. See 8.3.4.1 of this practice.

3.2.6 *all appropriate inquiry*—that inquiry constituting “all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice” as defined in CERCLA, 42 U.S.C §9601(35)(B), that will qualify a party to a *commercial real estate transaction* for one of threshold criteria for satisfying the *LLPs* to CERCLA liability (42 U.S.C §9601(35)(A) & (B), §9607(b)(3), §9607(q); and §9607(r)), assuming compliance with other elements of the defense. See Appendix X1.

3.2.7 *approximate minimum search distance*—the area for which records must be obtained and reviewed pursuant to Section 8 subject to the limitations provided in that section. This may include areas outside the property and shall be measured from the nearest property boundary. This term is used in lieu of radius to include irregularly shaped properties.

3.2.8 *bona fide prospective purchaser liability protection*—(42 U.S.C. §9607(r))—a person may qualify as a bona fide prospective purchaser if, among other requirements, such person made “all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices.” Knowledge of contamination resulting from *all appropriate inquiry* would not generally preclude this liability protection. A person must make *all appropriate inquiry* on or before the date of purchase. The facility must have been purchased after January 11, 2002. See Appendix X1 for the other necessary requirements that are beyond the scope of this practice.

3.2.9 *Brownfields Amendments*—amendments to CERCLA pursuant to the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 (2002), 42 U.S.C. §§9601 *et seq.*

3.2.10 *building department records*—those records of the local government in which the property is located indicating permission of the local government to construct, alter, or demolish improvements on the property. Often *building department records* are located in the building department of a municipality or county. See 8.3.4.7.

3.2.11 *business environmental risk*—a risk which can have a material environmental or environmentally-driven impact on the business associated with the current or planned use of a parcel of *commercial real estate*, not necessarily limited to those environmental issues required to be investigated in this practice. Consideration of *business environmental risk* issues may involve addressing one or more non-scope considerations, some of which are identified in Section 13.

3.2.12 *commercial real estate*—any real property except a dwelling or property with no more than four dwelling units exclusively for residential use (except that a dwelling or property with no more than four dwelling units exclusively for residential use is included in this term when it has a commercial function, as in the building of such dwellings for profit). This term includes but is not limited to undeveloped real property and real property used for industrial, retail, office, agricultural, other commercial, medical, or educational purposes; property used for residential purposes that has more than four residential dwelling units; and property with no more than four dwelling units for residential use when it has a commercial function, as in the building of such dwellings for profit.

3.2.13 *commercial real estate transaction*—a transfer of title to or possession of real property or receipt of a security interest in real property, except that it does not include transfer of title to or possession of real property or the receipt of a security interest in real property with respect to an individual dwelling or building containing fewer than five dwelling units, nor does it include the purchase of a lot or lots to construct a

⁴ The term *AUL* is taken from the ASTM Standard Guide E 2091 to include both legal (that is, institutional) and physical (that is, engineering) controls within its scope. Other agencies, organizations, and jurisdictions may define or utilize these terms differently (for example, EPA and California do not include physical controls within their definitions of “institutional controls.” Department of Defense and International County/City Management Association use “Land Use Controls.” The term “land use restrictions” is used but not defined in the *Brownfields Amendments*).

5.3 Information Provided by the AUL—The AUL should provide information on the chemical(s) of concern, the potential exposure pathway(s) that the AUL is intended to control, the environmental medium that is being controlled, and the expected performance objective(s) of the AUL. AULs may be used to provide access to monitoring wells, sampling locations, or remediation equipment.

5.4 Where AULs Can Be Found—AULs are often recorded in land title records. AUL information is contained in the restrictions of record on the title, rather than a typical chain of title. Chain of title will not provide information regarding restrictions on title such as restrictive covenants, easements, or other types of AULs. Some AULs are maintained on a state *IC or EC Registry* and may not be recorded in land title records. While some states maintain readily accessible *IC/EC registries*, other states do not. The *environmental professional* is cautioned to determine whether AULs are considered readily available records in the state in which the *property* is located. Some AULs may only exist in project documentation, which may not be readily available to the *environmental professional*. This may be the case in states where project files are archived after a period of years and access to the archives is restricted. AULs imposed upon some properties by local agencies with limited environmental oversight may not be recorded in the land title records, particularly where a local agency has been delegated regulatory authority over environmental programs.

6. User's Responsibilities

6.1 Scope—The purpose of this section is to describe tasks to be performed by the *user* that will help identify the possibility of *recognized environmental conditions* in connection with the *property*. These tasks do not require the technical expertise of an *environmental professional* and are generally not performed by *environmental professionals* performing a *Phase I Environmental Site Assessment*. Appendix X3 provides an optional *User Questionnaire* to assist the *user* and the *environmental professional* in gathering information from the *user* that may be material to identifying *recognized environmental conditions*.

