SEYFARTH SHAW

MANAGEMENT ALERT

November 12, 2004

ASTME 1527-00 or USEPA "All Appropriate Inquiry" Standard Which Will You Choose?

The deadline for accepting comments on U.S. EPA's proposed "all appropriate inquiry" standard for environmental due diligence is November 30, 2004. This new standard is likely to have a significant effect upon the cost and scope of environmental site assessments conducted as part of property acquisitions. For that reason, purchasers of real estate will need to address a number of questions, including the following: what are the objectives of your due diligence? Which standard environmental site assessment, if any, should you use? Does your purchase contract and any leases on the property permit the access necessary to conduct an environmental assessment that meets the "all appropriate inquiry" standard? Does the contract with the environmental professional allocate responsibility for all of the tasks that comprise "all appropriate inquiry"?

The "all appropriate inquiry" standard forces consideration of these issues for a number of reasons. Briefly, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or "Superfund") provides that certain persons buying real property can defend themselves from CERLCA liability for pre-acquisition contamination present on the property, provided that the buyer, among many other things,[1] made "all appropriate inquiry" into previous ownership and uses of the property. Although this "innocent purchaser" defense was added to the original Superfund law by the 1986 amendments to CERCLA, Congress did not then specify what it meant by "all appropriate inquiry." Subsequently, Congress amended CERCLA again in 2002, adding additional defenses for "bona fide prospective purchasers" and "contiguous property owners," who were also required to make "all appropriate inquiry" into past uses of the property. Congress directed the U.S. Environmental Protection Agency ("U.S. EPA") to issue regulations by January 2004 that define "all appropriate inquiry," taking into account ten criteria set out in the statute.

The U.S. EPA issued a proposed rule in August 2004 defining the "all appropriate inquiry" that must be conducted to qualify for the defenses to liability under CERCLA. 69 Fed. Reg. 52541 (Aug. 26, 2004).[2] First, U.S. EPA adopted "objectives" and "performance standards" that must be met to constitute "all appropriate inquiry." The objectives of "all appropriate inquiry" include identification of current and past uses and occupancies, current and past uses of hazardous substances, waste management and disposal activities, engineering and institutional controls, and risks from adjoining properties.

Performance factors proposed by U.S. EPA require the person performing the assessment (1) to gather information required by each standard and practice that is publicly available, obtainable within reasonable time and cost constraints, and that can practically be reviewed; (2) review and evaluate the thoroughness and reliability of the information gathered; and (3) identify "data gaps," the sources consulted to address data gaps, and comment on the significance of the data gaps. "Data gaps" represent the inability to obtain required information, despite good faith effort. The person conducting the environmental assessment must identify data gaps that affect his or her ability to identify conditions indicative of a release. For example, the proposed rule requires that a visual inspection be made of the subject property. If the surface of the property cannot be viewed, because it is covered with snow, that's a data gap. The person performing the assessment would have to determine whether the fact that he or she could not view the surface affects his or her ability to identify conditions indicative of a release. If the data gap does affect the assessor's ability to identify conditions indicative of a release, then the assessor will not be able to give the opinion required by the proposed rule (discussed below) and the whole exercise is futile. On the other hand, the assessor may, by consulting earlier reports, aerial photographs, and other documents, and interviews with facility personnel, be able to satisfy himself or herself that they have the ability to identify condi-

tions indicative of a release, and can meet the standard contained in the proposed rule.

The proposed rule also defines those who may conduct environmental assessments: an "environmental professional," who is someone that possesses "sufficient education, training and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases." The environmental professional's duties are to perform the environmental inquiry (described below) and prepare a written report. The written report must (1) include an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases, (2) identify data gaps and comment on their significance, (3) state the environmental professional's qualifications, (4) certify that the person preparing the report meets the requirements of an environmental professional, and (5) certify that the assessment meets the "all appropriate inquiry" standard.

