

INNOCENT LANDOWNER APPLICATIONS AND SOIL AND GROUNDWATER INVESTIGATIONS

COURTNEY SCOTT, C: 214-335-9856, COURTNEY.SCOTT@SAGEENVIRONMENTAL.COM

ROBERT SHERRILL, C: 512-470-8710, ROBERT.SHERRILL@SAGEENVIRONMENTAL.COM

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BACKGROUND:

THE INNOCENT LANDOWNER DEFENSE

IN 1986, THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT (SARA) CREATED AN INNOCENT LANDOWNER DEFENSE TO CERCLA LIABILITY BY ADDING SECTION 101(35)(B). THIS SECTION STATES: FOR THOSE PERSONS WHO COULD DEMONSTRATE, AMONG OTHER REQUIREMENTS, THAT THEY “DID NOT KNOW AND HAD NO REASON TO KNOW” PRIOR TO PURCHASING A PROPERTY THAT ANY HAZARDOUS SUBSTANCE THAT IS THE SUBJECT OF A RELEASE OR THREATENED RELEASE WAS DISPOSED OF ON, IN, OR AT THE PROPERTY. SUCH PERSONS, TO DEMONSTRATE THAT THEY HAD “NO REASON TO KNOW” MUST HAVE UNDERTAKEN, PRIOR TO, OR ON THE DATE OF ACQUISITION OF THE PROPERTY, “ALL APPROPRIATE INQUIRIES” (AAI) INTO THE PREVIOUS OWNERSHIP AND USES OF THE PROPERTY CONSISTENT WITH GOOD COMMERCIAL OR CUSTOMARY STANDARDS AND PRACTICES.

Complying with AAI begins with conducting a Phase I environmental site assessment(s) in which AAI's requirements are rigorously followed and completed to qualify for CERCLA landowner liability protection. A Phase I Environmental Site Assessment, often referred to as environmental due diligence, is used by purchasers and lenders to evaluate a property for potential environmental contamination and to assess the potential liability for contamination present at the property.

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THE INNOCENT LANDOWNER DEFENSE

In November 2005, the EPA issued the final AAI Rule - Environmental Site Assessments, Phase I Investigations, which established the specific regulatory requirements and standards for conducting AAIs to qualify for one of the three landowner liability protections under the CERCLA Brownfields Amendments: bona fide prospective purchaser, contiguous property owner, and innocent landowner.

Only those purchasers who rigorously follow the All Appropriate Inquiries Rule prior to purchase may benefit from the CERCLA innocent landowner exemption.

OUR SERVICES AND APPROACH:

ATTAINING THE INNOCENT LANDOWNER EXEMPTION

Sage conducts AAI investigations and prepares Innocent Landowner Applications for clients across numerous states. This assistance includes planning, implementation, and ensuring compliance with the AAI requirements, as summarized below:

- Certification that the inquiry into the property and the resulting report was prepared by a qualified Environmental Professional with requisite experience in accordance with the final AAI Rule
- Visual inspections of the property and adjacent properties by the Environmental Professional
- Interviews with past and present owners, operators, occupants and the prospective purchaser
- Reviews of historical sources back to the first obvious use of the property
- Review of government records
- Commonly known or reasonably attainable information, including an evaluation of the purchase price of the property
- An evaluation of commonly known or reasonably attainable information, including the degree of obviousness of the presence of contamination and the ability to detect the presence of such contamination
- Data gaps and the significance of those data gaps in the Environmental Professional's opinion
- An inquiry by the purchaser of the property for any environmental cleanup liens filed against the property, whether the person has any specialized knowledge or experience, the relationship of the purchase price to the fair market value of the property, if the property was not contaminated, and any commonly known or reasonably ascertainable information about the property

AAIs must be conducted within one year prior to the date on which the property is acquired. If any inquiry was completed more than 180 days prior to the date of acquisition of the property, certain components (e.g., interviews with past and present owners, operators and occupants, searches for environmental liens, and visual inspections of the property and adjoining properties) must be updated within 180 days prior to the acquisition date of the property.

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AAI - Phase I Environmental Site Assessments performed by Sage follow the AAI/ASTM E 1527-05 standards of practice. These assessments are more likely to result in discovery of potential problems before purchase and hold up in court if contamination is found at any time post-purchase.

