

EPA to Propose Significant Revisions to CERCLA's 'All Appropriate Inquiry' Standard

*– By Michael P. Carvalho, Esq.**

EPA intends to propose significant changes to the environmental due diligence process that will require additional effort and impose new obligations on Environmental Health & Safety (EH&S) Managers in connection with virtually all commercial and industrial real estate transactions to comply with the *All Appropriate Inquiry* standard mandated by the recent federal Brownfields Law. All Appropriate Inquiry (or environmental due diligence) is the process of evaluating a property for potential environmental contamination and assessing the potential for environmental impairment liability. If adopted, the “quick and dirty” Phase I Environmental Site Assessment (ESA) of the past will no longer be sufficient to qualify for the Landowner Liability Protections provided in the Brownfields law, and additional effort will be required to avoid the sweeping legal liability net cast by Superfund. Analysis of the regulatory consideration suggests that many of the proposed changes will lead to longer lead times and higher transactional costs, while injecting a degree of confusion and uncertainty into the real estate transaction process as the environmental consulting industry scrambles to develop meaningful ways to meet this evolving standard. Whether the proposed rule, which is still subject to a formal comment period following publication in the *Federal Register* late in the summer of 2004, succeeds in facilitating the redevelopment of environmentally challenged sites remains to be seen.

* Mike Carvalho is an experienced environmental real estate attorney who represents buyers and sellers of environmentally impaired commercial and industrial property. He has been an Instructor for ABS-GI's national Environmental Site Assessment Course since 1997 and can be reached at 678-354-0066 or via email at mpc@carvalholawfirm.com

Since 1993, EH&S Managers, real estate developers, lenders, attorneys, and buyers of commercial and industrial property have routinely relied on the American Society for Testing and Materials (ASTM) E1527 "Standard Practice for Conducting Phase I Environmental Site Assessments" in evaluating the potential for environmental impairment liability. Indeed, this ASTM Standard is specifically recognized as *"the"* interim process in the Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Law") signed by President Bush in January 2002. Among other important provisions, the Brownfields Law requires EPA to develop regulations that will establish standards and practices for conducting "all appropriate inquiry" into the past use of property to qualify for Landowner Liability Protections by January 2004 – a timeframe that has since passed. In order to qualify for these protections, landowners must also meet certain threshold criteria and satisfy certain continuing obligations associated with so-called "due care obligations."

Parties seeking to comply with EPA's "all appropriate inquiry" rule will need to be aware of important changes to the ASTM Phase I ESA process that go beyond the existing practice considerations. These changes, to include a restatement of objectives, new obligations imposed on the User/Transferor, substantive changes, and the definition of who is an "Environmental Professional" capable of completing Phase I ESAs, will all need to be carefully considered by EH&S Managers and their advisors. While EPA staff is now in the process of gaining approval from other affected federal agencies, here's what you can expect regarding the proposed revisions:

1. **Objective the Proposed Rule** – Rather than adopt the term “Recognized Environmental Condition” (REC) used in the ASTM Standard, the proposed rule states that “all appropriate inquiry” is intended to identify conditions that are “indicative of releases or threatened releases” of hazardous substances. This change was offered to keep the proposed rule within the statutory framework of the federal Brownfields law. The current ASTM standard defines a REC as “a condition that, if brought to the attention of a regulatory agency, would likely give rise to an enforcement action or cleanup obligation.” Many sophisticated Users have historically objected to the term REC as being too narrow.
2. **Definition & Obligations of Environmental Professionals** – This portion of the proposed rule generated a significant amount of debate among the certain groups of stakeholders. Suffice it to say, some parties within the environmental consulting community sought to limit the definition to “Professional Engineers” and “Professional Geologists”. The proposed rule recognizes such qualifications, but tempers the definition by adding other state sanctioned registrations provided the individual meets certain additional relevant experience requirements of 3 years. The definition also extends to those who possess a Baccalaureate or higher degree in the areas of environmental science, earth science and/or engineering with 5 years of experience; and those with a Baccalaureate or higher degree (in any area) and 10 years of relevant experience are also acceptable. Importantly, the Environmental Professional will need to “Certify” that the report was prepared in accordance with the standards and practices of the proposed rule, and the report *must* contain an opinion as to whether sampling and testing is necessary or appropriate. It remains unclear what effect, if any, the added requirements for Environmental Professionals will have on the cost of Errors & Omission liability insurance, and, correspondingly, the cost of the Environmental Site Assessment Report.
3. **New User/Transferor Obligations** – Under the proposed rule, the User/Transferor will be required to divulge *any* information it has relating to the environmental condition of the property. Such information may include, but not be limited to, the history and use of both the site and adjoining properties; cleanup activities (both past and ongoing); existence of any environmental liens; specialized knowledge or experience of the User/Transferor; relationship to the purchase price to the Fair Market Value if the property were not contaminated; commonly known or reasonably ascertainable information about the property; and the existence of any institutional or engineering controls. Many commentators believe that significant additional time and resources will be required to obtain the information mandated by EPA’s proposed rule. Failure of the User to

