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Environmentally Impaired Real Property: Getting the Deal Closed

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I. Introduction – Getting the Deal Closed

The Texas real estate market for environmentally impaired real estate is growing and changing. Urban real estate with many types of environmental impairments that used to scare away would-be developers has become more attractive for redevelopment. Cranes dot Texas' urban landscape. It is clear that the definition of a "sophisticated" lender or purchaser, who not so long ago was considered "sophisticated" because they avoided environmental issues altogether, has changed. In an increasing number of real estate markets in Texas, developers are now being forced to reconsider their aversion to environmental impairments if they want to enter, or to remain viable players.

What is driving this evolution? I can assure you as an environmental law practitioner that this evolution is not the result of more relaxed environmental regulations, including clean up standards, or more relaxed environmental regulators. The government's environmental investigation and remediation regulations are not becoming less stringent over time; in some cases the opposite is true. Environmental regulators are as demanding as ever.

In the author's judgment, this evolution is being driven by (1) broadened, improved environmental due diligence, (2) the implementation of new statutorily-driven environmental programs, (3) empirical results proving the value of the first two to the real estate market, and (4) real estate transactions of greater size and financial magnitude that can more readily absorb some of the risk associated with the management of environmental impairments. The combination of these factors has encouraged real estate developers to cautiously embrace prickly environmental impairments as a source of value and as a basis to encourage real estate transactions.

This presentation is divided into discussions of what arguably are the three most significant recent changes in environmental law that affect the Texas real estate market: statutorily-driven environmental programs, specifically, the Texas Municipal Settings Designation program, and the Dry Cleaner Remediation Program, and broadened environmental due diligence. This paper also touches briefly on the environmental risk management role that environmental insurance can play in Texas real estate transactions.

This presentation is written from the perspective of a career environmental lawyer who works with the management of environmental risk on a daily basis. It is not the intention to create environmental experts out of career real estate attorneys. The author acknowledges that those who only occasionally encounter environmental issues, including experienced real estate counsel, may tend to view these issues with greater concern and skepticism than does the author. The purpose of this presentation is to provide real estate practitioners of all levels of experience with the opportunity to provide assurance to clients that as certain kinds of environmental issues arise, they can be addressed and resolved consistent with client business needs and sound commercial and legal practices, so their deal can and does close.

II. Municipal Settings Designations

Environmental impairments to real estate create uncertainty: uncertainty as to timing, uncertainty as to short term cost and uncertainty as to possible long term legal and financial exposure. Uncertainty translates to risk. Risk translates to price and credit availability, as well as credit terms. These uncertainties affect all the stakeholders: the seller, the potential purchasers/developers, lenders, and to a lesser extent, adjoining property owners, and others. The degree of uncertainty varies between and among these parties, and often times, what is considered material to one party is immaterial or even transparent to others.

The ideal resolution that satisfies all parties is the satisfaction of the environmental impairment itself. Tools for managing environmental risks in the real estate marketplace are often measured against this ideal. The tools for managing environmental uncertainties come in numerous forms, including risk-based cleanup standards, Federal and State statutory provisions offering protection from select liability to the government, contractual risk allocation, environmental insurance and deal structuring.

Viewed in this light, the Texas Municipal Settings Designation ("*MSD*") legislation and now-expanding regulatory program is especially important. As explained in more detail below, the MSD program can pave the way for achieving resolution of an environmental impairment more quickly, more completely and in a less costly manner with less long term risk than most other environmental tools.

A. Background

The issuance of a Certificate of Completion ("*COC*") from the Texas Commission on Environmental Quality's ("*TCEQ*") Voluntary Cleanup Program ("*VCP*") continues to be the form of regulatory closure preferred by the real estate market in Texas. The Municipal Setting Designation is intended to be used as a component part of the State's regulatory closure process. It is not a stand-alone regulatory fix for a contaminated property. An MSD does not substitute for a COC under the Texas Voluntary Cleanup Program or a no further action determination under one of the other Texas remediation programs, such as TCEQ's Corrective Action Program or Petroleum Storage Tank Program. Following is a description of how the MSD works in the context of the VCP.

1. MSD and VCP

The VCP is intended to provide incentive to remediate contaminated property by removing liability of future landowners and lenders.[2] When the necessary investigation and appropriate response actions with respect to a site have been completed and a COC is issued by TCEQ, future owners, operators, and lenders are released (subject to limited exceptions) from liability to the State of Texas with respect to cleanup of contamination present at the site covered by the COC at the time the COC was issued.[3] Prospective purchasers of contaminated sites that

become applicants under the VCP *prior to taking ownership of the property* will also be released from liability upon TCEQ's subsequent issuance of a COC.[4]

2. Texas Risk Reduction Program

The Texas Risk Reduction Program ("*TRRP*") contains TCEQ's cleanup methodology for Texas environmental investigation and remediation projects. The detailed TRRP regulations,[5] and extensive accompanying guidance issued by TCEQ, provide a comprehensive risk-based approach for assessing and responding to environmental contamination. TRRP requires persons addressing environmental contamination to perform a series of activities with respect to a site. Those activities include:

a. Conducting an affected property assessment, classifying groundwater, determining land use, and notifying affected offsite property owners;
b. Determining critical protective concentration levels for the affected environmental media (e.g., soil, groundwater, surface water) and potential exposure pathways (e.g. dermal exposure to soil, human ingestion of groundwater, ecological receptors);
c. Preparing an Affected Property Assessment Report ("*APAR*") which sets out in detail the information noted above, along with a significant amount of other site-related information called for by TRRP;
d. Developing a Response Action Plan that describes how the proposed response objectives will be met; and
e. Preparing and submitting to TCEQ following completion of response actions, a Response Action Completion Report.[6]

A complete delineation of the lateral and vertical extent of impacts to affected media above TRRP standards, known as Protective Concentration Levels ("*PCL's*"), for "chemicals of concern" is generally required as part of the APAR. Delineation will many times be the most costly and time-consuming component of the TRRP process. Typically the most stringent PCLs for contaminants in soil and groundwater are based directly or indirectly on Federal drinking water standards.

The Municipal Setting Designation was enacted in 2003 as a legislative amendment to the TCEQ TRRP regulatory provisions. The legislation provides particular relief from the investigation and remediation factor typically responsible for the greatest amount of cost and time in addressing environmental impacts at a contaminated site – potential human consumption of contaminated groundwater – where conditions indicate that human consumption of affected groundwater cannot be reasonably anticipated. With an MSD, persons addressing impacted property may be subject to less stringent soil and groundwater assessment and cleanup requirements than would otherwise be required under TRRP.

B. The Municipal Setting Designation

H.B. 3152 (effective September 1, 2003)[7] authorized the creation of MSDs in Chapter 361, Subchapter W of the Texas Solid Waste Disposal Act.[8] As adopted, the statute imposed two criteria for eligibility:

1. A public drinking water supply system exists which is capable of supplying drinking water to the MSD property and property within ½ mile of the MSD property; and
2. The property is within the corporate city limits or extraterritorial jurisdiction of a municipality with a population of at least 20,000.[9]

The second eligibility criterion was eliminated by H.B. 2018, which was passed by the 80th Legislature and signed by the Governor on May 25, 2007, allowing for wider utilization of MSDs in Texas.

Prior to the passage of the MSD legislation, and today in areas of the state where an MSD program has not been locally implemented, the TCEQ VCP requires all groundwater to be considered and protected as if it were a drinking water source, whether or not that is or has ever been the case, and whether or not the groundwater is of such long lastingly poor quality due to natural (brackish water, for example,) or man-made factors that it can ever be consumed in the future. As described above, protection of groundwater for human consumption is often the most difficult, costly and time consuming TRRP requirement. As a result, no investment in these properties has occurred for decades and there has been little prospect of investment for the future because addressing the property's environmental conditions was cost prohibitive. This is a market reality the legislature recognized.

The environmental premise of the MSD legislation is that, with local consent, it is not necessary to protect groundwater of such long lastingly poor quality in the same manner as groundwater of better quality with actual or presumed better potential consumptive value to humans. In general, if the groundwater at a property is not believed to be capable of being remediated to the point where human consumption can reasonably be anticipated, the legislature determined that the public policy of the state should be to overcome that taint, and allow, with local consent, the property to be redeveloped by relaxing the remediation standards through the MSD process. To achieve redevelopment, the required groundwater response is reduced thereby decreasing the cost and time for satisfying applicable requirements, investment in the property is more likely to then become viable, though other environmental conditions at the property can and are required to be addressed.[10]

An MSD is applied to a specified geographic area certified by the TCEQ pursuant to an application by a property owner, municipality, or others. The boundaries of an MSD will usually be identical to the boundaries of the property owned by the VCP applicant. It can be as small or as large as the applicant specifies so long as the land sought to be included is within the municipality's jurisdiction. In certain circumstances, an MSD can extend beyond the applicant's property and also cover adjacent properties. Generally such a multi-property MSD will require the authorization of the owners of the covered property.[11] Note, however, that the City of Fort

Worth is in the process of obtaining an MSD for 1,964 acres in the Trinity Uptown section of the City without the prior written approval of property owners within the MSD boundaries. Additionally, the City of Beaumont has put in place an ordinance that qualified all groundwater in the City as non-potable and that designated the entire City as an MSD.

Certification of an MSD affects TRRP standards by changing the applicable assessment and cleanup levels for soil and groundwater with respect to the MSD site. So long as groundwater contamination is not causing, nor is it reasonably anticipated to cause, offsite impacts to human health within a ½ mile buffer zone surrounding the MSD, then soil and groundwater assessment and cleanup levels based directly or indirectly on safe drinking water standards do not apply under TRRP. The determination of actual or potential exposure to contaminated groundwater is based on a survey of existing groundwater wells within the ½ mile buffer zone surrounding the MSD. Even if there are state-registered groundwater wells within the buffer zone surrounding the MSD property, if the groundwater contamination impacting the MSD property is not reasonably anticipated to impact these existing wells, the human ingestion pathway for groundwater will not be considered under TRRP. To justify elimination of the human ingestion risk factor, a City ordinance or deed restriction prohibiting potable use of affected groundwater within an MSD will be required.[12]

If no groundwater wells exist within the buffer zone, or if it can be shown that the contamination is not reasonably anticipated to impact any existing wells, the VCP applicant can eliminate the following PCLs for purposes of assessment and cleanup under TRRP:

1. The groundwater PCLs for direct human ingestion of groundwater ($^{GW}GW_{Ing}$), and
2. The soil PCLs for protection against leaching of contaminants from soils into groundwater at levels that would be unsafe for human ingestion ($^{GW}Soil_{Ing}$).

At sites where an MSD can eliminate the groundwater exposure pathway, the effect on assessment and cleanup standards can be dramatic. For example, at dry cleaner sites, the contaminant invariably will be the solvent used in dry cleaner operations. Historically, that solvent has been perchlorethylene, commonly known as perc. The groundwater PCL, based on ingestion of perc, is 0.005 ppm.[13] That number will be considered the "critical" PCL that drives remediation decisions: groundwater assessment and cleanup to that level would be required. By eliminating the ingestion pathway with an MSD, the critical PCL is increased to 330 ppm to protect the human inhalation pathway, a 66,000 times increase over the non-MSD critical PCL of 0.005 ppm.[14]

Also, although groundwater contamination may be the primary focus at a site, an MSD can also relax soil assessment requirements and reduce the amount of soil that must be removed or otherwise remediated to achieve regulatory closure and obtain a COC. When an MSD removes the groundwater ingestion pathway, the critical PCL for soil will be based upon a combined ingestion, dermal and inhalation exposure level rather than a soil-to-groundwater protection level. For example, elimination of the ingestion PCL for perc at a site with a source area under 0.5 acre can result in an increase in the critical PCL for soil by almost 200 or over 700

times: from 0.05 mg/kg ($^{GW}Soil_{Ing}$) to 98 mg/kg ($^{Tot}Soil_{Comb}$)[15] for a residential site and 360 mg/kg ($^{Tot}Soil_{Comb}$)[16] for a commercial/industrial site.

In many cases, no offsite assessment and no remediation of groundwater will be necessary to achieve a Residential Remedy A cleanup with an MSD. However, certification of an MSD may not eliminate all assessment and cleanup requirements under TRRP. While two of the groundwater-related exposure pathways (ingestion, and protection of groundwater from surface and subsurface soil contamination) are eliminated from the risk analysis under TRRP, there are three other groundwater pathways that must still be considered and either eliminated or addressed: inhalation of volatiles; discharge to surface water; and ecological protection.[17] Similarly, an MSD does not eliminate all assessment and cleanup requirements for soil contamination. For these and other reasons discussed above, it is important that persons planning to use an MSD strategy to address contamination under TRRP conduct an initial screening investigation to evaluate whether an MSD can be used to meet all TRRP assessment and cleanup requirements.

C. The MSD Process

The MSD process is made up of a series of requirements at the municipal and state levels.

