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## **EPA's Proposed Due Diligence Will Lead to Significantly Higher Costs and Longer Lead Times**

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EPA's attempt at developing new regulations to satisfy the "All Appropriate Inquiry" (AAI) standard under CERCLA, as amended by the recent Brownfields law has resulted in a proposed rule that will significantly increase the cost and timeframe for completing environmental due diligence.

Unfortunately, EPA considerably understates the increase in these costs, which should be carefully considered by the regulated community.

In its proposed rule published in the Federal Register on August 28, 2004, EPA states that the cost increase for completing a Phase I Environmental Site Assessment (ESA) is "estimated to be between \$41 and \$47." However, an informal survey of the regulated community and literature search on the subject finds that virtually no one believes EPA's estimate.

Indeed, most professionals engaged in the preparation and review of Phase I ESAs believe that the additional obligations imposed on Environmental Professionals will realistically increase cost between \$400 and \$600 per report. In some cases, estimates run as high as \$1,500 in additional costs. Assuming EPA's estimate that 240,000 Phase I ESAs are performed annually, the regulated community will conservatively be expected to bear an additional \$96,000,000 to \$144,000,000 in transactional costs. An informal poll of attendees at ASTM's recent conference on AAI in Washington, D.C. supports this assessment.

Why the increase in cost? Much of the increase can be directly attributed to EPA's definition of Environmental Professional and the role such individuals play in the completion of Phase I ESAs. Historically, Environmental Professionals and the companies that employed them were able to staff work based on the complexity of the property and other factors. However, because EPA specifically "...recommends that visual inspections...be conducted by an individual who meets the proposed regulatory definition of an environmental professional" the staffing of such projects will necessarily change. The impact of such staffing requirements, particularly on "out-of-town" projects, will result in the higher-cost environmental professional completing routine tasks formerly completed by junior level employees.

Additionally, it is widely assumed that the certification requirements under the proposed regulation, coupled with the potential liability for professional engineers and geologists, and the need to evaluate "Data Gaps" will introduce more conservatism into the ESA process and result in more projects moving towards complex (and expensive) Phase II sampling and testing.

EPA's proposed rule also requires that registries and publicly available lists of engineering and institutional controls be reviewed for all sites within one-half mile of the subject site (§312.26). Apart from the fact that such lists are not practically reviewable, no comprehensive database for this information exists in most states or at the federal level.

According to Tad Minkler of FirstSearch Technology Corporation, a national environmental data provider, EPA's Environmental Data Standard Council is setting out a standard for Institutional Control tracking and offering state agencies grant money to adopt the standard and create their own tracking systems. "This database is at least 5 years away," said Minkler.

EPA has asked for comments, and the regulated community should carefully review the proposed regulation and question the agency's assumptions.