Many of the elements of an environment assessment meeting U.S. EPA's proposed "all appropriate inquiry" standard are familiar from the current ASTM standard for Phase I Environmental Site Assessments, ASTM Standard E 1527-00. In many cases, however, the requirements of U.S. EPA's standard go beyond those contained in the ASTM standard. For example, U.S. EPA's all appropriate inquiry standard requires interviews with the current owner and operator of the subject property, and requires interviews with past owners, occupants, operators, or facility managers to the extent necessary to meet the proposed objectives of the rule. If the property contains multiple occupants, the inquiry must include interviews with the "major" occupants and those likely to store hazardous materials. If the property is abandoned, the inquiry must include interviews with owners or occupants of adjacent property. The ASTM standard, on the other hand, requires only an interview with a "key site manager," who is a person identified by the owner with "good knowledge of the uses and physical characteristics of the property"; in addition, the ASTM standard requires a "reasonable attempt" to interview a "reasonable number" of occupants. The U.S. EPA standard thus provides much less flexibility than the ASTM standard in selecting the person to be interviewed for the assessment.

Similarly, the U.S. EPA standard requires that the environmental inquiry review historical records going back to the date on which the property was first used for residential, agricultural, commercial, industrial, or government purposes. The ASTM standard requires that the assessment look back only to the earlier of first developed use or 1940.

The U.S. EPA standard also requires an on-site visual inspection of the property. Although the proposed rule does contain a limited exception to the on-site inspection requirement, in general the simple refusal of the property seller to provide access is not enough to excuse the failure to perform the inspection. Any physical limitations to the on-site visual inspection (*e.g.*, snow) must be documented and the impact of the limitations discussed in the report.

Although most of the tasks included in the environmental inquiry must be performed by or under the supervision of the environmental professional, certain tasks can be performed by others (*e.g.*, the property purchaser) and the information provided to the environmental professional, including: search for recorded environmental cleanup liens, any specialized knowledge on the part of the purchaser, the relation of the purchase price of the property to its market value if not contaminated, and commonly known or reasonably ascertainable knowledge about the property. Persons contracting with environmental professionals must ensure that the contract specifies who will be performing these tasks, so that each element of the "all appropriate inquiry" standard is met.

Compliance with U.S. EPA's all appropriate inquiry standard is likely to impose significant time and cost burdens on purchasers of real estate, compared to compliance with ASTM Standard E 1527. Purchasers should therefore have a due diligence plan, which includes consideration of the following:

- What are the objectives of your due diligence? Is it critical to secure the defenses to CERCLA liability, given the additional burden pre-closing and especially given the additional requirements to maintain the defenses post-closing?[3]
- Which standard, ASTM E 1527, U.S. EPA's all appropriate inquiry, or a third standard, will most effectively meet your objectives?
- If the "all appropriate inquiry" standard is appropriate for your transaction, does the purchase contact require the seller to make available those persons who must be interviewed by the environmental professional? Do the property leases, if any, require the tenants to cooperate? Have appropriate access rights been secured?
- Does the contract with the professional allocate responsibility for activities that must be performed by the environmental professional, and for activities that can be performed by others, who then supply the information to the environmental professional?

Readers are welcome to contact any member of Seyfarth Shaw's Environmental Safety and Toxic Tort Practice Group with questions relating to U.S. EPA's "all appropriate inquiry" standard or environmental site assessments generally.

Endnotes

1 See Seyfarth Shaw's recent One Minute Memo on the "Elusive Nature of Defenses to CERCLA Liability: Beyond Conducting 'All Appropriate Inquiry,'" available here: http://www.seyfarth.com/db30/cgi-bin/pubs/OMMCERCLA.pdf.

2 A copy of the proposed rule is available at U.S. EPA's website: http://www.epa.gov/swerosps/bf/regneg.htm

3 See "The Elusive Nature of Defenses to CERCLA Liability," n. 1, above.

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