1. State MSD Requirements

The steps to obtain MSD certification for a site are defined in Subchapter W of the Texas Health & Safety Code.[18] These steps include application and payment of a $1,000 fee; notice of the application (mailed to affected municipalities, municipal and retail public water utilities, and registered water well owners); public comment period (60 days); staff technical review (90 days); and certification by TCEQ.[19]

2. Municipal MSD Procedures

Before TCEQ may certify an MSD, the applicant must provide documentation evidencing that:

a. The MSD application to TCEQ is accompanied by resolutions in support adopted by (i) the city council of the municipality in which the MSD is located and any other municipalities lying within the boundaries of the MSD and ½ mile buffer zone; and (ii) the governing body of each municipal and retail public utility having a groundwater supply well within 5 miles of the MSD; and

b. The property for which an MSD is sought is subject to either:

c. (1) a municipal ordinance that prohibits the use of affected groundwater from beneath the property as potable water and that appropriately restricts other uses of and contact with that groundwater; or

d. (2) a restrictive covenant enforceable by the municipality in which the property is located that prohibits the use of designated groundwater from beneath the property as potable water and appropriately restricts other

uses or contact with that groundwater. Restrictive covenants must be approved by municipal resolution.[20]

The first two MSDs were done in the City of Dallas on a "pilot project" basis. The City of Dallas subsequently adopted a procedural ordinance[21] to standardize the processing of MSD applications. Other municipalities that have adopted MSD procedural ordinances as of May 2007 include Fort Worth, Grapevine, Grand Prairie, and Arlington.[22] The city of Houston adopted an MSD ordinance on August 23, 2007, see Exhibit A. As would be expected, the municipal MSD programs vary in their approach to application fees, notice requirements, public participation and paperwork required during and after related TCEQ determinations.

Whether the jurisdiction has adopted a procedural ordinance, or whether it would consider an application on a case-to-case basis, the challenge is to obtain a resolution in support of the MSD not only from the municipality in which the MSD is located, but also resolutions of support from municipalities and regulated public utilities within the specified distances from the site, which may not have the same interest in approving the MSD as the host municipality.

Consequently, the MSD is, at its heart, a political process, with accompanying environmental technical aspects, and it is imperative that the MSD applicant keep in mind that their project team will need to include professionals that can assist with the political and related legal issues, which are beyond what environmental consultants typically provide.

D. The Importance of MSDs to Real Estate Deals

MSDs offer the opportunity to take a new strategic approach at sites that require regulatory closure. The typical brownfield site may present a number of challenges:

1. performing a cleanup that is cost-effective within the context of the property value or cost of redevelopment;
2. dealing with uncertainty as to if and when the State will grant regulatory closure; or
3. dealing with situations where contamination sourced on the subject property has migrated offsite or where the source of the contamination is an upgradient site which cannot be controlled by the subject property.

In our firm's experience in dealing with those challenges on client's projects, the MSD has provided a significant improvement in offering more certainty and finality to projects involving contaminated properties at less cost and in a shorter period of time.

As noted earlier, an MSD strategy can eliminate the need to "chase the plume" of contamination, which would otherwise be required under TRRP. That is particularly useful in situations where the plume has migrated and impacted offsite properties.

Even though an MSD requires a municipal ordinance or deed restriction on groundwater, a closure utilizing an MSD qualifies as TRRP Residential Remedy Standard A, so the MSD would not be considered to be an institutional control. TRRP Residential Remedy Standard A

closure criteria allow the applicant to move more quickly, by using a Self Implementation Notice ("*SIN*") under TRRP rules to achieve target cleanup levels, rather than having to submit a Response Action Plan that, unlike a SIN, will require State approval.

A combined VCP/MSD approach can substitute for an Innocent Owner/Operator program ("*IOP*") strategy for a site. The certificate issued by TCEQ under their IOP program provides a release of liability from the State without addressing regulatory closure of the contamination. In contrast, an MSD/VCP approach can provide regulatory closure and also overcome the primary drawback of Innocent Owner Certificates ("*IOCs*") to real estate developers: the IOC does not run with the land.

MSDs can also address concerns regarding liability exposure for environmental conditions that may have impacted surrounding properties. MSDs can reduce the potential for tort exposure by demonstrating that levels that exceed TRRP published standards can be left in place and still be deemed protective of human health and the environment under TRRP. MSDs also offer a vehicle for the owners of impacted adjacent property to join with the MSD applicant and extend the boundaries of the MSD to cover that adjacent property.

The MSD process can provide comfort to lenders and environmental insurance underwriters for a brownfield site. It has been our firm's experience that lenders are willing to consider financing for a contaminated property, even though regulatory closure has not yet been obtained from TCEQ, where an MSD has been (or, in certain instances, is expected to be) obtained for a property. Also an MSD will be considered to lower the underwriting risks for writing an environmental liability policy covering a brownfield site.

Exhibit B is the City of Dallas' map showing MSDs subsequently certified by TCEQ as of March 2007. The affects on the city's redevelopment have been profound and are likely to last for decades. Exhibit C is the City of Fort Worth's map showing MSDs granted by the city. Assuming the TCEQ certifies the MSD for the Trinity Uptown area, the program will have the same long lasting affects in that city as the program has had in Dallas.

By our informal calculation, the projected value of redevelopment projects made possible by the certified MSDs that Guida, Slavich & Flores has handled through May 2007 (approximately half of the MSDs certified to that date by TCEQ) exceeds $500 million. With the additional client properties we currently have in the pipeline for MSD certifications, that total number is expected to exceed $2.5 billion in the near future. Those numbers, while admittedly estimates, show the significant impact that the MSDs have had in the short time of their existence. MSDs provide an important tool for property owners needing an exit strategy for environmentally-impacted properties, and for purchasers and developers dealing with the challenges of redeveloping contaminated property.

III. The Dry Cleaner Remediation Program – A Better Approach?

A. Dry Cleaner Environmental Response Statute

The Dry Cleaner Environmental Response Statute ("*Dry Cleaner Statute*") was adopted by the 78th Legislature in 2003[23] and later amended by the 79th Legislature in 2005.[24] The statute is codified as Chapter 374 of the Texas Health & Safety Code.[25] Rules were promulgated by TCEQ and are set forth in 30 TAC Chapter 337. The Dry Cleaner Statute provided for rules that, among other things, prompt an appropriate corrective action of releases from dry cleaning facilities.[26] The Dry Cleaner Statute established registration requirements, fees, performance standards and other operational regulations, and investigation and remediation ("*corrective action*") requirements for dry cleaning facilities. The particular provisions of the Dry Cleaner Statute that this paper will address are outlined in Section 374.101, which created a State fund to pay for State-lead cleanup of dry cleaner-related contaminated sites. The fund is financed by dry cleaner registration fees and fees imposed on the purchase of dry cleaner solvent.[27]

The Dry Cleaner Statute also imposed response requirements in the event of a release of dry cleaning solvent. These requirements include immediately containing and controlling a release, and release reporting requirements.[28]

B. The Dry Cleaner Remediation Program

The portion of the Dry Cleaner Statute of particular interest to real estate investors and developers is the Dry Cleaner Remediation Program ("*DCRP*"). The DCRP provides for State-lead and -paid cleanup of site contamination from a retail dry cleaning establishment. The Dry Cleaner Statute provides that if a contaminated dry cleaning site has been "ranked" under Section 374.154, then the State of Texas may use money from the fund (up to $5 million for that single site[29]) for corrective action at the site. TCEQ's guidance on the operation of this program is attached as Exhibit D.

1. DCRP Eligibility

There are three classes of "owners" eligible to apply for a site to be ranked.[30] The first class, an owner of a dry cleaning facility or drop station, can apply for site ranking, provided that for active facilities, the facility is registered and current on fees, the dry cleaning operations are in compliance with applicable performance standards at the time of the release, and the owner is not in arrears for other monies owed to the TCEQ.[31]

The second class is the owner of the real property on which the dry cleaning facility or drop station is or was located, who is also eligible to apply for site ranking. A five-year ownership requirement was removed in the 2005 amendments to the Dry Cleaner statute. Certain former owners of real property on which the facility or drop station is or was formerly located are also eligible to apply for site ranking and make up the third class.[32]

H.B. 3220 (2007) amended the DCRP statute to require the two latter classes of real property owners noted above to pay an annual registration fee of $1,500 to participate in DCRP

fund benefits. It would also subject the real property at which the State undertakes DCRP corrective action to a lien if those registration fees have not been paid.

2. Site Ranking and Prioritization

For a site to be eligible for TCEQ cleanup under the DCRP, an eligible person must submit a ranking application.[33] The DCRP application requires site specific information, including a receptor survey, a site map showing the location of dry cleaning equipment, and a sufficient number of environmental samples, including groundwater samples, to document that a release of dry cleaning solvents has occurred.[34]

TCEQ requires a $5,000 per site deductible,[35] which can be met by a demonstration that the applicant has spent that much money in site investigation costs. TCEQ ranks a site based on information contained in the ranking application.[36] Non-emergency sites are ranked in order of relative significance.[37] The ranking procedures are set forth in TCEQ's rules.[38] Based on those procedures, TCEQ assigns a numerical score for the applying site. The ranking is considered by TCEQ to be a measure of the potential for the release to impact receptors. TCEQ is to assign ranking to a site within ninety (90) days of receiving a ranking application.[39]

The State also makes a separate prioritization determination for ranked sites. That determination is to be made semi-annually.[40] TCEQ will consider factors in addition to a site's ranking score,[41] such as the amount of money in the fund, and whether interim or immediate action may prove cost effective by reducing the future costs necessary for remediation of the site. The relative priority, among ranked sites, can change,[42] particularly as new sites apply and are assigned a site ranking.

3. Corrective Action

The statute provides that TCEQ is responsible for corrective action at sites that have been ranked.[43] "Corrective action" includes investigation, assessment and cleanup of affected soil, groundwater, and surface water, both onsite and offsite.[44] TCEQ can compel site access to perform corrective action; however, TCEQ has indicated that they prefer access be granted voluntarily.[45] TCEQ can compel owners or lessees of dry cleaning facilities to undertake corrective action under certain circumstances as long as requiring the owner or lessee to bear the responsibility would not prejudice another eligible person to have corrective action costs paid by the fund.[46]

TCEQ can and does use entities other than state employees to perform site investigation and remediation. The third-party contractors currently under contract with TCEQ to address issues at ranked sites are Ecology & Environment, Inc. and Weston Solutions, Inc. Additionally, the statute allows TCEQ to use a cleanup standard less stringent than those required by TRRP. To date, however, State policy has been not to utilize a less stringent cleanup standard. TCEQ representatives have also previously indicated that TCEQ does not plan to utilize Municipal Setting Designations in connection with DCRP cleanups.

4. DCRP and the VCP

TCEQ treats the DCRP as a corrective action alternative to the Voluntary Cleanup Program. Although there is no statutory restriction on having a site addressed under both the DCRP and the VCP, TCEQ takes the position that an election between the two programs must be made. After a VCP site has been ranked in the DCRP, the applicant must decide within forty-five (45) days whether to remain in the VCP, or to withdraw the site from the VCP and let the State perform corrective action under the DCRP.[47]

The following chart compares certain aspects of the two programs:

	DCRP	VCP
Who can apply?	"Eligible persons"	Anyone (subject to site eligibility)
Cost to apply	$5,000 deductible	$1,000 application fee
Who does work?	State contractors (State-lead program)	Applicant hires contractors
Other costs	None, but DCRP funds for a site are capped at $5 million	Pay for corrective action; pay for State oversight
State confirmation of completion	No Further Action letter	Certificate of Completion
Protection	Eligible persons exempt from claims under State law for: (i) cost recovery (ii) enforcement of corrective action (with exceptions)	Release of liability to future owners and lenders

5. DCRP and Real Estate Deals

In a real estate deal involving an environmentally-impacted site, there are two important considerations: the status of regulatory closure for a site, and the impact of that status on potential investors and their lenders. Although DCRP, on its face, presents a very attractive opportunity to have the State assume responsibility for dry cleaning contamination impacting a site, there are a number of potential downsides of the DCRP that should be considered for any site:

1. *Is the site impacted by pollutants in addition to dry cleaning solvents from the dry cleaning facility?* The program is limited to addressing dry cleaning solvents from retail dry cleaning facilities.[48] Similar chlorinated solvent contamination and non-dry cleaning solvent contamination are not covered by this program, and so needs

to be addressed under TCEQ programs other than the DCRP, such as the VCP. The DCRP may not provide a complete solution.

2. *What will be the real estate implications of regulatory closure using a commercial/industrial standard?* TCEQ utilizes a risk-based closure approach. If the future plans for the property are as "residential" as defined by TCEQ regulatory programs, the DCRP will probably not be the full answer. In performing corrective action at a dry cleaning site, TCEQ would not be expected to perform a clean up more stringent than that required under a commercial/industrial standard. Particularly where properties are being redeveloped and repurposed, such as for mixed use, additional remediation of the site may need to be performed by the site owner to permit residential use at the site. TRRP draws a distinction between regulatory closures where the anticipated use of the property is residential and where the anticipated use is commercial/industrial. The investigative and cleanup standards for the former use are more stringent than for the latter use.

3. *How will remediation strategy be impacted by TCEQ's position that a site cannot pursue remediation using both the DCRP and the VCP?* TCEQ limits a site from being in both the DCRP and the VCP simultaneously.[49] This limit on a dual-track remediation strategy is not required by statute and can present practical issues to a property owner or developer that wants to use a comprehensive regulatory closure approach for a site. Although a site owner whose property is ranked in the DCRP could, if necessary, drop out of the DCRP, do necessary work under the VCP and then re-enter the DCRP, the disconnect between the two programs can create issues. Work performed under the DCRP that is considered "remediation" for purposes of the VCP, can bar entry of that site into the VCP. Remediation will make the site ineligible for the VCP.[50] Also, TCEQ guidance regarding the DCRP indicates that once the State spends remediation money on a site, the site cannot withdraw from the DCRP and be entered into the VCP.[51]

VI. Environmental Due Diligence: The All Appropriate Inquiries and the ASTM 2005 Phase I Environmental Site Assessment Standards

Much of the real estate bar is aware that environmental due diligence "standards" have changed over the last few years. Focus has been drawn to the issue by news reports and professional articles concerning November 2006 changes to the federal Superfund statute's "All Appropriate Inquiries" or "AAI" provisions and the "innocent landowner defense." There is no doubt that these changes and additions to United States Environmental Protection Agency's ("EPA") regulations are generally relevant to the practice of real estate. In fact, they are highly relevant and very important to certain very high risk real estate deals.