MINIMIZING LIABILITY EXPOSURE

Under the CERCLA Brownfields Amendments, the following conditions minimize a purchaser's exposure to liability for past environmental contamination.

- Did not cause or contribute to hazardous substances
- Property acquired by inheritance or bequest
- After completing AAI & ASTM E 1527-05, did not know and had no reason to know of "release or threatened release" at the time of acquisition

Several of the conditions a landowner must meet in order to achieve and maintain a landowner liability protection are continuing obligations, including:

- Complying with land use restrictions and institutional controls
- Taking reasonable steps with respect to hazardous substance releases
- Providing full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration
- Complying with information requests and administrative subpoenas
- Providing legally required notices

MEETING INNOCENT LANDOWNER APPLICATION REQUIREMENTS: EXAMPLE

Application requirements for acceptance as an innocent landowner vary somewhat by State. Sage conducts AAIs and prepares applications throughout the United States and is familiar with the differing requirements. For example, Texas has one of the more stringent State-mandated requirements.

In Texas, the program is known as the Innocent Owner/Operator Program (IOP). The IOP provides an Innocent Owner/Operator Certificate (IOC) to owners or operators (leaseholder or tenant) who are able to show that they did not cause or contribute to the contamination on their property, and that the contamination originated from an off-site source. The IOP is not a cleanup program. The IOP can be used by owners and/or operators of any kind of property in Texas (e.g., undeveloped land, offices and warehouses, supermarket and retail sites, commercial development sites, and even private residences). The IOC, which is granted when a demonstration of innocence is made, is not transferable to future owners and operators. Prospective purchasers and operators may, however, be included in or added to applications to facilitate property transactions and use of the property.

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Applicants are required to provide environmental soil and groundwater data to support their innocence; however, this data is not used to make a cleanup decision. Sage's soil and groundwater team obtains and provides this information to the State on behalf of the landowner.

To be eligible for an IOC, an applicant must meet the following criteria, which can also be found in the Texas Health and Safety Code, sections 361.751(2) and 361.752(b):

- The subject site is contaminated.
- At the time of application, the innocent person is a current owner or operator of the subject site.
- The applicant did not cause nor contribute to the source of contamination.
- The subject site is not a subdivided portion of a source tract, or the subject site is a subdivided portion of a source tract but the subdivision occurred prior to Sept. 1, 1997 (the effective date of the IOP law), or the subject site is a subdivided portion of a source tract but the subdivision occurred on or after Sept. 1, 1997, and after appropriate inquiry consistent with good commercial or customary practice (latest ASTM standards), the person did not know or have reason to know of the contamination at the time the person acquired the property.

To be eligible for certification through the TCEQ as an innocent owner/operator, you must apply to the IOP. The IOP application requirements are described in the Texas Health and Safety Code, Chapter 361.753, and in Title 30 of the Texas Administrative Code (TAC), Section 333.35.

The application process includes the following steps:

STEP 1 Complete a site investigation report (SIR) or provide a Phase I and Phase II ESA (or other report documenting that the site is contaminated) with supplemental attachments that contain the additional information requested in the SIR. The SIR or other submittals should include an IOP outline and checklist. Submit two copies of all documents.

STEP 2 If the results of the SIR suggest that you meet IOP eligibility requirements, complete and submit an IOP application, the SIR (or equivalent submittals), and the required \$1,000 fee. The IOP application and instructions on how to complete the application and associated submittals are located on the IOP Web page: www.tceq.state.tx.us/goto/iop. (Scroll down to IOP Forms and Publications.)

STEP 3 Notify adjacent landowners of your intent to obtain an IOC from the IOP. Provide proof of the notification to the IOP within 14 days of the date of your application. You may send out the public notice letters as a prospective purchaser or operator as long as that status is evident in the letters. You may also include current and prospective owners/operators in a single letter. For time-sensitive property transactions, the TCEQ encourages you to accomplish these tasks expeditiously, since the TCEQ cannot issue an IOC until the comment period for public notice has expired. You can download a sample notification letter at the TCEQ's IOP Web page (go to www.tceq.state.tx.us/goto/iop and scroll down to IOP Public Notification Letter under IOP Forms and Publications).