provide any of the foregoing information to the Environmental Professional responsible for completing the assessment may result in the denial of liability protections. Such User/Transferor obligations also raise several important legal issues that may present significant complications beyond the context of the Phase I. For example, Sellers frequently complete Phase I studies when preparing a property for divestiture. The effect of disclosure to potential buyers in this context should be carefully reviewed with experienced environmental legal counsel; as such disclosures may rise to the level of Representations and Warranties in the Purchase and Sale Agreement, and constitute a waiver of the Attorney-Client Privilege.

4. **Substantive Changes** – The User and/or Environmental Professional will be required to consider the reliability of the information provided; the cost and time associated with obtaining the information; data gaps and their significance; and specifically identify any and all releases or threatened releases to the environment, including those from adjoining properties. *De Minimus* releases and threatened releases that do not pose a threat to human health or the environment are exempt. To the extent that insufficient data exists to determine whether a release or threatened release has occurred, the User and/or Environmental Professional must document the existence of such knowledge limitations and determine whether sampling is warranted. Note that the proposed rule does not mandate that sampling be completed. The Environmental Professional is also charged with the responsibility of interviewing past owners, operators and occupants of the property. Where the site is abandoned, the Environmental Professional *must* interview adjoining landowners and occupants. The quality and significance of information obtained from adjoining landowners should naturally be viewed with a healthy dose of skepticism. Most experienced real estate professionals would agree that local and state regulatory agencies provide a more reliable source of information. In any event, the requirement to contact adjoining landowners would eviscerate the confidential nature of many pre-acquisition deliberations.
5. **Time for Completion** – All Appropriate Inquiry must be conducted within 1 year prior to acquisition; however, after 180 days certain aspects of the ESA, to include interviews, cleanup liens, government records review, and visual inspection, must be updated. Any changes in the condition of the property must be noted. For practical purposes, this means that the Phase I ESA should be completed within 6 months prior to transfer.
6. **Institutional and Engineering Controls** – As many states sought to develop their own Brownfield-type laws, an important concept to emerge is the roll of institutional and engineering controls in achieving cleanup

goals. Typically, these controls involve the use of barriers, such as paved parking lots, berms, etc., and use limitations (*e.g.* deed restrictions, etc.) to protect the public from environmentally impaired areas and substantially reduce cleanup costs. Such controls and limitations are typically recorded in Deed Records for the site. What remains unclear, however, is the proposed requirement that such records be reviewed for all properties within ½ mile of the study site. There is currently no comprehensive database that tracks such Deed restrictions or other mechanism that is capable of being reviewed in a timely or cost-effective manner beyond an assessment of the target property. Given the current fiscal crisis that exists in many state treasuries, it is unlikely that this portion of the proposed regulation can be complied with near term.

While EPA offers prospective purchasers of Brownfield sites potentially significant liability protections, each of the foregoing contributes to the inevitable cost and delay. EH&S Managers should consider such uncertainties in connection with current or future transactional context, particularly in the case of time and risk sensitive deals. It is also worth noting that the completion of Phase I Environmental Site Assessments is important for a number of reasons that go well beyond the ability to establish Landowner Liability Protections or to otherwise comply with EPA's proposed rule. For example, a thorough understanding of the environmental issues helps buyers and sellers allocate risk, and avoid costly construction and permitting delays. In many cases, these benefits will remain the most important consideration for completing high-quality environmental assessments.

EPA's Committee reached consensus on its proposed rule on November 14, 2003. In January, 2004, EPA drafted a preamble and regulatory impact analysis, and submitted its findings to the Office of Management and Budget, among other agencies for review and comment. In the past, EPA has taken the position that it reserves the right to proceed

with its own rulemaking notwithstanding the outcome of the Reg-Neg Process. Patricia Overmeyer, who is spearheading EPA's efforts through the Office of Brownfields Cleanup and Redevelopment, stated OMB, among other federal agencies, would review the proposed rule before being finalized. EPA will then publish its proposed Final Rule in the *Federal Register* for a 60-day public review and comment period within the next several months. EPA will craft the Final Rule after considering and responding to all public comments.

The concept behind Brownfields is to facilitate the redevelopment of real property, the expansion, redevelopment or reuse of which is complicated by the presence of hazardous substances, pollutants or contaminants. EH&S Managers should take note of the impact of EPA's proposed rule and its affect on real estate transfers. Additional information may be obtained from the author at mpc@carvalhohlawfirm.com and EPA's website <http://www.epa.gov/swerosps/bf/regneg.htm>.