In the opinion of this author, however, the adoption of the ASTM 1527-05 Phase I Environmental Site Assessment requirements ("ASTM 2005") is in fact a more important change to the environmental due diligence landscape for real estate practitioners. The changes to the AAI program are important to the day-to-day practice of real estate law because of their express

adoption of ASTM 2005 for the relatively limited purposes of AAI, and for their de facto endorsement of ASTM 2005 as the applicable process for minimally acceptable environmental due diligence in the real estate marketplace.

A. The All Appropriate Inquiries Standard

AAI arises in the context of the federal Superfund statute, known more formally as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.[52] ('CERCLA" or "Superfund"). The statute is familiar to most real estate practitioners, at least in a general way. It authorizes remediation of contaminated property that threatens human health or the environment by the federal government, as well as states. It also authorizes the government to seek recovery of the costs of the clean up, including remediation, administrative, and legal costs, from potentially responsible parties ("PRPs").[53] CERCLA liability is status liability: illegal or negligent behavior, for example, is irrelevant to civil liability. Liability is strict, and joint and several among the following parties as set forth at 42 U.S.C. § 9607(a):

> *(a) 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 . . .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 the disposal or treatment, of hazardous substances . . .*
> *(4) . . . 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 . . .*

Contribution provisions under CERCLA available to PRPs are set forth at 42 U.S.C. § 9613(f)(1):

> *(f)(1) Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title . . .*

These provisions have been the subject of some dispute and clarification in recent decisions by the Supreme Court, see *Aviall v. Cooper Industries, Inc.*,[54] and *U.S. v. Atlantic Research Corp.*[55] A general discussion of these cases is beyond the scope of this paper and is largely tangential to this AAI, ASTM 2005 and environmental due diligence discussion.

In practice, and most importantly for this presentation to real estate attorneys, the government initiates Superfund activities only at the most highly contaminated properties found on the National Priorities List, 40 C.F.R. 300 (2007). Those properties have received the highest rankings under the EPA Hazard Ranking System based on their threat to human health and the environment. Real estate listed on the National Priorities List is generally of limited market value and accordingly is thought not to be marketable to any but the most highly risk tolerant real estate purchasers. There are few, if any, lenders who accept such properties as collateral, and as a result those interested in acquiring such properties are more typically cash buyers.

The AAI process and related defenses are directed, as described below, to this limited number of properties in which the real estate market has limited interest. This is why AAI is less important to every day real estate practice, in the author's judgment, than ASTM 2005.

1. Innocent Landowner Defense to CERCLA Liability

CERCLA includes a defense to CERCLA section 107(a) liability known as the "innocent landowner" defense.[56] Specifically, 42 U.S.C. § 9607(b)(3) provides:

> *(b) 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---*
>
> . . .
>
> *(3) an act or omission of a third party other . . . than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly, with the defendant . . ., 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.*[57]

The term "contractual relationship" includes land contracts and deeds or other instruments transferring title or possession to land, including leases.[58] However, a contractual relationship is not the only criterion for establishing this defense. The "innocent landowner" defense is available only if "the subject real property was acquired after the disposal or placement of the hazardous substance on, in, or at the facility."[59] This is quite different than the sometime expressed impression that if a prospective purchase is unaware of an existing environmental problem, it may successfully claim the defense. This is not necessarily the case.

Also, a person seeking to invoke the innocent owner defense must demonstrate that:

> *(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.*[60]

Prior to the January 11, 2002, AAI amendments to Superfund, "had no reason to know" had been defined to mean that the person seeking to use the defense must:

> *. . . have undertaken, at the time of acquisition, all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonable ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.*[61]

The AAI amendments essentially did away with this confusing and internally inconsistent definition. In their place, the statute provides that "had no reason to know" means that the potentially responsible party, prior to its acquisition of the property, carried out all appropriate inquiries into the previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices.[62] In addition, the potentially responsible party is required to take reasonable steps to stop any continuing release of pollutants, prevent any threatened future release, and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.[63]

The statute provides further exposition on the first criterion, but none on the later. It directs EPA to establish regulatory standards that include ten specific practices.[64] The final EPA AAI regulations, practically speaking, do little more than repeat the statutory criteria, with one exception with respect to property purchased on or after May 31, 1997, and before January 11, 2002.

Since this defense is invoked only after an environmental problem has been identified that the purchaser is seeking to avoid liability for and did not identify, those asserting the defense are subject to "Monday morning quarterbacking" and all that that implies.

2. <u>AAI Comes of Age: The 2002 Brownfields Law Amendments</u>

The Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Law"),[65] signed by President Bush on January 11, 2002, added, among other things, the bona fide prospective purchaser ("BFPP") and contiguous property owner defenses to CERCLA liability. Exhibit E hereto contains the latest EPA brief discussion of the AAI standard. The Brownfields Law and EPA regulations and guidance also added a number of criteria known as the "common elements" that innocent landowners, BFPPs, and contiguous property owners would need to meet to qualify for one of these defenses. Collectively, these three CERCLA defenses are now being referred to as landowner liability protections or "LLPS."

(a) The AAI Standard

The Brownfields Law required EPA to develop its own standard for "all appropriate inquiries" by January 11, 2004. EPA proposed a new AAI standard on August 26, 2004,[66] and on November 1, 2005, following a Negotiated Rulemaking, EPA published final AAI rules.[67] The following basic conclusions answer many of the most common questions the author receives from real estate practitioners:

1. No, EPA has not provided "bright lines" for the actions required to inevitably establish any one of the defenses made available by the 2002 legislation. Uncertainty, the foil of successfully closing many real estate transactions, is ubiquitous.

2. Yes, the general guidance provided by EPA leaves many practical problems. Among them: many real estate deals do not provide a long enough time line to accomplish what EPA has described to establish the defense.

3. Yes, these defenses pertain to federal legal requirements. But they do not limit liability under Texas statute or common law in any statutorily described manner. Nor do they provide protection from federal liability for petroleum products which are specifically excluded from CERCLA. There is also no liability protection for third-party claims that may be brought with respect to the property.

4. Yes, the practical value of these defenses is limited because the market for properties on the National Priorities List is limited.

5. Yes, AAI is useful because of its *de facto* endorsement of ASTM 2005 as a reasoned approach to environmental due diligence.

B. ASTM 2005 Phase I Environmental Site Assessment Requirements

ASTM 1527-05 ("ASTM 2005") replaced ASTM 1527-00 (issued in 2000) when the former became effective in November 2006. The performance of a Phase I environmental site assessment to ASTM 2005 requirements in general provides a more comprehensive report, prepared by a more qualified professional at a somewhat greater (typically $200-600) cost. It is the author's view that the typically better work product is worth the additional cost. The likes and dislikes of environmental attorneys aside, the Texas lending community has made performance of the ASTM 2005 standard a prerequisite to obtaining most real estate-related financing.

ASTM 2005 provides an environmental baseline for the property at the time the investigation is conducted giving the prospective purchaser a basis upon which to make business decisions. This puts the user in a better position to identify actual or potential liabilities and to manage those liabilities going forward.

Exhibit F contains a comparison by EPA of the ASTM 2000 and ASTM 2005 standards. In the author's view, ASTM 2005's more significant improvements are:

- The final report must identify any data gaps and a statement as to the significance of each data gap and any potential impacts on the conclusions of the report. This can be critical from the perspective of environmental counsel.
- ASTM 1527-00 required reasonable efforts to gather certain information, EPA's AAI rule requires an interview with owners, operators and occupants of the subject property.[68] Note that this may impact the confidentiality of the proposed transaction.
- ASTM 2005 provides a means of updating the Phase I investigation when the original investigation was conducted more than 180 days prior to the transaction (e.g. the report's shelf-life has expired).
- ASTM 2005 includes a discussion on activity and use limitations and where they can be found.
- ASTM 2005 responsibilities are placed on the purchaser and current tenants.
- ASTM 2005 requires the user, typically the purchaser, to provide any information they may have to the environmental consultant as part of the investigation.
- ASTM 2005 includes a declaration by the environmental professional that they meet the necessary qualifications to conduct the investigation.

The ASTM standard also provides for non-scope items, or add-ins, which may be important to the transaction but are not relevant to liability defenses under either federal or state law. The add-ins may include an investigation into the potential presence of asbestos, lead-based paint, wetlands, endangered species, etc. The presence of these types of issues could affect both timing and property development plans. The Phase I may also contain a review of an operating facility's regulatory compliance to identify any potential statutory or common law liabilities.

ASTM 2005, as a "Phase I" standard, continues the practice of excluding any field testing.

Contrary to the language in many Phase I reports, a Phase I conducted in accordance with ASTM 2005 does not in and of itself meet AAI requirements: it meets one of the requirements for a statutory defense under CERCLA.

V. Environmental Insurance Update

Environmental insurance of various types for various purposes has often been discussed as an alternative or additional means to manage the uncertainty present in a real estate transaction involving environmental impairments. The author is of the belief that the environmental insurance market in Texas has evolved to the point that environmental insurance can be an effective risk allocation tool for the parties to the transaction, excluding the secured lender.

There are three types of environmental insurance most often recognized by the real estate market. Pollution Legal Liability (the name given by AIG, the market leader) provides coverage for environmental conditions that are unknown at the time of closing. This coverage is typically available only after the due diligence process is completed, often to more exacting insurer-

required standards. This coverage is also available to address on- and off-site claims for personal injury, property and natural resource damages, and economic loss associated with the environmental conditions. XL Environmental and others in the market offer their own insurance products with their own names intended to similarly address environmental unknowns.

"Cleanup cost-cap" environmental coverage is a product intended to address known environmental conditions if the costs of environment remediation exceed a specific dollar value. In these policies, the insured's costs are capped at a specific dollar value, and the insurer then pays for certain costs above that amount up to a finite policy limit. This coverage has become less available in recent years for a number of reasons.

Anecdotally, it would appear that a primary reason is that the loss experience by the insurers has exceeded that which was anticipated. There are other reasons as well. Properties are often eliminated as cleanup cost-cap insurance candidates because their environmental investigation is not approaching completion. When a site is approaching completion of its environmental investigation, the range of costs estimated to resolve those conditions begins to narrow, giving the insurer additional comfort. A corollary view from the perspective of the proposed insured is that, as the range of cost for remediation narrows, they have greater comfort in the final cost estimate and have less interest in paying an insurance premium for the cleanup cost-cap coverage. Sites whose environmental investigation has not reached this point may simply be rejected because remediation costs may be too difficult for insurer to comfortably predict.

When coverage is offered, one can anticipate that the insurer will propose a self-retained limit some percentage above what it believes the high end of the estimated range of environmental response costs.

We understand that insurers have a considerable investment of time to review cost-cap coverage requests, which plays itself out in the premium charge. We have been informed that properties whose environmental remediation costs are expected to be at or greater than $1 million are reasonable candidates for consideration by the insurers in this market, but those whose remediation cost is expected to be less may not be good candidates.

Secured lender environmental coverage had been a substantial product but today it plays a minor role in the real estate market. The coverage, when it was first introduced, would cover the greater of the remaining balance of the debtor/property owner's loan balance and the cost of environmental remediation to state standards if a loan default occurred prior to completion of the environmental remediation. This quickly became a problem for the insurers. The policies were rewritten to cover the lesser of the remaining balance of the debtor/property owner's loan balance and the cost of environmental remediation to state standards. This made the insurance proposition for the insurers far more palatable. Nevertheless, AIG, the largest percentage player in the environmental insurance market, has stopped offering secured lender coverage.

State law requires that environmental insurance be purchased from a licensed environmental insurance broker. The author's experience is that there are few insurance brokers

in Texas with the ability and experience to provide highly capable service and guidance in the environmental insurance arena.

Environmental insurance is not written on forms or endorsements common to all insurers. To gain full value for the proposed insured requires heavy negotiation by environmental counsel. Each carrier offers its own policy forms and corresponding scopes of coverage. Experienced environmental counsel can guide their client through this insurance negotiation process.

There are gaps in some Corporate Director and Officer policy coverages for environmental claims asserted against the corporation. One should consider the affect of an acquisition of an environmentally-impaired parcel of real property in this context as well.

A 2006 informal joint survey by the Land Use and Environmental Committee and the Insurance Committee of the American College of Real Estate Lawyers of its members nationally sheds some light on environmental insurance procurement practices in the real world.[69] The author suspects these results would hold true in a poll of Texas real estate counsel as well. A summary of the survey results concerning Pollution Legal Liability includes the following information:

a. About one-third of the survey respondents reported never having purchased environmental insurance.
b. Nineteen percent have used environmental insurance fewer than five times.
c. The typical policy has $5 or 10 million in coverage, a deductible of $100,000-250,000, and a policy term of ten years.
d. The recommendation to use or not to environmental insurance typically comes from counsel.
e. Most environmental insurance is highly negotiated by counsel without additional premium cost to the insured.