6.2 Review Title and Judicial Records for Environmental Liens or Activity and Use Limitations (AULs)—*Reasonably ascertainable recorded land title records* and lien records that are filed under federal, tribal, state, or local law should be reviewed to identify *environmental liens or activity and use limitations*, if any, that are currently recorded against the *property*. *Environmental liens and activity and use limitations* that are imposed by judicial authorities may be recorded or filed in judicial records, and, where applicable, such records should be reviewed. Any *environmental liens or activity and use limitations* so identified shall be reported to the *environmental professional* conducting a *Phase I Environmental Site Assessment*. Unless added by a change in the scope of work to be performed by the *environmental professional*, this practice does not impose on the *environmental professional* the responsibility to undertake a review of *recorded land title records* and judicial records for *environmental liens or activity and use limitations*. The *user* should either (1) engage a title company or title professional to undertake a review of *reasonably ascertainable recorded land title records* and lien records for

environmental liens or activity and use limitations currently recorded against or relating to the *property*, or (2) negotiate such an engagement of a title company or title professional as an addition to the scope of work to be performed by the *environmental professional*.

6.2.1 Reasonably Ascertainable—Except to the extent that applicable federal, state, local or tribal statutes, or regulations specify any place other than *recorded land title records* for recording or filing *environmental liens or activity and use limitations* or specify records to be reviewed to identify the existence of such *environmental liens or activity and use limitations*, *environmental liens or activity and use limitations* that are recorded or filed any place other than *recorded land title records* are not considered to be *reasonably ascertainable*.

6.3 Specialized Knowledge or Experience of the User—If the *user* is aware of any specialized knowledge or experience that is material to *recognized environmental conditions* in connection with the *property*, it is the *user's* responsibility to communicate any information based on such specialized knowledge or experience to the *environmental professional*. The *user* should do so before the *environmental professional* conducts the *site reconnaissance*.

6.4 Actual Knowledge of the User—If the *user* has *actual knowledge* of any *environmental lien* or AULs encumbering the *property* or in connection with the *property*, it is the *user's* responsibility to communicate such information to the *environmental professional*. The *user* should do so before the *environmental professional* conducts the *site reconnaissance*.

6.5 Reason for Significantly Lower Purchase Price—In a transaction involving the purchase of a parcel of *commercial real estate*, the *user* shall consider the relationship of the purchase price of the *property* to the fair market value of the *property* if the *property* was not affected by *hazardous substances or petroleum products*. The *user* should try to identify an explanation for a lower price which does not reasonably reflect fair market value if the *property* were not contaminated, and make a written record of such explanation. Among the factors to consider will be the information that becomes known to the *user* pursuant to the *Phase I Environmental Site Assessment*. This standard does not require that a real estate appraisal be obtained in order to ascertain fair market value of the *property*.

6.6 Commonly Known or Reasonably Ascertainable Information—If the *user* is aware of any commonly known or *reasonably ascertainable* information within the local community about the *property* that is material to *recognized environmental conditions* in connection with the *property*, it is the *user's* responsibility to communicate such information to the *environmental professional*. The *user* should do so before the *environmental professional* conducts the *site reconnaissance*.

6.7 Other—Either the *user* shall make known to the *environmental professional* the reason why the *user* wants to have the *Phase I Environmental Site Assessment* performed or, if the *user* does not identify the purpose of the *Phase I Environmental Site Assessment*, the *environmental professional* shall assume the purpose is to qualify for an LLP to CERCLA liability and state this in the *report*. In addition to satisfying one of the requirements to qualify for an LLP to CERCLA liability,

substances or petroleum products (in that case the contents should be described in the report). Drums often hold 55 gal (208 L) of liquid, but containers as small as 5 gal (19 L) should also be described.

9.4.2.8 Hazardous Substance and Petroleum Products Containers (Not Necessarily in Connection With Identified Uses)—When containers identified as containing hazardous substances or petroleum products are visually and/or physically observed on the property and are or might be a recognized environmental condition: the hazardous substances or petroleum products shall be identified or indicated as unidentified in the report, and the approximate quantities involved, types of containers, and storage conditions shall be described in the report.

9.4.2.9 Unidentified Substance Containers—When open or damaged containers containing unidentified substances suspected of being hazardous substances or petroleum products are visually and/or physically observed on the property, the approximate quantities involved, types of containers, and storage conditions shall be described in the report.

9.4.2.10 PCBs—Electrical or hydraulic equipment known to contain PCBs or likely to contain PCBs shall be described in the report to the extent visually and/or physically observed or identified from the interviews or records review. Fluorescent light ballast likely to contain PCBs does not need to be noted.

