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## EPA ISSUES PROPOSED RULE FOR NEW ENVIRONMENTAL SITE ASSESSMENT

The United States Environmental Protection Agency (“EPA”) has recently published a proposed rule that will set new standards for conducting environmental site assessments (the “Proposed Rule”). The new standards will affect owners, potential buyers and developers of commercial and industrial real estate who are seeking liability protection under the innocent landowner, contiguous landowner and bona fide prospective purchaser provisions of the federal Superfund statute (“CERCLA”). In order to be eligible for any of these defenses, otherwise potentially responsible parties must be able to demonstrate that they conducted an “all appropriate inquiry” as to the previous ownership and uses of the property.<sup>1</sup> The Proposed Rule sets forth EPA’s proposed regulations specifying the standards and practices that meet the level of necessary inquiry.

EPA developed the Proposed Rule using the negotiated rulemaking process. The language of the proposed rule is substantially the same as the language proposed by the Negotiated Rulemaking Committee on All Appropriate Inquiry in its Final Consensus Document on November 14, 2003. EPA is seeking comments on the Proposed Rule by November 30, 2004.

### Background

On January 11, 2002, President Bush enacted the Small Business Liability Relief and Brownfield Revitalization Act (the “Brownfields Act”). One of the goals of the Brownfields Act was to provide (or clarify) liability protection for bona fide prospective purchasers, contiguous property owners and innocent landowners. The Brownfields Act also required EPA to establish regulations which specified the standards and practices that meet the level of “all appropriate inquiry” necessary to qualify for such liability protection. The Proposed Rule sets forth the standards proposed by EPA.

It should be noted that the Proposed Rule does not apply to most property acquired for residential or similar uses. The standard for “all appropriate inquiry” for these types of sites consists of a site inspection and a title search that reveals no basis for further investigation.

It should also be noted that the requirements for those securing liability protections under Superfund are not limited to demonstrating that an “all appropriate inquiry” has been conducted. In addition, persons seeking liability protection must perform the following continuing obligations, which are not addressed in the Proposed Rule:

<sup>1</sup> The scope of the “all appropriate inquiry” is to identify releases and threatened releases of hazardous substances which cause or threaten to cause the incurrence of response costs.

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- § Exercise “appropriate care” with respect to the hazardous substances encountered (e.g., taking “reasonable steps” to stop the release and protect against human or environmental exposures, etc.);
- § Provide full cooperation and access to EPA or others performing response actions or natural resources restoration at the property;
- § Comply with land use restrictions;
- § Comply with release reporting requirements;
- § Avoid interfering with the effectiveness or integrity of institutional controls used to control the release of hazardous substances;
- § Comply with Superfund information requests and administrative subpoenas; and
- § Provide legally required notices.

Compliance with these continuing obligations is critical to maintaining the liability protection initially sought by performing an “all appropriate inquiry.” Although not addressed in the Proposed Rule, EPA has issued guidance regarding these continuing obligations as part of its March 6, 2003 “Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner and Innocent Landowner Limitations on CERCLA Liability (‘Common Elements’).”

### **“All Appropriate Inquiry” and ASTM Standards**

As part of the Brownfields Act, Congress stated that the environmental site assessment procedures established by the American Society for Testing and Materials (“ASTM”), including ASTM’s 1997 and 2000 standards for conducting Phase I Environmental Site Assessments (known as “ASTM E1527-97 and ASTM E1527-00,” respectively), satisfy the “all appropriate inquiry” requirement in the interim until EPA’s rules are adopted. The Proposed Rule has no effect on the interim ASTM standards. However, when the final “all appropriate inquiry” regulations are effective, they will replace the interim standards, and inquiries conducted under the current ASTM standards will not satisfy the “all appropriate inquiry” requirement. Indeed, the Proposed Rule specifically notes that the current ASTM standard for conducting Phase I environmental site assessments is “inconsistent with applicable law” because EPA has determined that the ASTM standard does not meet the statutory criteria of CERCLA for all appropriate inquiries, provided at 42 U.S.C. § 9601(35)(B).