VI. Conclusion

MSD's, the DCRP and environmental insurance offer opportunities to address environmental issues that can otherwise present a roadblock for real estate transactions. All three require sound environmental due diligence. As with all such transactions, the real estate practitioner is well advised to keep in mind the following big picture items:

1. Begin with the end in mind; develop an environmental strategy to coordinate with the client's business plan. A critical component of the project planning process is an information baseline derived from an environmental investigation. The scope of the investigation should be prepared with the assistance of experienced professionals and with the development plans in mind. That baseline and the development plans should be used to select the appropriate remediation tools and to develop a strategic approach. The strategic approach selected to address environmental issues should take into account the proposed use for the property and regulatory standards, especially the cleanup targets, the project will need to meet. Above all, the approach needs to factor the client's post-purchase exit strategy into the analysis.

2. Enlist the assistance of professionals with expertise and experience. Because of the complexities that can arise in development of a brownfield property, the developer is well advised to supplement the real estate/development/construction team with additional expertise. Usually that will include an environmental attorney, an environmental consultant, and remediation contractors. There may also be a need to include an environmental insurance broker, and community relations and governmental affairs liaisons. The coordination between and among the different disciplines is crucial for a successful project. Those additional professionals should be brought in at the earliest stages of the project and the team will need to closely coordinate their efforts throughout the project.

Where contaminated property is involved and remediation is recommended, if not mandatory, practitioners need to take advantage of remediation tools that are appropriate for the situation presented. MSDs and the DCRP are two of the tools that may prove useful under the right circumstances, but practitioners should not lose sight of the fact that there are additional remediation tools that were not discussed in this paper, but that may also merit consideration.

These tools, when used strategically, can provide sufficient comfort for sellers, buyers, and lenders so that deals involving the acquisition and redevelopment of brownfield properties can proceed and those properties can be remediated and returned to productive use.

ENDNOTES

[1] Portions of this paper have appeared in other forms previously. The MSD section in particular draws on work done by my colleagues John Slavich, Greg Rogers, David Whitten, and Erika Erikson, who have been instrumental in developing the MSD process in connection with implementing MSDs for our firm's clients. Also, Ms. Erikson assisted with research for the paper and the preparation of the Endnotes.

[2] TEX. HEALTH & SAFETY CODE § 361.602 (visited May 23, 2007) http://tlo2.tlc.state.tx.us/statutes/docs/HS/content/pdf/hs.005.00.000361.00.pdf.

[3] *Id.* § 361.610.

[4] *Id.*

[5] 30 TEX. ADMIN. CODE § 350.001 *et seq.* (visited August 24, 2007) http://www.tceq.state.tx.us/rules/indxpdf.html#350.

[6] *Id.* § 350.3.

[7] Tex. H.B. 3152, 78th Leg., R.S. (2003).

[8] TEX. HEALTH & SAFETY CODE § 361.801 *et seq.*

[9] *Id.* § 361.803

[10] *See*, Kathryn A. Hansen, *Municipal Setting Designations "The Ever Lovin' Blue-Eyed Thing" (A Municipality's Perspective)*, presented to the 17th annual Texas Environmental Superconference, State Bar of Texas (Aug. 4, 2005).

[11] *See* Susan Rainey, *Municipal Setting Designations and Tort Liability: Adjacent Property Owners at Risk*, 35 ST. B. TEX. ENVTL. L. J. 41 (Fall 2004).

[12] *Id.* § 361.8065(a)(2).

[13] Table 3, Tier 1 Groundwater PCLs – Residential and Commercial/Industrial, updated Apr. 20, 2007 (visited May 23, 2007) http://www.tceq.state.tx.us/assets/public/remediation/trrp/TRRPPCLTables1_5_042007.xls.

[14] *Id.*

[15] Table 1, Tier 1 Residential Soil PCLs, updated Apr. 20, 2007 (visited May 23, 2007) http://www.tceq.state.tx.us/assets/public/remediation/trrp/TRRPPCLTables1_5_042007.xls.

[16] Table 2, Tier 1 Commercial/Industrial Soil PCLs, updated Apr. 20, 2007 (visited May 23, 2007) http://www.tceq.state.tx.us/assets/public/remediation/trrp/TRRPPCLTables1_5_042007.xls.

[17] TEX. HEALTH & SAFETY CODE § 361.808(f).

[18] *Id.* § 361.801 *et. seq.*

[19] *Id.* §361.804.

[20] *Id.* § 361.8065.

[21] Dallas, Tex., Ordinance 262001, May 25, 2005 (visited August 24, 2007) http://www.dallascityhall.com/pdf/DevSvcs/MSDOrdinance.pdf.

[22] Fort Worth, Tex., Ordinance to Add Municipal Setting Designations to Chapter 12.5 Environmental Protection and Compliance, January 11, 2005 (visited May 29, 2007) http://www.fortworthgov.org/uploadedFiles/Department_of_Environmental_Management/About_Us/Brownfields/MSD_ordinance.pdf; Grapevine, Tex., Ordinance 2005-79, codified in Chapter 25, Article VII, Oct. 11, 2005, (visited May 29, 2007) http://www.municode.com/resources/gateway.asp?pid=10855&sid=43; Grand Prairie, Tex., Ordinance to Add Municipal Setting Designations, codified in Chapter 13, Article XVIII, Jan. 3, 2006, (visited May 29, 2007) http://www.municode.com/resources/gateway.asp?sid=43&pid=10142; Arlington, Tex., Ordinance 06-089, Aug, 22, 2006 (visited May 29, 2007) http://www.ci.arlington.tx.us/environmentalservices/pdf/ordinances_MunicipalSettingDesignation.pdf.

[23] Tex. H.B. 1366, 78th Leg., R.S. (2003).

[24] Tex. H.B. 2376 and S.B. 444, 79th Leg., (2005).

[25] TEX. HEALTH & SAFETY CODE § 374.001 *et seq.* (visited August 24, 2007) http://tlo2.tlc.state.tx.us/statutes/docs/HS/content/pdf/hs.005.00.000374.00.pdf.

[26] *Id.* § 374.051(a)(2).

[27] *Id.* § 374.101.

[28] *Id.* § 374.151(b).

[29] *Id.* § 374.203.

[30] *Id.* § 374.154(b) and § 374.203.

[31] 30 TEX. ADMIN. CODE § 337.32 (visited August 24, 2007) http://www.tceq.state.tx.us/rules/indxpdf.html#337.

[32] TEX. HEALTH & SAFETY CODE § 374.154(b)(3).

[33] *Id.* § 374.203(c).

[34] *TCEQ Dry Cleaner Remediation Program Application for Ranking*, Texas Commission on Environmental Quality, App. A (visited May 21, 2007) http://www.tceq.state.tx.us/remediation/dry_cleaners/forms.html.

[35] TEX. HEALTH & SAFETY CODE § 374.203(d).

[36] *Id.* § 374.154.

[37] *Id.* § 374.154(a).

[38] 30 TEX. ADMIN. CODE § 337.31 (visited August 24, 2007) http://www.tceq.state.tx.us/rules/indxpdf.html#337.

[39] TEX. HEALTH & SAFETY CODE § 374.154(f).

[40] *Id.* § 337.30(a).

[41] *Id.* § 337.30(b).

[42] *Id.* § 337.30(c).

[43] TEX. HEALTH & SAFETY CODE § 374.055.

[44] *Id.* § 374.153.

[45] *Answers to Your Questions about the Dry Cleaner Remediation Program*, Texas Commission on Environmental Quality, Question A4, (revised August 9, 2006).

[46] TEX. HEALTH & SAFETY CODE § 374.202

[47] *Answers to Your Questions about the Dry Cleaner Remediation Program*, Question C1.

[48] TEX. HEALTH & SAFETY CODE § 374.208(b).

[49] *Answers to Your Questions about the Dry Cleaner Remediation Program*, Question C1.

[50] *See Id.* Question C4 and *Voluntary Cleanup Program Rules* 30 TEX. ADMIN. CODE § 333.6 (visited May 21, 2007) http://www.tceq.state.tx.us/assets/public/legal/rules/rules/pdflib/333a.pdf.

[51] *Answers to Your Questions about the Dry Cleaner Remediation Program*, Question C1.

[52] 42 U.S.C. § 9601 et seq.

[53] 42 U.S.C. § 9607(a). Texas' counterpart applies to actual or threatened releases of solid waste. *See* TEX. HEALTH & SAFETY CODE §§ 361.271(A), 361.272, and 361.273.

[54] 543 U.S. 157 (2004).

[55] 127 S.Ct. 2331 (2007).

[56] Note that no statutory defense is provided to contribution actions under CERCLA section 113(f)(1).

[57] 42 U.S.C. § 9607(b)(3) (emphasis added).

[58] 42 U.S.C. § 9601(35)(A).

[59] *Id.*

[60] *Id.*

[61] 42 U.S.C. § 9601(35)(B) (emphasis added).

[62] 42 U.S.C. §9601(35)(B)(i)(I).

[63] 42 U.S.C. §9601(35)(B)(i)(II).

[64] These practices, as provided in 42 U.S.C. §9601(35)(B)(iii)(I)-(X), are: 1) the results of inquiry by an environmental professional; 2) interviews with past and present owners, operators, and occupants of the property concerning potential for contamination; 3) reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies; 4) research for recorded environmental cleanup liens; 5) reviews of federal, state and local government records concerning waste management and contamination at or near the property; 6) visual inspection of the property and adjoining properties; 7) specialized knowledge or experience of the potentially responsible party; 8) the relationship of the purchase price to the value of the property if the property is not contaminated; 9) "commonly known or reasonably ascertainable information" about the property; and 10) the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect contamination by appropriate investigation.

[65] Pub. L. No. 107-118.

[66] 69 Fed. Reg. 52542 (August 26, 2004).

[67] *See* 70 Fed. Reg. 66070 (November 1, 2005). The author would be pleased to provide a copy of the final AAI rule is to any reader, but most real estate practitioners have little interest in the details.

[68] 40 C.F.R. § 312.23(a).

[69] Fersko, Jack and Waeger, Ann., *Environmental Insurance Survey: Report of ACREL Membership Experiences*, ACREL NEWS, Vol. 25, No. 1, at p. 10 (February 2007).

EXHIBIT A

City of Houston, Texas, Ordinance No. 2007-_____

AN ORDINANCE AMENDING CHAPTER 47 OF THE CODE OF ORDINANCES, HOUSTON, TEXAS, BY ADDING ARTICLE XIII RELATING TO GROUNDWATER; PROVIDING A PROCESS FOR ESTABLISHING MUNICIPAL SETTING DESIGNATION ORDINANCES TO PROHIBIT CERTAIN CONTAMINATED GROUNDWATER FROM POTABLE USE; CONTAINING FINDINGS AND OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING A PENALTY; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE; AND DECLARING AN EMERGENCY.

* * * * * * *

WHEREAS, the City of Houston is a municipal corporation organized under the Constitution and the general and special laws of the State of Texas and exercises powers granted by the City's Charter and the provisions of Article XI, Section 5 of the Texas Constitution; and

WHEREAS, in the exercise of its lawful authority, the City may enact police power ordinances to promote and protect the health, safety, and welfare of the public; and

WHEREAS, the City uses groundwater from deep aquifers in very distinct, limited areas in the City as a source for public potable water; and

WHEREAS, the City Council finds that there are areas within the City and its extraterritorial jurisdiction where the groundwater may not be valuable as a source for potable water due to its limited quantity and low quality; and

WHEREAS, properties in the City and its extraterritorial jurisdiction are underlain with unused or unusable groundwater that has become contaminated by historical on-site or off-site sources; and

WHEREAS, the Texas legislature has established a process in which a particular type of municipal ordinance will serve in lieu of regulations from the Texas Commission on Environmental Quality (TCEQ) to prohibit contaminated groundwater from potable use; and

WHEREAS, the process of having TCEQ approve these municipal ordinances, called municipal setting designations, is authorized by Subchapter W of Chapter 361 of the Texas Health and Safety Code (the Solid Waste Disposal Act), which balances protection of human health and the environment with the economic welfare of the citizens and the City; and

WHEREAS, municipal setting designation ordinances enable a state corrective process for groundwater that protects human health and the environment while also promoting the economic welfare of citizens of the city; and

WHEREAS, if the use of the groundwater in a particular area presents an actual or potential threat to human health, and another source of potable water is available, the use of designated groundwater beneath a designated property should be prohibited to protect the public health, safety, and welfare; and

WHEREAS, municipal setting designation ordinances should be considered only after a process that allows for public notice and input; and

WHEREAS, the use of municipal setting designation ordinances within the City and its extraterritorial jurisdiction will encourage the economic development of these properties; and

WHEREAS, the City Council finds that it is appropriate to recover the City's costs of administering the municipal setting designation ordinance program established by the

Ordinance through the assessment of fees; and

WHEREAS, the City Council finds that the Department of Public Works and Engineering has analyzed the costs of administering the municipal setting designation ordinance program, and related those costs to the individual municipal setting designation ordinances that will be submitted for City Council action; and

WHEREAS, the City Council finds that the fees are reasonably related to the cost of administering the program;

WHEREAS, the City Council further finds that it is appropriate for the applicant for a municipal setting designation to pay all expenses associated with notices and hearings;

NOW, THEREFORE;

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:

Section 1. That the findings contained in the preamble of this Ordinance are determined to be true and correct and are hereby adopted as part of this Ordinance.

Section 2. That Chapter 47 of the Code of Ordinances, Houston, Texas, is hereby amended by adding a new Article XIII, which shall read as follows:

"ARTICLE XIII. MUNICIPAL SETTING DESIGNATIONS

Sec. 47-761. Definitions.