9.4.3 Interior Observations:

9.4.3.1 Heating/Cooling—The means of heating and cooling the buildings on the property, including the fuel source for heating and cooling, shall be identified in the report (for example, heating oil, gas, electric, radiators from steam boiler fueled by gas).

9.4.3.2 Stains or Corrosion—To the extent visually and/or physically observed or identified from the interviews, stains or corrosion on floors, walls, or ceilings shall be described in the report, except for staining from water.

9.4.3.3 Drains and Sumps—To the extent visually and/or physically observed or identified from the interviews, floor drains and sumps shall be described in the report.

9.4.4 Exterior Observations:

9.4.4.1 Pits, Ponds, or Lagoons—To the extent visually and/or physically observed or identified from the interviews or records review, pits, ponds, or lagoons on the property shall be described in the report, particularly if they have been used in connection with waste disposal or waste treatment. Pits, ponds, or lagoons on properties adjoining the property shall be described in the report to the extent they are visually and/or physically observed from the property or identified in the interviews or records review.

9.4.4.2 Stained Soil or Pavement—To the extent visually and/or physically observed or identified from the interviews, areas of stained soil or pavement shall be described in the report.

9.4.4.3 Stressed Vegetation—To the extent visually and/or physically observed or identified from the interviews, areas of stressed vegetation (from something other than insufficient water) shall be described in the report.

9.4.4.4 Solid Waste—To the extent visually and/or physically observed or identified from the interviews or records review, areas that are apparently filled or graded by non-natural

causes (or filled by fill of unknown origin) suggesting trash construction debris, demolition debris, or other solid waste disposal, or mounds or depressions suggesting trash or other solid waste disposal, shall be described in the report.

9.4.4.5 Waste Water—To the extent visually and/or physically observed or identified from the interviews or records review, waste water or other liquid (including storm water) or any discharge into a drain, ditch, underground injection system, or stream on or adjacent to the property shall be described in the report.

9.4.4.6 Wells—To the extent visually and/or physically observed or identified from the interviews or records review, all wells (including dry wells, irrigation wells, injection wells, abandoned wells, or other wells) shall be described in the report.

9.4.4.7 Septic Systems—To the extent visually and/or physically observed or identified from the interviews or records review, indications of on-site septic systems or cesspools should be described in the report.

10. Interviews With Past and Present Owners and Occupants

10.1 Objective—The objective of interviews is to obtain information indicating recognized environmental conditions in connection with the property.

10.2 Content—Interviews with past and present owners, operators, and occupants of the property, consist of questions to be asked in the manner and of persons as described in this section. The content of questions to be asked shall attempt to obtain information about uses and conditions as described in Section 9, as well as information described in 10.8 and 10.9.

10.3 Medium—Questions to be asked pursuant to this section may be asked in person, by telephone, or in writing, in the discretion of the environmental professional.

10.4 Timing—Except as specified in 10.8 and 10.9, it is in the discretion of the environmental professional whether to ask questions before, during, or after the site visit described in Section 9, or in some combination thereof.

10.5 Who Should be Interviewed:

10.5.1 Key Site Manager—Prior to the site visit, the owner should be asked to identify a person with good knowledge of the uses and physical characteristics of the property (the key site manager). Often the key site manager will be the property manager, the chief physical plant supervisor, or head maintenance person. (If the user is the current property owner, the user has an obligation to identify a key site manager, even if it is the user himself or herself.) If a key site manager is identified, the person conducting the site visit shall make at least one reasonable attempt (in writing or by telephone) to arrange a mutually convenient appointment for the site visit when the key site manager agrees to be there. If the attempt is successful, the key site manager shall be interviewed in conjunction with the site visit. If such an attempt is unsuccessful, when conducting the site visit, the environmental professional shall inquire whether an identified key site manager (if any) or if a person with good knowledge of the uses and physical characteristics of the property is available to be interviewed at that time; if so, that person shall be interviewed. In any case, it is within the discretion of the environmental

professional to decide which questions to ask before, during, or after the *site visit* or in some combination thereof.

10.5.2 *Occupants*—A reasonable attempt shall be made to interview a reasonable number of *occupants* of the *property*.

10.5.2.1 *Multi-Family Properties*—For multi-family residential properties, residential *occupants* do not need to be interviewed, but if the *property* has nonresidential uses, *interviews* should be held with the nonresidential *occupants* based on criteria specified in 10.5.2.2.