The ASTM intends to issue a revised standard for conducting Phase I environmental site assessments that meets the regulatory requirements of EPA, prior to the promulgation of the new regulations. The revised standard is not anticipated to be issued until the fall of 2005, while the final regulations are not expected until the end of 2005.

### **The Proposed Rule**

The Proposed Rule contains a comprehensive set of objectives and performance factors which must be met for the “all appropriate inquiry” to be satisfied. There is no set procedure for fulfilling these requirements, and the “environmental professional” is responsible for developing the best process and sequence for collecting and analyzing the necessary information to meet the objectives and performance factors set forth in the Proposed Rule. The objectives of the “all appropriate inquiry” are to identify the following types of information prior to acquiring a property:

- § Current and past property uses and occupancies;
- § Current and past uses of hazardous substances;
- § Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;
- § Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;
- § Engineering controls;
- § Institutional controls; and
- § Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances at the subject property.

The performance factors under which the “all appropriate inquiry” must be performed include:

- § Gather the information that is required for each standard and practice that is publicly available (or otherwise obtainable) within reasonable time and cost constraints and can practicably be reviewed; and
- § Review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice, taking into account information gathered in the course of complying with the other standards and practices.

The proposed objectives and performance factors are provided only as guidelines as to the level of necessary inquiry. EPA has not suggested that the goal of the “all appropriate inquiry” is to identify every available document and piece of information regarding a property and its environmental conditions. Rather, the objective of the inquiry is to develop an understanding of the conditions of the property and to determine whether those conditions indicate a release or threatened release of a hazardous substance at the subject property.

Generally, the Proposed Rule is similar to the interim ASTM standards. The Proposed Rule does not set forth any new disclosure or reporting obligations. It also does not change the statutory criteria, under CERCLA, by which a person may qualify as an innocent landowner, contiguous landowner or bona fide prospective purchaser. It also does not require a specific report format, length or structure.

However, potentially significant differences do exist. Because the final regulation will directly affect the Superfund liability protection of property buyers and developers as soon as the regulations are promulgated, potentially affected persons should be aware of these differences now.

#### Environmental Professional Requirement

The Proposed Rule requires that all appropriate inquiries be conducted by an “environmental professional.” There are several combinations of education and experience requirements that qualify a person as an “environmental professional.” For example, a person can qualify as an “environmental professional” by holding a Professional Geologist’s or Professional Engineer’s license or registration from a state, tribe or U.S. territory and having the equivalent of three years of full-time relevant experience. Another way to qualify is by having a Baccalaureate or higher degree from an accredited institution of higher learning in a relevant discipline of engineering, environmental science, or earth science and the equivalent of five years of full-time relevant experience. The Proposed Rule also has a “grandfather” provision allowing persons with a Baccalaureate or higher degree from an accredited institution of higher learning and the equivalent of ten years of full-time relevant experience as of the date of the promulgation of the final rule to qualify as an “environmental professional.”

The Proposed Rule allows persons who do not qualify as environmental professionals to contribute to the inquiry so long as they are working under the supervision of a qualified “environmental professional,” and the environmental professional conducts a final review of the inquiry.

In addition, the prospective purchaser or landowner can conduct the following tasks of the inquiry itself provided that the environmental professional overseeing the inquiry is provided with the results:

- § Searches for environmental cleanup liens against the property;
- § Assessments of specialized knowledge/experience of purchaser or landowner;
- § Assessment of the relationship of the purchase price and the fair market value of the property, if the property was not contaminated; and
- § Assessment of commonly known or reasonably ascertainable information regarding the property.

### Identification of Data Gaps

As part of the “all appropriate inquiry,” the environmental professional’s report must include an opinion as to whether the inquiry identified conditions that would indicate a release or threatened release of hazardous substances at the property. The environmental professional must also identify “data gaps” that affect the environmental professional’s ability to render such an opinion and then evaluate the significance of such gaps. Data gaps indicate the inability to obtain, despite “good faith” efforts, necessary information which affects the environmental professional’s ability to identify releases or threatened releases of hazardous substances.