As used in this article, the following words and terms shall have the meanings ascribed in this section, unless the context of their usage clearly indicates another meaning:

Application means the application submitted to the city for a municipal setting designation ordinance.

Contaminant of concern means any contaminant that has the potential to adversely affect ecological or human receptors due to its

concentration, distribution or mode of toxicity.

Critical protective concentration level means the lowest protective concentration level for a contaminant of concern within a source medium determined from all applicable human exposure pathways.

Designated groundwater means groundwater that will be or is prohibited from use as potable water by a municipal setting designation ordinance.

Designated property means the property that will be or is subject to a municipal setting designation ordinance. The designated property may cover several platted lots or tracts of land and may include rights-of-way of the city or other governmental entity.

EPA means the United States Environmental Protection Agency and any successor agency or department.

Groundwater means water below the surface of the earth.

Ingestion protective concentration level means the protective concentration level for human ingestion for contaminants of concern in groundwater established by the TCEQ under the Texas Risk Reduction Program, determined as if there were no municipal setting designation ordinance.

Ingestion protective concentration level exceedence zone means the area where concentrations of contaminants of concern from sources on or migrating from or through the designated property are greater than the ingestion protective concentration level in groundwater, determined as if there were no municipal setting designation ordinance.

Municipal setting designation means a TCEQ designation authorized by Subchapter W of Chapter 361 of the Texas Health and Safety Code, as it may be amended from time to time.

Municipal setting designation ordinance means an ordinance adopted pursuant to this article.

Non-ingestion protective concentration level means the protective concentration level for dermal contact or inhalation for contaminants of concern in groundwater established by the TCEQ under the Texas Risk Reduction Program.

Non-ingestion protective concentration level exceedence zone means the area where concentrations of contaminants of concern from sources on or migrating from or through the designated property are greater than the non-ingestion protective concentration level in groundwater.

Potable water means water that is used for irrigation, production of food or drink products intended for human consumption, drinking, showering, bathing or cooking purposes.

Protective concentration level means the concentration of a contaminant of concern that the TCEQ has determined can remain within the source medium and not result in a level that exceeds the applicable human health risk-based exposure limit or ecological protective concentration level at the point of exposure for an exposure pathway.

Response action means the control, decontamination or removal from the environment of a hazardous substance or contaminant pursuant to Subchapter W of Chapter 361 of the Texas Health and Safety Code, as it may be amended from time to time.

TCEQ means the Texas Commission on Environmental Quality and any successor agency.

TCEQ application means the application submitted to the TCEQ for certification of a municipal setting designation.

To the extent known means information known by an applicant or applicant's agent after review of all public and private records and other information sources available in the exercise of due diligence.

Sec. 47-762. Application.

(a) A person seeking a municipal setting designation ordinance shall file an electronic portable digital file and at least one paper copy of an application and any supporting documentation with the director.

(b) The application must be clear, complete, concise, correct, contain only relevant information and be organized to facilitate analysis. Maps must be accurate and drawn to scale. Supporting documentation, if necessary, must be submitted as a separate appendix to the application.

(c) A professional surveyor registered with the Texas Board of Professional Surveying must certify that all property descriptions or maps

with metes and bounds descriptions are accurate.

(d) The application must be on the form required by the director and contain the following information in the order listed:

(1) An executive summary of the application;

(2) The name, address, telephone number(s) and email addresses of all applicants, all property owners within the designated property, and any representatives of the applicants or property owners;

(3) A legal description of the boundaries of the designated property and a copy of the deed for the designated property;

(4) A site map showing:

a. The location of the designated property;

b. The topography of the designated property as indicated on publicly available sources, which must note the watershed and whether the designated property is located in a floodplain or floodway, as those terms are defined in chapter 19 of this Code;

c. The detected area of groundwater contamination;

d. The location of all soil sampling locations and all groundwater monitoring wells;

e. Groundwater gradients, to the extent known, and direction of groundwater flow; and

f. The ingestion protective concentration level exceedence zone for each contaminant of concern, to the extent known;

(5) A description of the current use, and, to the extent known, the anticipated uses, of the designated property and properties within 500 feet of the boundary of the designated property;

(6) For each contaminant of concern within the ingestion protective concentration level exceedence zone, to the extent

known:

a. A description of the ingestion protective concentration level exceedence zone and the non-ingestion protective concentration level exceedence zone, including a specification of the horizontal area and the minimum and maximum depth below ground surface;

b. The level of contamination, the ingestion protective concentration level, and the non-ingestion protective concentration level, all expressed as mg/L units; and

c. Its basic geochemical properties (e.g., whether the contaminant of concern migrates with groundwater, floats or is soluble in water);

(7) For each contaminant of concern within the designated groundwater, to the extent known:

a. A description of the ingestion protective concentration level exceedence zone and the non-ingestion protective concentration level exceedence zone, including a specification of the horizontal area and the minimum and maximum depth below ground surface;

b. The level of contamination, the ingestion protective concentration level, and the non-ingestion protective concentration level, all expressed as mg/L units; and

c. Its basic geochemical properties (e.g., whether the contaminant of concern migrates with groundwater, floats or is soluble in water);

(8) A table displaying the following information for each contaminant of concern, to the extent known:

a. The concentration level for soil and groundwater, the ingestion protective concentration level, and the non-ingestion protective concentration level, all expressed as mg/L units; and

b. The critical protective concentration level without the municipal setting designation, highlighting any

exceedences;

(9) A statement as to whether the plume of contamination is stable, expanding, or contracting, with the basis for that statement. If this information is not known, a statement of why the information is not known;

(10) A statement as to whether contamination on and off the designated property without a municipal setting designation exceeds a residential assessment level as defined in the Texas Risk Reduction Program or analogous residential level set by EPA, if known, and the basis for that statement;

(11) A statement as to whether contamination on and off the designated property with a municipal setting designation will exceed a residential assessment level as defined in the Texas Risk Reduction Program or analogous residential level set by EPA, if known, and the basis for that statement;

(12) Identification of the points of origin of the contamination and the persons responsible for the contamination, to the extent known;

(13) A description of any environmental regulatory actions that have been taken within the past five years in connection with the designated property, to the extent known;

(14) A listing of all existing state or EPA registrations, permits, and identification numbers that apply to the designated property;

(15) A statement as to whether the designated property has been admitted to the Texas Voluntary Cleanup Program (section 361.601 of the Texas Health & Safety Code, as may be amended from time to time) or similar state or federal program, and a description of the status of the designated property in the program;

(16) A summary of any environmental site assessment reports filed with the TCEQ regarding any site investigations or response actions that are planned, ongoing or completed related to the designated property;

(17) A statement as to whether any public drinking water supply

system exists that satisfies the requirements of Chapter 341 of the Texas Health and Safety Code and that supplies or is capable of supplying drinking water to the designated property and property within one-half mile of the designated property and the identity of each supply system;

(18) The name and address of each owner or operator of a water well registered or permitted by the state or the Houston-Galveston Subsidence District that is located within five miles of the boundary of the designated property, along with:

a. A map showing the location of each well and, to the extent known, a notation of whether each well is used for potable water; and

b. A statement as to whether the applicant has provided notice to each owner in compliance with section 361.805 of the Texas Health and Safety Code;

(19) The name and address of each retail public utility, as defined in section 13.002 of the Texas Water Code, that owns or operates a groundwater supply well within five miles of the boundary of the designated property, along with a statement as to whether the applicant has provided notice as required by section 361.805 of the Texas Health and Safety Code;

(20) A listing of each municipality, other than the city, with a corporate limit within one-half mile of the boundary of the designated property, and a statement as to whether the applicant has provided notice as required by section 361.805 of the Texas Health and Safety Code;

(21) A listing of each municipality, other than the city, that owns or operates a groundwater supply well within five miles of the boundary of the designated property, and a statement as to whether the applicant has provided notice as required by section 361.805 of the Texas Health and Safety Code;

(22) The following statement signed and sealed by a licensed professional engineer or licensed professional geoscientist authorized to practice in the State of Texas with expertise in environmental remediation:

'To the best of my knowledge and belief, based upon a review of all public and private records and other information sources available to me in the exercise of due diligence, the opinions stated and conclusions made in this application are supported by such information, and the technical and scientific information submitted with the application is true, accurate and complete. Based on such review, the contaminants of concern from sources on the designated property or migrating from or through the designated property more likely than not ***do exceed*** or ***do not exceed*** a non-ingestion protective concentration level on property beyond the boundaries of the designated property';

(23) If the licensed professional engineer or licensed professional geoscientist determines that contaminants of concern from sources on the designated property or migrating from or through the designated property more likely than not ***do exceed*** a non-ingestion protective concentration level on property beyond the boundary of the designated property, then the applicant must:

a. Specify the name and address of the owner of each property;

b. Send a copy of the application to the owner of the property with the notice of the public meeting;

c. Provide documentation that the designated property has been included in a state or federal program that requires that the entire non-ingestion protective concentration level exceedence zone be addressed to the satisfaction of the agency administering the program, along with documentation of the estimated time period in which it is to be addressed. An example of such a program is the Texas Voluntary Cleanup Program (section 361.501 of the Texas Health and Safety Code, as may be amended from time to time); and

d. Provide documentation upon completion of the state or federal program showing that the non-ingestion protective concentration level exceedences have been addressed to the satisfaction of the agency

administering the program;

(24) The following statement certified by the applicant and any authorized representatives of the applicant(s) listed in the application:

'I certify under penalty of law that this application and all attachments were prepared under my direction or supervision in a manner designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the persons responsible for gathering and evaluating the information, the information submitted is, the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations';

(25) The signature of the applicant and proof that the applicant has the legal authority to restrict the use of the groundwater on the designated property; and

(26) Any other information that the director deems necessary.

(e) The director shall, from time to time, prepare and submit for approval by motion of the city council a schedule of fees that shall be paid by an applicant for a municipal setting designation. Payment of any applicable fees when due is a condition of the processing of any application under this article, and no refund of the application fee shall be made. The director shall not mail notices or advertise the public meeting required by this article until the estimated cost of mailing notices and advertising the public meeting is paid by the applicant. The director shall not request that a municipal setting designation ordinance be placed on a city council agenda until the applicant has paid all costs associated with advertising and mailing notices for the public meeting. The director may waive the application fee but not other costs if the director finds that payment of the application fee would result in a substantial financial hardship to the applicant.

(f) Within 30 days after submission of an application, the director shall notify the applicant that the application is complete or notify the applicant in writing of any deficiencies in the application and of any additional documentation required. The applicant shall have 60 days from the date of the deficiency letter to correct the deficiencies or submit additional documentation. The director may, for good cause, extend the deadline to

correct or supplement the application. If the applicant fails to correct or supplement the application within 60 days or the extended period, the application shall be deemed withdrawn and the initial filing fee forfeited. No application shall be deemed complete until all supporting documentation is supplied.

Sec. 47-763. Staff review.

(a) The director shall distribute a copy of the complete application to the city attorney, the mayor's office, the department of health and human services and any other city department whose property or operations may be affected by the application for review and comment. The director shall also send a copy of the application to the TCEQ.

(b) The city is not responsible for conducting an environmental risk assessment with respect to the application or the designated property.

Sec. 47-764. Public meeting.

(a) The director shall conduct a public meeting within 60 days after the application is deemed complete. The public meeting must be held at a facility open to the public near the designated property.

(b) Upon receipt of the estimated cost of mailing notices and advertising the public meeting, the director shall cause to be provided notification of the public meeting as follows:

(1) The notice of the public meeting must include:

a. The date, time and location of the public meeting;

b. The identity of the applicant;

c. The location and legal description of the designated property;

d. The purpose of a municipal setting designation; and

e. The type of contamination identified in the designated groundwater;

(2) The director shall publish notice of the public meeting in a newspaper of general circulation at least 30 days before the

public meeting;

(3) The director shall mail notice of the public meeting at least 30 days before the date of the public meeting by depositing the notice properly addressed and postage paid in the United States mail. The notice must be written in at least English and Spanish. The applicant may not alter, change, amend, or enlarge the application after notices for the public meeting have been mailed. The director shall mail notice of the public meeting to:

a. The applicant;

b. Owners of real property within 2,500 feet of the boundary of the designated property as indicated by the most recent appraisal district records;

c. Owners and operators of water wells registered or permitted by the state or the Harris-Galveston Subsidence District that are located within five miles of the boundary of the designated property, as indicated on the application, by certified mail;

d. Any municipality with a corporate limit within one-half mile of the boundary of the designated property, as indicated on the application, by certified mail;

e. Any municipality that owns or operates a groundwater supply well within five miles of the boundary of the designated property, as indicated on the application, by certified mail;

f. The Harris-Galveston Subsidence District;

g. Any civic organization, property owners' association, or any other interested group with identifiable boundaries, provided that the organization, association or group is registered with the planning and development department in a manner prescribed by the director of that department, the boundary of which organization, association or group is within one-half mile of the boundary of the designated property, as indicated on the application, by certified mail; and

h. The TCEQ; and

(4) The director shall cause a copy of the application to be placed on display at the public library closest to the designated property at least 30 days prior to the public meeting.

(c) The applicant, the licensed professional engineer or licensed professional geoscientist who signed and sealed the application, or a licensed professional engineer or licensed professional geoscientist who is familiar with the application must be present at the public meeting. If the required person is not present at the public meeting, the director may either deem the application withdrawn and any fees forfeited or reschedule the public meeting at the applicant's expense.

