

## Searching for Environmental Liens and Activity & Use Limitations Under EPA's All Appropriate Inquiries Rule

One element of satisfying EPA's All Appropriate Inquiries (AAI) rule (40 CFR Part 312) that is generating uncertainty within the environmental due diligence industry is "searches for recorded environmental cleanup liens." The language in the federal rule (and in the ASTM E 1527-05 Phase I standard, which is recognized in EPA's rule as an acceptable guidance document for satisfying AAI requirements) has raised questions about what is required, how to satisfy requirements to identify environmental liens and other environmental encumbrances on a target property, where the responsibility for conducting the search lies, what sources can be used, and how environmental consultants should address this requirement in their reports.

Below is a list of frequently asked questions and answers about identifying any environmental liens and other environmental encumbrances placed on properties undergoing Phase I environmental site assessments.

### What does the AAI rule say about the environmental lien search requirement?

Under Section 312.25, "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." *EPA's new AAI rule includes the environmental lien search as one of the 10 criteria for satisfying AAI, pursuant to the list laid out by Congress in the 2002 Brownfields Law.*

### How does an environmental lien differ from other environmental encum-

### brances on a property? What requirements apply to these environmental encumbrances?

A lien is a financial instrument used to recover past environmental cleanup costs. An activity and use limitation (AUL) includes other environmental encumbrances, such as institutional controls and engineering controls. AULs became prevalent during the 1990s, as state environmental agencies began embracing the concept of "risk-based cleanups." This concept essentially allows residual contamination to remain on a property so long as it does not present an unacceptable risk to public health or the environment.

Institutional controls (ICs) are legal or regulatory restrictions on a property's use. Records of ICs on a property generally include a description of any contaminants left in place, the risks posed by such contamination, and any restrictions on the property's use. These controls are usually attached to the land title records, just like a lien. The same record may also be mirrored on a state agency list that EDR loads into its Radius Map Report. Examples of ICs found in land title records include:

- Prohibition of groundwater use (due to residual contamination)
- Limitation of land use (e.g., no residential use, no use for sensitive receptors like day care centers, schools, or hospitals)
- Limitation on excavation (e.g., no excavation beyond 12 inches, restrictions on puncturing an impermeable layer, such as a parking lot/cap)
- Limitation of commercial use (e.g., no hazardous waste activities)
- Zoning limitations (e.g., no basements)

Engineering controls (ECs) are physical mechanisms that restrict site access or

use. ECs take the form of natural or man-made barriers, warning signs, fencing or any other physical structures designed to prevent exposure to hazardous wastes left on a property. It is not unusual for an EC to be used in concert with an IC to physically limit access to a particular part of a property.

In the AAI rule, EPA lists the identification of ECs and ICs as two of seven overall objectives of the inquiry. These AULs may be identified from a number of sources, including land title records. Accordingly, EDR's lien search focuses on identifying not only financial encumbrances, but also any ICs or ECs found in land title records.

### Didn't the previous ASTM E 1527-00 standard require a search for environmental cleanup liens? Why are lien searches getting so much more attention now?

Yes, but several factors have placed increased emphasis on the requirement that a search of environmental liens be conducted:

1. The search for environmental cleanup liens has traditionally been, and continues to be, addressed as a user responsibility in the ASTM standard. According to EPA, the AAI rule differs from the previous ASTM E 1527-00 standard in that it explicitly allows the lien search to be performed either by the user (i.e., the person seeking CERCLA liability protection) or through the inquiry of an environmental professional (EP), as an added-scope element to the Phase I ESA. Many clients are already outsourcing this responsibility to their environmental consultants.

