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Coast Guard Promulgates All Appropriate Inquiry Rule

On January 14, 2008, at 73 Fed. Reg. 2146 (Jan. 14, 2008), the United States Coast Guard promulgated a final rule under the Oil Pollution Act of 1990. The final rule is effective February 13, 2008.

The final rule is promulgated pursuant to the Coast Guard and Maritime Transportation Act of 2004 (P.L. 108-293), which amended the Oil Pollution Act '90 (OPA) at 33 U.S.C. 2703(d)(4), by creating an "innocent landowner" defense to liability for those persons who could demonstrate, among other requirements, that before acquiring real property on which an OPA-covered facility (storage tanks, terminals, docks, refineries, etc.) is located, they did not know, and had no reason to know, that an oil discharge or substantial threat of an oil discharge is located on, in, or at the facility. This innocent landowner status is created by conducting an all appropriate inquiry (environmental site assessment Phase I) on the property before its acquisition.

The rule-making protects commercial entities planning to acquire real property on which an OPA facility is located and by requiring that they take steps necessary to protect themselves from OPA liability should unknown oil that is the subject of a discharge or substantial threat of discharge is found at the facility after they acquire it. These persons are called "landowners" or "owners" in the regulation.

The new regulation is at 33 C.F.R. §137.1. The regulation tracks and is consistent with the EPA all appropriate inquiry rule at 40 C.F.R. 312. EPA's rule applies not only to hazardous substance but also to petroleum under the Comprehensive Environmental Response Compensation and Liability Act, which also has an innocent purchaser defense from clean-up liability, as well as for other protected statuses, including Brownfield voluntary clean-up state programs, bona fide prospective purchasers, and contiguous landowners. The latter categories do not exist under OPA, only the innocent landowner defense exists in that statute.

The Coast Guard, like EPA, allows use of the ASTM standard 1527-05, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." In other words, the same type of inquiry, including by a qualified environmental professional, interviews with past and present owners, operators, and occupants, searching for clean-up liens, reviewing government records, visually inspecting the property, and so forth, within 180 days of the acquisition of real property, must be followed to secure the innocent landowner protection under OPA.

Although this new rule does not have any changes for land-loving landowners who acquire inland properties only versus properties that are near navigable waters or their shorelines, but it does behoove an environmental professional to refer-



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ence the new Coast Guard rule and OPA in their Phase I, as well as CERCLA and EPA's rule, when dealing with properties that are near navigable waters or shorelines, in order to obtain the additional benefit of innocent landowner defense under both statutes, OPA and CERCLA.

Contact [Stan Millan](#), [Mike Chernekoff](#), [Boyd Bryan](#), or [Bob Lemon](#) for more information.