(d) The purpose of the public meeting is to provide information to the community about municipal setting designations in general and the application in specific, allow the applicant to explain the application, allow proponents and opponents to comment, and notify the community of the date of the city council public hearing.

Sec. 47-765. City council public hearing.

(a) City council shall conduct a public hearing to consider a municipal setting designation ordinance.

(b) Prior to the city council public hearing, the director shall prepare a recommendation as to whether the municipal setting designation ordinance should be granted or denied, and listing any conditions that should be imposed.

(1) The director may recommend that the municipal setting designation ordinance prohibit the use of the designated groundwater from beneath public rights-of-way immediately adjacent to the designated property as potable water.

(2) If, in the sole discretion of the director, the director determines it is more likely than not that a source of a contaminant of concern originated on the designated property, and the ingestion protective concentration level exceedence zone or the non-ingestion protective concentration level exceedence zone for that contaminant of concern extends to public rights-of-way immediately adjacent to the designated property, the director may recommend that the municipal setting

designation ordinance include a condition that the public right-of-way immediately adjacent to the designated property be included, at no additional cost to the city, in the TCEQ application.

(c) Upon payment of the costs associated with providing notice of the public hearing, the director shall provide notification of the public hearing as follows:

(1) The notice of the public hearing must include:

a. The date, time and location of the public hearing;

b. The identity of the applicant;

c. The location and legal description of the designated property;

d. The purpose of a municipal setting designation; and

e. The type of contamination identified in the designated groundwater; and

(2) The director shall publish notice of the public hearing in a newspaper of general circulation at least 30 days before the public hearing.

(d) The applicant, the licensed professional engineer or licensed professional geoscientist who signed and sealed the application or a licensed professional engineer or licensed professional geoscientist who is familiar with the application must be present at the public hearing. If the required person is not present at the public hearing, the city council may either deny the application or continue the public hearing.

(e) The city council shall deny the application if it finds that:

(1) It does not meet the eligibility criteria of section 361.803 of the Texas Health and Safety Code;

(2) The municipal setting designation will have an adverse effect on the current or future water resource needs or obligations of the city; or

(3) There is not a public drinking water supply system that satisfies the requirements of Chapter 341 of the Texas Health and Safety Code and that supplies or is capable of supplying drinking water to the designated property and property within one-half mile of the boundary of the designated property.

(f) If the city council does not deny an application pursuant to subsection (d), it shall adopt a municipal setting designation ordinance that:

(1) States that the ordinance is necessary because the concentrations of contaminants of concern exceed human ingestion protective concentration levels;

(2) Provides a legal description of the designated property;

(3) Describes the designated groundwater, including the maximum depth below ground surface of the designated groundwater; however, the maximum depth shall not exceed 200 feet below ground surface unless the applicant specifically so requests and the ordinance specifically provides a greater depth;

(4) Prohibits the use as potable water of groundwater from beneath the designated property;

(5) Appropriately restricts other uses of or contact with the designated groundwater, including, but not limited to, properly plugging any existing water production well on the designated property;

(6) Lists any reasonable and necessary conditions; and

(7) Indicates support of the applicant's TCEQ application, with any comments.

(g) The municipal setting designation ordinance may prohibit the use as potable water of the designated groundwater from beneath public rights-of-way immediately adjacent to the designated property as potable water.

(h) The municipal setting designation ordinance may include a condition that the public rights-of-way immediately adjacent to the designated property be included, at no additional cost to the city, in the TCEQ application.

Sec. 47-766. Limitation on reapplication.

If the applicant withdraws the application after the public hearing, or if the city council denies the application, no further applications may be accepted for that property for one year after the date of the withdrawal or denial.

Sec. 47-767. Effect of municipal setting designation ordinance.

(a) The effect of a municipal setting designation ordinance is to prohibit use of designated groundwater as potable water and thereby enable the TCEQ to certify a municipal setting designation for the designated property. If certified by the TCEQ, the municipal setting designation may limit the scope of or eliminate the need for risk-based site investigations and response actions pursuant to Section 361.808 of the Texas Health and Safety Code based on the non-existence, elimination, or control of pathways for human ingestion of contaminated groundwater.

(b) Any person owning, operating, or controlling the designated property remains responsible for complying with all applicable federal and state laws and regulations and all ordinances, rules, and regulations of the city. The city council's approval of a municipal setting designation ordinance in itself does not change any environmental assessment or cleanup requirements applicable to the designated property.

(c) Approval of a municipal setting designation ordinance shall not be construed to subject the city to any responsibility or liability for any injury to persons or damage to property caused by any contaminant of concern.

Sec. 47-768. Additional requirements following adoption of an ordinance.

(a) Within 30 days after adoption of a municipal setting designation ordinance, the applicant shall provide:

(1) The director with an electronic file showing the location of the designated property and the designated groundwater in a format compatible with the city's geographic information system and its integrated land management system; and

(2) The Harris County Appraisal District with an electronic file showing the location of the designated property and the designated groundwater in a format compatible with its system.

(b) Within 30 days after adoption and upon receipt of the necessary filing fee from the applicant, the director shall file a certified copy of the municipal setting designation ordinance in the deed records of the county where the designated property is located.

(c) Within 30 days after adoption, the director shall send a certified copy of the municipal setting designation ordinance to the applicant and the TCEQ or EPA, as applicable.

(d) The applicant shall provide the director with a copy of the municipal setting designation certificate issued by the TCEQ pursuant to Section 361.807 of the Texas Health and Safety Code within 30 days after issuance of the certificate.

(e) The applicant shall provide the director with a copy of the certificate of completion or other analogous documentation issued by the TCEQ or EPA showing that any site investigations and response actions required pursuant to Section 361.808 of the Texas Health and Safety Code have been completed to the satisfaction of the TCEQ or EPA within the time period required. The director may, for good cause, extend the time for submitting the documentation.

(f) The director may, for good cause, recommend to the city council that the municipal setting designation ordinance be repealed, after giving 30 days written notice in advance to the applicant and the TCEQ or EPA, as applicable, of such a recommendation.

(g) The applicant shall notify the director in writing if the applicant determines that notice is required to be sent to an owner of other property beyond the boundaries of the designated property under Title 30 Texas Administrative Code, Section 350.55(b), providing the name of the property owner, the property address, and a copy of the notice sent to the property owner.

Sec. 47-769. Authority of the director.

The director is authorized to:

(1) Enter public or private property to determine whether designated groundwater is being used in violation of this section.

(2) Administer and enforce the provisions of this section.

Sec. 47-770. Offenses; penalty.

(a) A person commits an offense if the person:

(1) Uses designated groundwater as a potable water source or for a purpose prohibited in the municipal setting designation ordinance;

(2) Fails to provide the director with a copy of the municipal setting designation certificate issued by the TCEQ pursuant to Section 361.807 of the Texas Health and Safety Code within 30 days after issuance of the certificate;

(3) Fails to provide the director with a copy of the certificate of completion or analogous documentation issued by the TCEQ or EPA showing that any site investigations and response actions required pursuant to Section 361.808 of the Texas Health and Safety Code have been completed to the satisfaction of the TCEQ or EPA within the time period required; and

(4) Fails to notify and provide documentation to the director within the time period, if any, required in the municipal setting designation ordinance that the entire non-ingestion protective concentration level exceedence zone originating from sources on the designated property or migrating from or through the designated property has been addressed to the satisfaction of the state or federal agency administering the program.

(b) Except as may otherwise be provided, whenever in this article an act is prohibited or is made or declared unlawful or an offense or misdemeanor, or whenever in this article the doing of any thing or act is required or the failure to do any thing or act is prohibited, the violation of the provision shall be and constitute a misdemeanor punishable, upon conviction, by a fine of not less than $500.00 nor more than $2,000.00 each day that any violation continues shall constitute and be punishable as a separate offense. Any offense under this article that also constitutes a violation of any state penal law shall be punishable as provided in the applicable state law."

SECTION 3. That the City Council hereby approves the initial schedule of application fees for municipal setting designations that is attached to and made a part of this Ordinance as Exhibit A.

SECTION 4. That if any provision, section, subsection, sentence, clause or phrase of this Ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their applicability to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that purpose.

SECTION 5. That there exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance be passed finally on that date and shall take effect at 12:01 a.m. on November 1, 2007.

PASSED AND APPROVED this ____ day of _____, 2007.

_____
Mayor of the City of Houston

Prepared by the Legal Dept. _____
CP/ej 07/31/2007 Ceil Price, Senior Assistant City Attorney
Requested by Michael S. Marcotte, P.E., DEE, Director, Public Works and Engineering Department
L.D. File No. 0760700004001
H:\WPfiles\PRICE\MSD\Final Ch 47 Art XIII Ordinance.doc

EXHIBIT A

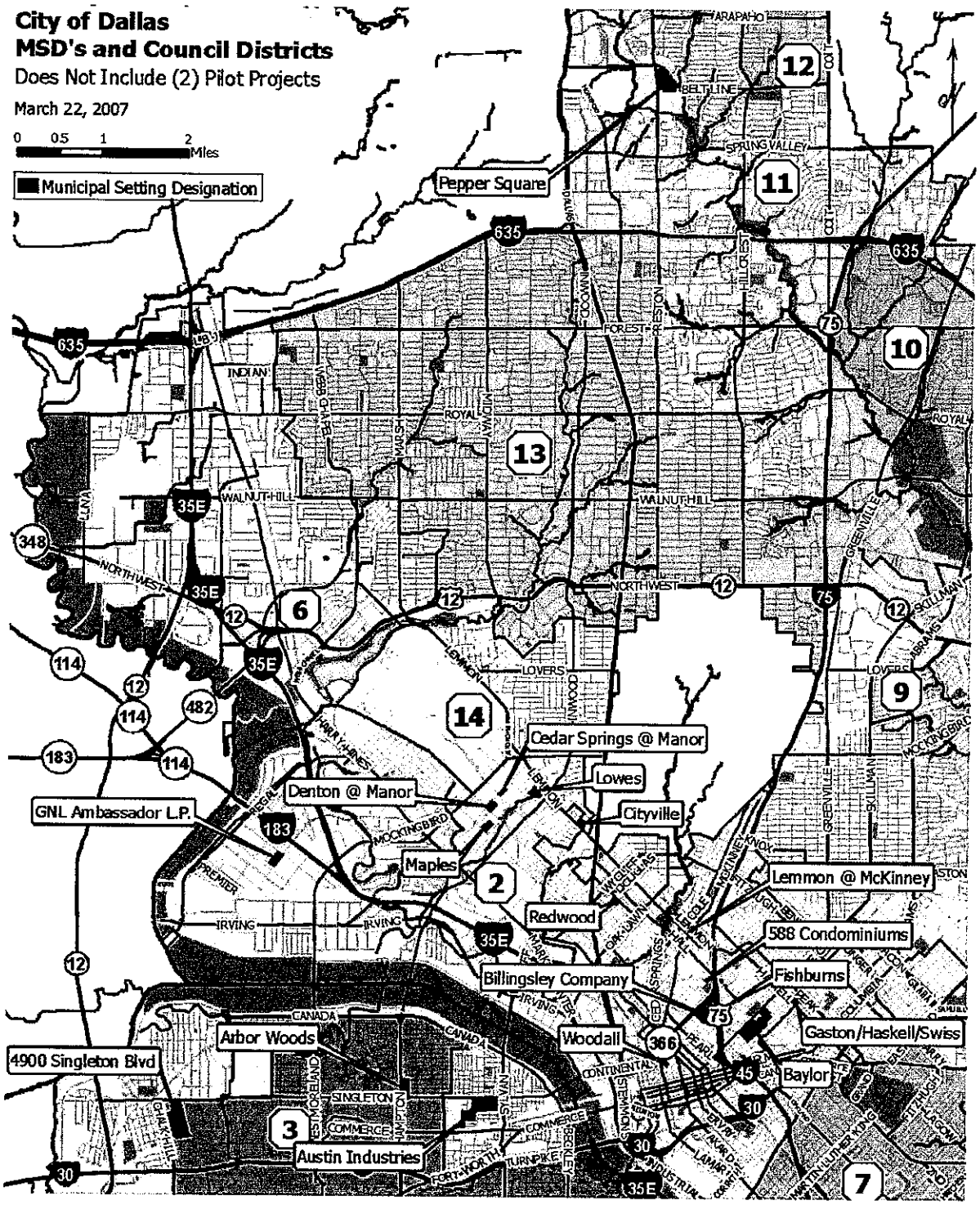
Application Fee[1]	$2,000
Notification Costs[2]	Site Dependent
Advertising Costs[2]	Site Dependent
Venue Costs[2]	Site Dependent
Filing Fee[2]	Site Dependent

[1] The Director may waive the application fee, but not other costs if the Director finds that payment of the application fee would result in a substantial financial hardship to the applicant.

[2] Estimated cost of these items will be provided to the applicant and must be paid by the applicant prior to City incurring these expenses.

Note: Fees will be adminstered through a special revenue account under Fund 8300 - Water and Sewer Operating Fund.