The presence of data gaps does not necessarily mean that liability protection cannot be obtained, and sampling is not necessarily required to address data gaps. However, sometimes sampling may be needed to understand site conditions and comply with the post-acquisition obligations necessary for maintaining Superfund liability protection (*e.g.*, taking “reasonable steps” to stop ongoing releases). For example, if a bona fide prospective purchaser is the first to identify contamination at a site after conducting an “all appropriate inquiry,” the purchaser is advised to assess the extent of the contamination to make sure that the purchaser’s proposed activities will not increase exposure to a hazardous substance or prolong a continuing release. As another example, if a purchaser’s inquiry prior to buying a property does not identify an on-site leaking underground storage tank, the new site owner may not have sufficient information to allow him to take “reasonable steps” to stop any continuing release or to prevent any threatened future release, as required under CERCLA.

### Declarations

The Proposed Rule requires the environmental professional to sign the report and to make two declarations. First, the environmental professional must declare that he or she meets the definition of an “environmental professional.” Second, the environmental professional must declare that he or she has performed the “all appropriate inquiry” in conformance with the effective regulations of 40 CFR Part 312.

### Time Limits

An “all appropriate inquiry” must be conducted within one year prior of taking title to the property (*i.e.*, the date the property is acquired). Certain information, including interviews with past and present owners, operators, and occupants, searches for environmental cleanup liens, reviews of governmental records, visual inspections of the property and the declaration of the environmental professional, must be updated within 180 days prior to taking title. Certain information from previous all appropriate inquiries, including third-party inquiries, can be used if the prior inquiry was conducted or updated within one year prior to the date title is taken and was in compliance with the applicable regulations at the time that inquiry was made. Obviously, some information cannot be used from other prior inquiries, including the relationship of the purchase price to the property value and the specialized knowledge of the purchaser.

### Interviews

Unlike the current ASTM Standards, the Proposed Rule requires that the environmental professional interview, as necessary, the past and present owners, operators and occupants of the site to gather information regarding potential or known contamination. Specific questions will depend on the site conditions. If a property is abandoned, interviews should be conducted with the owners and occupants of neighboring or nearby properties.

### Previous Uses of Property

While the ASTM standard requires identification of all obvious uses of the property from the present to property’s obvious first developed use or back to 1940, whichever is earlier, the Proposed Rule requires reviews of historical sources to determine “the previous uses and occupancies of the real property since the property was first developed.” EPA has

interpreted this requirement to include a review of records dating back to when the property first contained structures or was first used for residential, commercial, industrial or government purposes.

No specific sources of historical information are required to be investigated. Sources may include chain-of-title documents, aerial photographs, fire insurance maps, and local historical society records.

### Identification of Institutional Controls

Persons conducting an “all appropriate inquiry” must identify all institutional controls at the facility. Institutional controls are land-use controls and activity limitations that are intended to minimize the potential for human and environmental exposure to contamination. Examples of institutional controls include deed restrictions, easements, zoning restrictions and well drilling prohibitions.

Institutional controls may be identified from various sources, including searches of government records. For example, if a site is listed on the National Priority List (“NPL”), EPA Superfund documents, including Action Memoranda and Records of Decision may include institutional control information.

### Environmental Liens

The Proposed Rule requires the identification of environmental cleanup liens against the property that are filed or recorded under Federal, state or local law. The search may be conducted by the environmental professional or the purchaser. The identification of liens that are not recorded by government agencies or programs is not addressed by the Proposed Rule as part of the “all appropriate inquiry.”

### Review of Records

Federal, state, tribal and local records must be searched for information regarding hazardous substances and institutional controls at the facility and “nearby and adjoining” sites. The search may be conducted using public and private government record databases. The types of records that must be searched vary. However, the objective of searching the requested records is to identify past or current activities that have caused or may cause a release or threatened release of hazardous substances.

The approximate minimum search distances for nearby and adjoining properties are specified in the Proposed Rule and vary based on the type of activity identified. For example, searches of records to identify RCRA small and large quantity generators are only required for adjoining properties, while searches of records to identify sites with leaking underground storage tanks are required for properties within a one-half-mile radius of the site. The specified search distances are generally the same as those provided in the current ASTM standard. However, the Proposed Rule also requires additional searches of governmental records, such as registries of institutional and engineering controls (within one-half mile) and records of delisted NPL sites (within one-half mile).