10.5.2.2 *Major Occupants*—Except as specified in 10.5.2.1, if the *property* has five or fewer current *occupants*, a reasonable attempt shall be made to interview a representative of each one of them. If there are more than five current *occupants*, a reasonable attempt shall be made to interview the major occupant(s) and those other *occupants* whose operations are likely to indicate *recognized environmental conditions* in connection with the *property*.

10.5.2.3 *Reasonable Attempts to Interview*—Examples of reasonable attempts to interview those *occupants* specified in 10.5.2.2 include (but are not limited to) an attempt to interview such *occupants* when making the *site visit* or calling such *occupants* by telephone. In any case, when there are several *occupants* to interview, it is not expected that the *site visit* must be scheduled at a time when they will all be available to be interviewed.

10.5.2.4 *Occupant Identification*—The *report* shall identify the *occupants* interviewed and the duration of their occupancy.

10.5.3 *Prior Assessment Usage*—Persons interviewed as part of a prior *Phase I Environmental Site Assessment* consistent with this practice do not need to be questioned again about the content of answers they provided at that time. However, they should be questioned about any new information learned since that time, or others should be questioned about conditions since the prior *Phase I Environmental Site Assessment* consistent with this practice.

10.5.4 *Past Owners, Operators, and Occupants*—*Interviews* with past *owners*, *operators*, and *occupants* of the *property* who are likely to have material information regarding the potential for contamination at the *property* shall be conducted to the extent that they have been identified and that the information likely to be obtained is not duplicative of information already obtained from other sources.

10.5.5 *Interview Requirements for Abandoned Properties*—In the case of inquiries conducted at abandoned properties where there is evidence of potential unauthorized uses of the *abandoned property* or evidence of uncontrolled access to the *abandoned property*, *interviews* with one or more *owners* or *occupants* of neighboring or nearby properties shall be conducted.

10.6 *Quality of Answers*—The person(s) interviewed should be asked to be as specific as reasonably feasible in answering questions. The person(s) interviewed should be asked to answer in *good faith* and to the extent of their knowledge.

10.7 *Incomplete Answers*—While the person conducting the interview(s) has an obligation to ask questions, in many instances the persons to whom the questions are addressed will have no obligation to answer them.

10.7.1 *User*—If the person to be interviewed is the *user* (the person on whose behalf the *Phase I Environmental Site Assessment* is being conducted), the *user* has an obligation to answer all questions posed by the person conducting the interview, in *good faith*, to the extent of his or her *actual knowledge* or to designate a *key site manager* to do so. If answers to questions are unknown or partially unknown to the *user* or such *key site manager*, this interview section of the *Phase I Environmental Site Assessment* shall not thereby be deemed incomplete.

10.7.2 *Non-user*—If the person conducting the interview(s) asks questions of a person other than a *user* but does not receive answers or receives partial answers, this section of the *Phase I Environmental Site Assessment* shall not thereby be deemed incomplete, provided that (1) the questions have been asked (or attempted to be asked) in person, by electronic mail, or by telephone and written records have been kept of the person to whom the questions were addressed and the responses, or (2) the questions have been asked in writing sent by first class mail or by private, commercial carrier and no answer or incomplete answers have been obtained and at least one reasonable follow up (telephone call or written request) was made again asking for responses.

10.8 *Questions About Helpful Documents*—Prior to the *site visit*, the *property owner*, *key site manager* (if any is identified), and *user* (if different from the *property owner*) shall be asked if they know whether any of the documents listed in 10.8.1 exist and, if so, whether copies can and will be provided to the *environmental professional* within reasonable time and cost constraints. Even partial information provided may be useful. If so, the *environmental professional* conducting the *site visit* shall review the available documents prior to or at the beginning of the *site visit*.

10.8.1 *Helpful Documents:*

10.8.1.1 Environment site assessment *reports*,

10.8.1.2 Environment compliance audit *reports*,

10.8.1.3 Environmental permits (for example, solid waste disposal permits, *hazardous waste* disposal permits, *wastewater* permits, NPDES permits, *underground injection* permits),

10.8.1.4 Registrations for underground and above-ground storage tanks,

10.8.1.5 Registrations for *underground injection* systems,

10.8.1.6 *Material safety data sheets*,

10.8.1.7 Community right-to-know plan,

10.8.1.8 Safety plans; preparedness and prevention plans; spill prevention, countermeasure, and control plans; etc.,

10.8.1.9 *Reports* regarding hydrogeologic conditions on the *property* or surrounding area,

10.8.1.10 Notices or other correspondence from any government agency relating to past or current violations of environmental laws with respect to the *property* or relating to *environmental liens* encumbering the *property*,

10.8.1.11 *Hazardous waste* generator notices or *reports*,

10.8.1.12 Geotechnical studies,

10.8.1.13 Risk assessments, and

10.8.1.14 Recorded AULs.