2. In the 2002 Brownfields Law, Congress directed EPA to write an AAI rule that addresses each of 10 criteria, including the search for recorded environmental cleanup liens. This requirement is focusing more attention on the lien search. The 10 criteria specified by the law are:

- *Criterion 1:* Results of inquiries by an environmental professional
- *Criterion 2:* Interviews with past and present owners, operators, and occupants
- *Criterion 3:* Reviews of historical sources of information
- *Criterion 4:* Searches for recorded environmental cleanup liens
- *Criterion 5:* Reviews of Federal, State, Tribal and local government records
- *Criterion 6:* Visual inspections of the facility and of adjoining properties
- *Criterion 7:* Specialized knowledge or experience on the part of the defendant
- *Criterion 8:* The relationship of the purchase price to the value of the property, if the property were not contaminated
- *Criterion 9:* Commonly known or reasonably ascertainable information about the property
- *Criterion 10:* 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

3. The AAI rule itself is new, carrying the weight of a federal rule, which places increased emphasis on conducting a lien search as well as all of the other specific criteria and objectives in the regulation. Environmental consultants completing Phase I ESAs that are AAI-compliant must include a statement in their reports that: *[I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.* Operating under a federal rule, versus ASTM's voluntary industry standard, exposes environmental consultants to more scrutiny and potentially more professional liability. As a result, consultants are placing more attention on ensuring that every element of the investigation is being adequately addressed in accordance with EPA's rule, including the search for environmental cleanup liens.

4. In its cost analysis for the rule, EPA acknowledges that, when compared to the ASTM E1527-00 standard (i.e., the baseline used in EPA's Cost Impact Analysis for the AAI rule), there is an added level of effort involved in satisfying the environmental lien search requirement. Specifically: "The activities associated with today's rule that go beyond current customary and usual business practices include interviews with neighboring property owners and/or occupants in those cases where the subject property is abandoned, documentation of all environmental cleanup liens in the Phase I Environmental Site Assessment report, discussion of the relationship of purchase price to value of the property in the report, and consideration and discussion of whether additional environmental investigation is warranted." [italics added for emphasis]

### **Who should do the search for environmental cleanup liens: environmental professional or user?**

The AAI rule allows either party to conduct the search for environmental cleanup liens. If the Phase I is being conducted to satisfy AAI, the environmental professional should ensure that the scope of work and contract language clearly state whether the responsibility for finding environmental cleanup liens will fall on the user's shoulders or whether this responsibility is being transferred to the EP. The risk of ignoring the rule's requirement for conducting a lien search is that the property purchaser may forfeit the ability to qualify for CERCLA liability protection.

### **What if the client does not provide the EP with the results of a search for environmental cleanup liens? Or does not fill out the User Questionnaire in the ASTM E 1527-05 standard?**

Under AAI, the client is not obligated to share any of the user responsibilities with the environmental professional. If the property purchaser does not provide the EP with information on an environmental cleanup lien search, EPA recommends that "the environmental profes-

sional 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." At a minimum, consultants should provide clients seeking an AAI-compliant Phase I with a user questionnaire and ensure that clients are aware of the type of information they are responsible for addressing prior to the transaction date in order to qualify for CERCLA liability protection.

### **Will a traditional chain-of-title report or preliminary title report suffice for satisfying the AAI rule's lien search requirements? How does a lien search differ?**

The AAI rule states that "liens may be included as part of the chain of title documents or may be recorded in some other manner or format by state or local government agencies." A chain of title document is a historical source that may include information on liens as well as information on past owners of the property indicating that those owners managed hazardous substances on the property. Preliminary title reports, on the other hand, are often provided to purchasers as part of an application for title insurance, but do not necessarily contain searches for liens or AULs. As such, chain of title or preliminary title reports may not be sufficient to satisfy AAI. Title companies do not necessarily identify environmental cleanup liens as part of their reports, unless specifically requested to do so.

Furthermore, the client (or the client's attorney) typically does not order the chain of title until just before the closing, after the consultant has delivered the final Phase I ESA report. Any information uncovered at this stage cannot be factored into the Phase I findings.

### **What is the methodology used to search for environmental cleanup liens and AULs? What sources do title companies typically use?**

Title professionals search a variety of sources, including land title records, for evidence of recorded environmental liens and AULs on a property. These sources can vary significantly from state to state, which

is why local expertise is critical. Using client-supplied address and parcel number information, the title professional finds the correct deed and any accompanying documents. They review these documents, looking for any encumbrances on ownership (liens) or use (AULs). Then, the title professionals provide complete citations on their sources and supply copies of any encumbrances that are found for EP review. This methodology is incorporated in the EDR LienSearch™ Report.