EXHIBIT B


City of Dallas
MSD's and Council Districts
Does Not Include (2) Pilot Projects
March 22, 2007
0 0.5 1 2 Miles
Municipal Setting Designation
Pepper Square
Cedar Springs @ Manor
Lowes
Cityville
Denton @ Manor
GNL Ambassador L.P.
Maples
Lemmon @ McKinney
Redwood
588 Condominiums
Fishburns
Billingsley Company
Gaston/Haskell/Swiss
Arbor Woods
Woodall
Baylor
4900 Singleton Blvd
Austin Industries
2
3
6
7
9
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11
12
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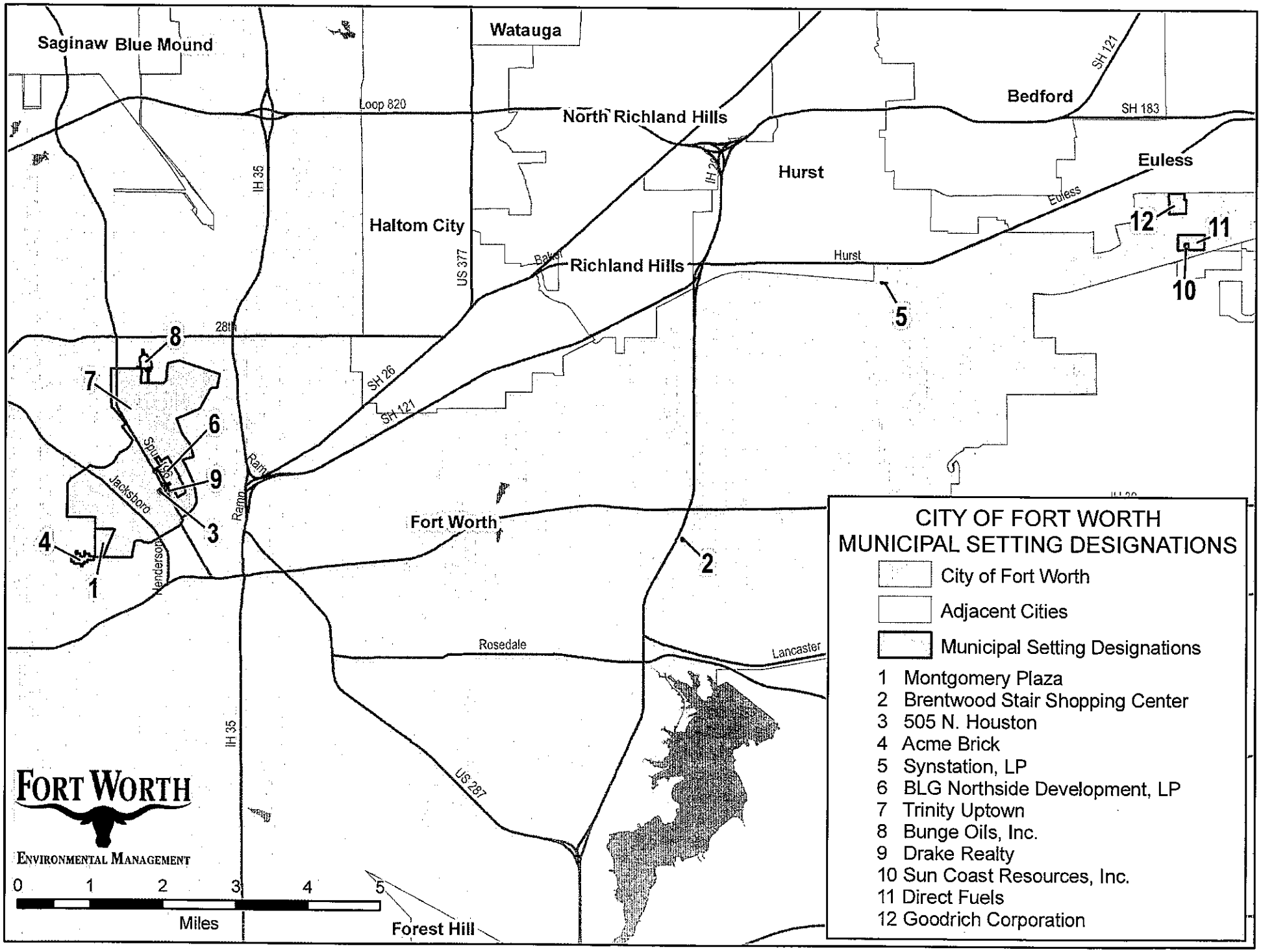
EXHIBIT C


CITY OF FORT WORTH
MUNICIPAL SETTING DESIGNATIONS
City of Fort Worth
Adjacent Cities
Municipal Setting Designations
1 Montgomery Plaza
2 Brentwood Stair Shopping Center
3 505 N. Houston
4 Acme Brick
5 Synstation, LP
6 BLG Northside Development, LP
7 Trinity Uptown
8 Bunge Oils, Inc.
9 Drake Realty
10 Sun Coast Resources, Inc.
11 Direct Fuels
12 Goodrich Corporation
FORT WORTH
ENVIRONMENTAL MANAGEMENT
0 1 2 3 4 5
Miles
Saginaw Blue Mound
Watauga
North Richland Hills
Bedford
Hurst
Euless
Haltom City
Richland Hills
Fort Worth
Forest Hill
Loop 820
SH 183
SH 121
IH 35
IH 20
US 377
Hurst
Euless
28th
SH 26
SH 121
Jacksboro
Henderson
Ramp
Rosedale
Lancaster
US 287
IH 35
1
2
3
4
5
6
7
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11
12

EXHIBIT D

Answers to Your Questions about the Dry Cleaner Remediation Program

(Revised August 9, 2006)

A. Eligibility

A1. Who is eligible for corrective action using the fund?

- Current owners of the dry cleaning facility or drop station,
- Former owners of the dry cleaning facility or drop station,
- Current real property owners on which a dry cleaning facility is or was located.
- Former real property owners on which a dry cleaner facility or drop station was located and who have entered into an agreement with the current owner that requires the former property owner to be responsible for any costs associated with the cleanup of contamination associated with the dry cleaner facility or drop station.

A2. I converted a dry cleaning facility into a drop station, am I eligible to apply for corrective action using the fund?

If not otherwise ineligible and you are the **same** person (or other legal entity that meets the definition of person) who owned the facility, then the dry cleaning facility would be eligible.

A3. I have not spent $5,000 on corrective action, may I still apply?

Yes, but you must pay the difference between what you have spent on corrective action and the $5,000 deductible when you submit your application. Eligible expenses are listed in Attachment A of the DCRP Application for Ranking.

A4. I am a landowner applying to the DCRP, but the dry cleaner facility owner will not sign the access agreement, what do I do?

As an applicant, you must include your signed access agreement (Attachment C) with your application. In addition, you must make a reasonable effort to obtain an access agreement from the other party (property owner or facility owner) prior to submitting an application. If you are unable to obtain the access agreement signed by the other party, you must provide evidence that you made a reasonable effort and that you have notified the other party of your intention to

file a DCRP application.
Failure to obtain a signed access agreement from the other party at the time the application is submitted can have several consequences:

(1) It will result in a lower Prioritization Score, and

(2) Corrective Action may be delayed until all access agreements are provided - since the TCEQ and State contractors must have access to the property in order to conduct corrective action.

The TCEQ has legal access authority if necessary, but voluntary access is best for all parties. The commission may hold an owner responsible for up to 100 percent of the costs of corrective action attributable to the owner if the commission finds, after notice and an opportunity for a hearing that the owner obstructed the efforts of the commission to carry out its obligations under this chapter other than by the exercise of the owner's legal rights.

A5. The facility owner and real property owner have submitted an application for the same site, which one will be ranked?
Applicants are encouraged to coordinate with each other and only submit one application. If two or more applications for the same site are submitted, the information may be combined and only one ranking score will be issued. Please note that each applicant must meet the $5,000 deductible if separate applications are submitted.

A6. Am I eligible to apply for corrective action if the facility has a Nonparticipating Non-Perchloroethylene Dry Cleaning Facility certificate?
A facility owner or real property owner of dry cleaning facility that was "opted out" of the program (i.e. has a Nonparticipating Non-Perchloroethylene Dry Cleaning Facility certificate) is not eligible to apply for corrective action. The "opt out" provision applies to the dry cleaning facility, therefore once a dry cleaning facility is "opted out," the facility is always "opted out."

"Opted out" facility owners or landowners may conduct RP/Applicant-Lead assessment and remediation work under the Corrective Action Program at the TCEQ or may be eligible for the Voluntary Cleanup Program. An overview of these Remediation Division programs can be found at http://www.tceq.state.tx.us/remediation/programs.html

A7. I own a drop station that at some time before I bought it was a dry cleaning facility, am I eligible to apply for corrective action using the fund?
Yes, so long as you are registered as a drop station and the former dry cleaning facility did not "opt out" of the program.

A8. I own an active dry cleaning facility or drop station and I have not paid all

of my registration fees, will that affect my Application for Ranking?
Yes, if you are not current with all of your dry cleaning fees owed to the TCEQ for all of your facilities and drop stations, you are not eligible for corrective action using the fund until those fees are paid in full. The requirement includes fees, fines, penalties, and interest owed for dry cleaning facilities and drop stations.

A9. I am the property owner and I am applying to the fund, can I sell the property to someone and they retain eligibility?
As a property owner applying for the fund, you must be eligible when you apply. All subsequent property owners, as well as facility owners, must also meet all relevant eligibility requirements.

If the property is sold, and the change in ownership involves an applicant, then the new owner must provide revised access agreements (Attachment C of the DCRP Application), proof of ownership, and revised applicant information (Application Sections 1, 2, 3 and 4 as applicable). A new $5000 deductible / application fee is not required.

It is the responsibility of the Applicant to notify the TCEQ should there be a change in property or facility ownership. A revised Attachment C – Consent for Access to Property must be completed by the new owner and submitted to the TCEQ. If the new owner does not provide a revised Attachment C – Consent for Access to Property within 90-days of change in ownership, the TCEQ will suspend corrective action at the site. If the new owner does not provide a revised Attachment C – Consent for Access to Property within 180-days of change in ownership, the TCEQ will remove the site from the DCRP Prioritization List. For any sites removed from the DCRP in this manner, the applicant will have to reapply in order to re-enter the program.

A10 Am I required to include groundwater analytical data with my Application for Ranking?
Acceptance into the DCRP requires analytical data showing evidence of a dry cleaner solvent release. This data must be from groundwater sample(s) unless the DCRP has previously approved a "Groundwater Exemption" based on pre-application data provided to the TCEQ by the potential applicant.

If no groundwater sample could be collected at your site, then a soil analysis may be substituted for the groundwater analysis, so long as prior written approval from the DCRP has been obtained. The Application for Ranking must include a copy of the TCEQ's written concurrence that no groundwater sample is required. Please note that the TCEQ will not provide written approval without technical justification as to why groundwater data could not be obtained at the site.

Requests for a groundwater exemption must document why a groundwater sample could not have been reasonably collected at the site using typical assessment practices and equipment and in a manner that was not prohibitively expensive. The justification should be based on a technical reason and not

solely a financial reason.

Sites located in areas where the first groundwater zone is known to be very deep (e.g. an El Paso site where the groundwater depth is >150 ft deep), may potentially receive a "Groundwater Exemption" since the groundwater investigation would be prohibitively expensive and justify the granting of the exemption.

Sites overlying near surface bedrock will likely represent the majority of "Groundwater Exemption" cases, since many large urban areas (where DC sites are most likely to be) are located where bed rock is shallow (e.g. Austin Chalk outcrops in the Dallas - Fort Worth area.). A site may be eligible for an exemption if the site investigation has proceeded through shallow soil and to the top of unweathered bedrock and no groundwater was observed. However, to support the argument, the applicant should consider data from nearby environmental sites: Example: Did the LPST site located across the street install wells and collect groundwater data? If so, then the DCRP applicant should have as well.

NOTE: Reporting groundwater data will increase the Ranking Score of a DCRP Application, therefore it is to the potential applicant's benefit to collect groundwater data. "No groundwater data sites" which are accepted into the DCRP will typically receive a lower "Ranking Score" than that of sites with groundwater data – since no ranking score "points" will be given for a groundwater impact. This potentially could be the difference between a DCRP site being "prioritized for corrective action" and the site not being selected for corrective action.

B. Ranking and Priority

B1. What is the difference between ranking and prioritization?

Site Ranking, which is described in 30TAC337.31(a) of the Dry Cleaner Environmental Response Rule, is intended to be a measure of a sites potential impact to human health or the environment. Site Prioritization, described in 30TAC337.30, is based in part on the Site Ranking, but also takes into account non-risk factors which promote effective use of the DCRP Fund. Section 303TAC337.30(b) of the DCER rule describes the seven factors which can be used to determine Site Priority.

Corrective Action (See Section D of this FAQ) cannot begin until the site has been both Ranked and Prioritized.

B2. I received a letter with a ranking score from the TCEQ. What does that mean?

Your application was reviewed by the TCEQ and was determined to be

administratively and technically complete and was processed. Based on the information you provided in your application, the TCEQ assigned a ranking score, which reflects the sites relative risk to human health and the environment. The estimated range for the ranking scores is from 0 to 1,500. The ranking will be used in combination with other factors to prioritize sites for corrective action.

B3. I received a ranking score. Does that mean my site is scheduled for some form of corrective action?

Not necessarily. The ranking score will be used in conjunction with other factors to establish a prioritization schedule for the use of the funds. Other factors may include, but are not limited to: the effect interim remedial measures may have on future costs, amount of funds available, proximity to other sites, site conditions (e.g., vacant building, planned construction activities), and the need to address an immediate threat to health and human safety.

B4. When will I find out if my site is scheduled for corrective action?

The prioritization of sites for corrective action will be done at least twice a year. Once your site has been prioritized for corrective action, you will be notified by the TCEQ when corrective action is scheduled.