### Visual Inspections

The Proposed Rule requires the Environmental Professional to visually inspect the subject facility and the improvements to the property, as well as the adjoining properties. Visual inspection of adjoining properties is not required by the current ASTM standard. Under the Proposed Rule, adjoining properties may be viewed from the subject property boundary or a public vantage point. If an “unusual circumstance,” such as a physical limitation or remote and inaccessible location, prohibits visual inspection of the subject property after a “good faith” effort, an on-site inspection will not be required. However, the Environmental Professional must document and comment on the significance of the

inability to inspect the subject property as it affects the ability to identify releases or threatened releases of hazardous substances at the property.

In addition, when an “unusual circumstance” occurs, the Environmental Professional must (1) visually inspect the subject property by another method (e.g., aerial photography or inspection from the closest public vantage point); (2) document efforts to obtain access and the reasons why such efforts were unsuccessful; and (3) document other sources of information that were consulted regarding releases or threatened releases at the subject property. Refusal of a voluntary seller to provide access does not constitute an “unusual circumstance.”

#### Specialized Knowledge or Experience

A prospective buyer’s specialized knowledge or information of the subject property, adjoining properties and other relevant factors must be considered as part of the Environmental Professional’s “all appropriate inquiry” in determining whether identified environmental conditions indicate releases or potential releases of hazardous substances at the subject property.

#### Relationship of Purchase Price vs. Fair Market Value

The Proposed Rule requires that the purchaser consider whether the purchase price of the property reflects its fair market value, assuming the property is uncontaminated. While the ASTM standard limits this requirement to the prospective buyer’s actual knowledge of a significantly lower sale price, the Proposed Rule requires the issue to be investigated through a comparison of prices of nearby properties or the consultation of a real estate expert who is familiar with properties in the vicinity of the subject property. A formal real estate appraisal is not required. If it is determined that the purchase price of the subject property does not reasonably reflect the fair market value of the property, if uncontaminated, the possibility that the difference is due to the presence of a release or threatened release of a hazardous substance must be investigated and discussed as part of the “all appropriate inquiry.”

#### Degree of Obviousness

The Proposed Rule does not change the standard as to the type of knowledge that would indicate that a release or threatened release of a hazardous substance had occurred at a facility as provided in the 1986 version of Superfund and subsequent case law. The “degree of obviousness” of contamination and the ability to detect it is based on whether the totality of the circumstances indicates the potential presence of a release or threatened release.

#### Conclusion

EPA published the Proposed Rule in the *Federal Register* on August 26, 2004 (69 *Fed. Reg.* 52542). The Proposed Rule is currently open for public comment until November 30, 2004.

While the Proposed Rule is, in many ways, similar to the current ASTM standard, it does have differences that must be taken into account to prevent losing liability protection under CERCLA. In particular, for a Phase I environmental site assessment to fall within the “all appropriate inquiry” standard of the Proposed Rule it must be conducted by a qualified Environmental Professional and it must consider:

- § Interviews with past owners and occupiers of the subject property;
- § Visual inspections of adjoining properties;
- § Record searches for environmental liens and institutional controls;
- § Reviews of historical sources dating back to the first development of the subject property;
- § Discussion of the specialized knowledge or experience of the purchaser; and

- § Consideration of the relationship between the purchase price of the subject property and its fair market value, assuming the property is uncontaminated.

As a final point, all prospective purchasers who conduct an “all appropriate inquiry” in the hopes of securing liability protection must also remember that such liability protection will be lost if the purchaser fails to fulfill the continuing obligations required by CERCLA and discussed further in EPA’s Common Elements interim guidance, including.

- § Taking reasonable steps to stop ongoing releases;
- § Providing legally-required notices;
- § Complying with land use restrictions and institutional controls; and
- § Responding to administrative information requests and subpoenas.

BCCZ will provide additional updates on this Proposed Rule as additional information becomes available. In the meantime, if you have any questions concerning the standards for conducting environmental site assessments or would like to explore providing EPA with comments on the proposed rule, please contact Lindsay Howard at (412) 394-5444, Lisa Bruderly at (412) 394-6495, or any of the other attorneys in BCCZ’s Environmental Health and Safety Services Group.