**To reflect the AAI rule, ASTM added language to the E 1527-05 standard to expand the search beyond the traditional “reasonably ascertainable recorded land title records” to include lien records filed under federal, tribal, state or local law. Does a lien search typically include this search of judicial records?**

Judicial records are decisions made in a court of law. Money judgments, when recorded, become a lien on real property of the defendant. Therefore, under common law, judicial records need to be filed at the appropriate recorder's office to be attached to real property. Similarly, judgments resulting in limitations in land use need to be filed with the deed in the land title records.

For this reason, when a court reaches a judgment that places an environmental cleanup lien or any encumbrance on a property's use, the last line of such decisions generally state that the lien or encumbrance is “to be immediately filed with the appropriate land title/deed record for the subject property.” This is the court's method for attaching the judgment to the affected property's land title records to ensure that it is conveyed to the property owner and enforced over time. Therefore, because judicial records against real property are generally filed with the deed for that real property, a search of deed and title records effectively encompasses judicial records. This is the methodology used by EDR's LienSearch™ report.

**Wouldn't an environmental lien or AUL be found during another part of**

**the Phase I investigation? Is the environmental lien search really necessary?**

It is possible that an environmental lien or AUL may show up in multiple sources, and might be identified during other phases of the EP's research (e.g., historical research, interviews, etc.). However, the lien search is one of 10 specific required AAI components, while the identification of ICs and ECs constitute two of the seven overall objectives of an AAI-compliant ESA. Accordingly, environmental liens should be addressed in the EP's report (in terms of whether or not a lien search was conducted). If the search is not done, either by the consultant or the user, a court could rule that AAI was not met.

**Are EPs qualified to review environmental liens and AULs?**

An increasing number of property purchasers are outsourcing the environmental lien search to an environmental professional. The EP employs a title professional to conduct the search for records on the target property and then interprets the results in the context of the Phase I ESA. Often liens and AULs are in the form of letters from a state environmental agency and use language that will be more familiar to an environmental consultant than a title professional. Consultants are uniquely qualified to interpret the results of environmental lien searches, both in terms of a lien or AUL itself and what it might signify about whether recognized environmental conditions (RECs) or potential RECs exist at the target property. It is critical for EPs to enlist the expertise of title professionals who have local knowledge of how liens or AULs are recorded in a particular area. Once the records are searched and documented, EPs are qualified to interpret any records found within the context of the environmental investigation, and in the process help their clients ensure that AAI requirements are met.

**How often does an environmental lien search identify a cleanup lien or AUL? What types are typically found?**

Both types of encumbrances have been found by the EDR LienSearch™ Report process. Environmental liens are typically

in favor of a state environmental agency that needs to recover the cost of an environmental cleanup. Examples of recorded environmental cleanup liens in land title records include:

- A lien to recover response costs of \$136,000 incurred by the Ohio EPA in its oversight of the investigation of contamination was imposed against the current and other owners and/or operators of a site formerly used for steel production;
- A site in Tennessee is subject to a lien for “all amounts expended by the state Department of Environment and Conservation to investigate, identify, contain and/or cleanup hazardous substances that have been or may found on the property;” and
- In response to a failure to submit the requisite closure plan for a former landfill in New Jersey, the state Superior Court impressed a lien against all real estate held by the owner and prohibited the affected real estate to be conveyed, transferred or encumbered without approval of the Court.

AULs are generally restrictions designed to minimize the risk that a recognized environmental condition will cause further environmental damage or risk to human health. Examples include permissible uses of the property, requirements that contaminated soils not be drilled into or excavated, prohibitions on the use of groundwater, specifications for floor slab construction to prevent vapor intrusion, and requirements that access to a property be granted for the purpose of environmental monitoring.

**Where can more information about the environmental lien search and AULs be obtained?**

The ultimate authority is EPA's AAI Rule (40 CFR Part 312), as supplemented by the associated industry standard ASTM E 1527-05. Links to these authorities -- as well as other relevant documents -- can be found at [www.edrnet.com/aa](http://www.edrnet.com/aa)

*For more information about the EDR LienSearch Report, contact your EDR representative at 800-352-0050*