B5. My site was given a low ranking and priority score. I am concerned that the TCEQ will not conduct corrective action at my site anytime soon. Is there anything I can do to raise my score?

Yes, You may also collect additional information at your own expense and update your application. This may result in a different ranking and prioritization score. However, in accordance with 30TAC337.31(a)(7), no more than one updated application can be submitted per year.

The costs for any additional corrective action work conducted by the applicant are not reimbursable.

Also, see Section C of this FAQ for other possible options.

B6. Is there a fee for updating an Application for Ranking?

No, there is no fee for updating an application at this time. However, in accordance with 30TAC337.31(a)(7), no more than one updated application can be submitted per year.

B7. I understand that the DCRP may postpone or suspend corrective action at my site in order to make funds available for higher priority sites. If this happens and the DCRP stops work at my site, then what options do I have?

Applicants for sites where Corrective Action has been postponed or suspended have several options....:

- The applicant could leave the DCRP and enter the Voluntary Cleanup Program (VCP) – so long as the site is in the pre-assessment / assessment phase and

they are eligible to enter the VCP,

- The applicant could leave the DCRP and continue corrective action in the Environmental Cleanup Section - Remediation Division of the TCEQ,
- The applicant could remain in the DCRP and hire their own contractor to perform correction action,
- The applicant could remain in the DCRP and hire their own contractor to collect additional assessment data and resubmit an Application for Ranking in order to increase the ranking and priority status,
- The applicant could remain in the DCRP until such time when the DCRP chooses to resume corrective action at the site.

C. Coordination between Voluntary Cleanup Program and the Dry Cleaner Remediation Program

C1. My site is currently in the Voluntary Cleanup Program (VCP). May I apply for the Dry Cleaner Remediation Program (DCRP)?

Yes, VCP applicants may apply to the DCRP and get a ranking score. However, a site cannot remain in both programs simultaneously, and once you have your ranking score, you will have 45 days to decide which program path is best for your site. You must indicate your intention using a "Program Participation Election Form, which will be provided with your ranking score notice letter.

If you decide to participate in the DCRP, you must withdraw from the VCP. However, you may decide to return to VCP at any time prior to the initiation of remediation at your site.

If you decide to remain in VCP, your DCRP application will be closed and you must maintain your VCP agreement and schedule. You will retain your eligibility for the DCRP. So at a later time if you decide that you want to withdraw from VCP and rely on the DCRP to complete investigation or corrective actions at your site, you can do so by withdrawing from the VCP.

C2. What type of letter will the DCRP be issuing upon completion of corrective action?

The DCRP will issue a "*No Further Action Letter*" when the TCEQ has determined that the site has met an appropriate Texas Risk Reduction Program closure standard.

C3. Why won't I get the same Certificate of Completion as in VCP?

The VCP and DCRP are separate and distinct programs. The VCP and the certificate of completion were created to provide private parties with the incentive to remediate property by removing liability of future owners. The DCRP uses state funds to pay for corrective action with state-procured environmental consultants.

C4. If my site has been ranked and prioritized in the DCRP, can I later decide to leave the DCRP and enter the VCP?

Potentially yes, but you must notify the TCEQ of your decision to withdraw from the DCRP, the site must be in the pre-assessment or assessment phase and you must be eligible to enter the VCP. If remediation has been performed at the site, with exception of emergency actions, you may be ineligible to enter the VCP pursuant to Section 30TAC333.6 of the VCP rules.

C5. What if I want a VCP certificate of completion and I am in the DCRP?

The only way to obtain a VCP certificate of completion is through the VCP.

C6. I received a letter with a ranking score from the TCEQ. I was told that I must withdraw from the VCP before my site can be "Prioritized for Corrective Action in the DCRP." This puts me in a difficult situation - since I can't make an informed choice about which program to participate in if I don't yet know where my site would be on the priority list. Is there some way I can get an idea of where I my site would might be placed on the Prioritization list?

Based on the ranking score assigned to your site in the TCEQ letter and the list of Prioritized DCRP sites available on the TCEQ website, you should be able to determine approximately where on the list your site would be placed should you decide to withdraw from the VCP.

Note: The list of Prioritized DCRP sites (which includes both ranking and priority score) is posted on the TCEQ website:
www.tceq.state.tx.us/assets/public/remediation/dry_cleaners/priorlist_current.pdf

D. Corrective Action

D1. What is corrective action?

As defined in the Dry Cleaner Environmental Response Statute, "Corrective Action" consists of everything from site assessment, remedial actions (e.g., soil excavation/removal, installation and operation of groundwater pump and treat systems), to the use of engineering and institutional controls (e.g., impervious cover, deed recordation).

D2. How clean will my site be when you are done?

The TCEQ will take the necessary steps to reduce the risk to human health and safety. The Dry Cleaner Environmental Response Rules require that corrective action be conducted in accordance with the Texas Risk Reduction Program Rules (30TAC350). Thus, the TCEQ determines the most appropriate TRRP Remedy Standard for a particular DCRP site.

However, the Dry Cleaner Environmental Response Rules also allow the TCEQ

to postpone or suspend corrective action at a low priority site in order to make money available for higher priority sites. Therefore, corrective action will not necessarily proceed to a full closure under Texas Risk Reduction Program Rules at all sites. The TCEQ will make the best use of the funds available and this may require addressing any immediate threats before proceeding to another lower priority site. At this time, the TCEQ is not committed to taking a site to closure in every case.

D3. I discovered a release at my facility. What do I do?

You are required to report any spills or releases to the TCEQ. You may call the TCEQ Environmental Release Hotline at 1-800-832-8224, or during business hours, you may call your regional office. After reporting the spill, the person has the option to clean up the area to pre-release conditions within 30 days of the spill or release. If the spill is older than 30 days, the person has the option of submitting an application to enter the Dry Cleaner Remediation Program, or the person can perform corrective action at the site under the supervision of the Voluntary Cleanup Program, or the Corrective Action Program of the TCEQ.

Additional information on release reporting can be found on the following TCEQ web page: http://www.tceq.state.tx.us/remediation/mysite.html

E. Delinquent Registration Fees

E1. I own an active dry cleaning facility / drop station and I have not paid all of my registration fees. Will this affect my Application for Ranking?

Yes, if you are not current with all dry cleaning fees owed to the TCEQ for all of your facilities and / or drop stations, you are not eligible for corrective action using the fund until those fees are paid in full. The requirement includes fees, fines, penalties, and interest owed for dry cleaning facilities and drop stations.

E2. I am an eligible landowner applying to the DCRP, but the active dry cleaner facility for which I am applying is currently delinquent on registration fees. Will my Application for Ranking still be accepted by the TCEQ?

Any application submitted by a person/entity who is delinquent on a fee and/or penalty will not be declared administratively complete until the fees/penalties are paid and/or current. If the outstanding fees are not paid within 30 days, the application will be returned to the applicant unprocessed.

E3. Although my site is currently delinquent with the TCEQ, the DCRP has determined that all appropriate closure standards have been met. When will I receive the "No Further Action Letter" documenting completion of corrective action activities?

Final action will be withheld by the agency on a site if it is discovered that the owner/entity who submitted the application is delinquent on fees and/or penalties until such time as the fees/penalties are paid and/or current.

E4. I am currently delinquent with the TCEQ, owing $100 for a penalty. Will my DCRP site / DCRP Application for Ranking still be worked?

Currently, Yes. If the total monies owed are less than $200.

However, when the TCEQ develops an automated system which will quickly and efficiently review for delinquent fees/penalties, then only applicants who owe less than $25 may have their application processed.

EXHIBIT E

All Appropriate Inquiries Final Rule

What is "All Appropriate Inquiries"?

"All appropriate inquiries" is the process of evaluating a property's environmental conditions and assessing potential liability for any contamination.

Why is EPA Establishing Standards for Conducting All Appropriate Inquiries?

The 2002 Brownfields Amendments to CERCLA require EPA to promulgate regulations establishing standards and practices for conducting all appropriate inquiries.

Stakeholder Collaboration

A Negotiated Rulemaking Committee consisting of 25 diverse stakeholders developed the proposed rule. Following publication of the proposed rule, EPA provided for a three month public comment period. EPA received over 400 comments from interested parties. Based upon a review and analysis of issues raised by commenters, EPA developed the final rule.

When is the Rule Effective?

The final rule is effective on November 1, 2006—one year after being published in the Federal Register. Until November 1, 2006, both the standards and practices included in the final regulation and the current interim standards established by Congress for all appropriate inquiries (ASTM E1527-00) will satisfy the statutory requirements for the conduct of all appropriate inquiries.

Who is Affected?

The final All Appropriate Inquiries requirements are applicable to any party who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. Parties who receive grants under the EPA's Brownfields Grant program to assess and characterize properties must comply with the All Appropriate Inquiries standards.

When Must All Appropriate Inquiries be Conducted?

All appropriate inquiries must be conducted or updated within one year prior to the date of acquisition of a property. If all appropriate inquiries are conducted more than 180 days prior to the acquisition date, certain aspects of the inquiries must be updated.

What Specific Activities Does the Rule Require?

Many of the inquiry's activities must be conducted by, or under the supervision or responsible charge of, an individual who qualifies as an environmental professional as defined in the final rule.

The inquiry of the environmental professional must include:

- interviews with past and present owners, operators and occupants;
- reviews of historical sources of information;
- reviews of federal, state, tribal and local government records;
- visual inspections of the facility and adjoining properties;
- commonly known or reasonably ascertainable information; and
- degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination.

Additional inquiries that must be conducted by or for the prospective landowner or grantee include:

- searches for environmental cleanup liens;
- assessments of any specialized knowledge or experience of the prospective landowner (or grantee);
- an assessment of the relationship of the purchase price to the fair market value of the property, if the property was not contaminated; and
- commonly known or reasonably ascertainable information.

How Does the Final AAI Rule Differ From the Interim Standard?

The final All Appropriate Inquiries rule does not differ significantly from the ASTM E1527-00 standard. The rule includes all the main activities that previously were performed as part of environmental due diligence such as site reconnaissance, records review, interviews, and documentation of recognized environmental conditions. The final rule, however, enhances the inquiries by extending the scope of a few of the environmental due diligence activities. In addition, the final rule requires that significant data gaps or uncertainties be documented.

Under the final All Appropriate Inquiries rule, interviewing the subject property's current owner or occupants is mandatory. The ASTM E1527-00 standard only required that the environmental professional make a reasonable attempt to conduct such interviews. In addition, the final rule includes provisions for interviewing past owners and occupants of the subject property, if necessary to meet the objectives and performance factors. Under the ASTM E1527-00 standard, the environmental professional had to inquire about past uses of the subject property when interviewing the current property owner.

The final rule also requires an interview with an owner of a neighboring property if the subject property is abandoned. The ASTM E1527-00 standard included such interviews at the environmental professional's discretion.

The final rule does not specify who is responsible for performing record searches, including searches for use limitations and environmental cleanup liens. The ASTM E1527-00 standard specified that these record searches are the responsibility of the user and required that the results be reported to the environmental professional.

Unlike the ASTM E1527-00 standard, the final rule requires the examination of tribal and local government records and more extensive documentation of data gaps.

The final rule includes specific documentation requirements if the subject property cannot be visually inspected. The ASTM E1527-00 standard did not include such requirements.

Who Qualifies as an Environmental Professional?

To ensure the quality of all appropriate inquiries, the final rule includes specific educational and experience requirements for an environmental professional.

The final rule defines an environmental professional as someone 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 on, at, in, or to a property, sufficient to meet the objectives and performance factors of the rule, and has: (1) a state or tribal issued certification or license and three years of relevant full-time work experience; **or** (2) a Baccalaureate degree or higher in science or engineering and five years of relevant full-time work experience; **or** (3) ten years of relevant full-time work experience.

For more information on the environmental professional definition, please see EPA's Fact Sheet on the Definition of an Environmental Professional.

Will There Be an Updated ASTM Phase I Site Assessment Standard?

Yes. ASTM International updated its E1527-00 standard, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." EPA establishes that the revised ASTM E1527-05 standard is consistent with the requirements of the final rule for all appropriate inquiries and may be used to comply with the provisions of the rule.

Contact Information

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Also, please see the U.S. EPA's web site at www.epa.gov/brownfields for additional information.

EXHIBIT F

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	• Specific certification/license, education, and experience requirements • Applies only to individuals supervising all appropriate inquiries	• 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	• 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	• 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	• Federal, state, tribal, and local • Records	• Federal and state records • Local records/sources at the discretion of the environmental professional
Site Inspection	• Visual inspection of subject property and adjoining properties required • Limited exemption with specific requirements if the subject • property cannot be visually inspected	• Visual inspection of subject property required. No exemption. • No specific requirement to inspect adjoining properties; only to report anything actually observed
Contaminants of Concern	Parties seeking CERCLA defense: • CERCLA hazardous substances EPA Brownfields Grant recipients: • 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	• 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 APPRORIATE 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	Hold a current Professional Engineer's or Professional Geologist's license and have the equivalent of *three* years of full-time relevant experience ***OR*** Hold a current registration from a state, tribe, U.S. territory, or the Commonwealth of Puerto Rico and have the equivalent of *three* years of full-time relevant experience ***OR*** 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 *three* years of full-time relevant experience ***A person who does not hold a relevant license or certificate may still qualify as an environmental professional if he/she*** 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 *five* years of full-time relevant experience ***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*** Has the equivalent of *ten* years of full-time relevant experience	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 substances[2] 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.

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[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 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.

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BACKGROUND, EDUCATION AND PRACTICE

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