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Natural Resources and Environmental Update - EPA Final Rule on All Appropriate Inquiry

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The United States Environmental Protection Agency (EPA) published on November 1, 2005 its final rule concerning "All Appropriate Inquiry" for purposes of environmental due diligence activities. 70 Fed. Reg. 66070 (Nov. 1, 2005) (the "Final Rule"). The new rule differs in several significant ways from the standards used to this point to perform environmental due diligence for commercial real estate and, more specifically, for the performance of Phase I Environmental Site Assessments. Anyone considering the purchase of real property will find it important to understand the new requirements and how Phase I Environmental Site Assessments should be conducted to conform to the new rules.

"All Appropriate Inquiry" is an investigation, prior to purchase, of the previous uses, ownership, and environmental conditions of a property and is required in order for a prospective purchaser to be eligible for certain defenses to liability under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), including the innocent landowner, contiguous property owner or bona fide prospective purchaser defenses. "All Appropriate Inquiry" generally consists of conducting a Phase I Environmental Assessment in accordance with industry standards set forth in American Society for Testing and Materials (ASTM) E1527. The "all appropriate inquiry" requirement prevents a prospective purchaser from ignoring warning signs of pre-existing contamination and then claiming ignorance of the contamination in the future in an attempt to avoid liability under CERCLA.

Since the 2002 Brownfields Amendments (otherwise known as the Small Business Liability Relief and Revitalization Act), parties have completed Phase I Environmental Site Assessments in accordance with ASTM E1527-00 in order to satisfy the all appropriate inquiry requirement. EPA has allowed prospective purchasers to follow ASTM E1527-00, which is the version of ASTM E1527 implemented in 2000, while waiting for the promulgation of the Final Rule. Parties are not required to follow the Final Rule until November 1, 2006. Until then, parties may comply with the Final Rule or ASTM E1527-00¹.

The Final Rule has some clear differences from the ASTM E1527-00, the most significant of which are discussed below:

- 1. Requirements for Environmental Professionals.** The Final Rule has specific certification, licensing, education, and experience requirements for the environmental professional signing the Phase I Environmental Assessment that are not found in ASTM 1527-00. For this reason, it will be critically important that anyone commissioning the performance of a Phase I Environmental Site Assessment ensure that the environmental professional performing the assessment meets the new technical criteria.
- 2. Interview With Current Owner and Occupants.** An interview with the current owner and occupants of the property is mandatory under the Final Rule. ASTM 1527-00 only requires a reasonable attempt to interview the current owner and occupants.

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¹ ASTM E1527-00 has already been modified to conform to the Final Rule, and, as modified, is referred to as ASTM E1527-05, with the "05" representing the year of modification of ASTM E1527.

- 3. Identification of Data Gaps.** The Final Rule requires the identification of data gaps along with analysis of their significance with regard to the ability to identify conditions indicative of releases and threatened releases. Data gaps are where a source is analyzed and/or consulted, but the source fails to produce the requisite information. ASTM 1527-00 leaves it to the environmental professionals' discretion to discuss the data gaps, but required only that sources revealing no findings be documented.
- 4. Relationship of the Purchase Price to the Market Value of the Property in the Absence of Contamination.** While both the Final Rule and ASTM 1527-00 address consideration of the relationship of the purchase price to the market value of the property in the absence of contamination, ASTM 1527-00 requires only that this be addressed where the purchaser has affirmative knowledge that the purchase price is significantly lower than market value. The Final Rule requires that the purchaser consider and investigate whether the difference between the purchase price and market value is related to the presence of contamination. If the difference in the price is caused by the presence of contamination, EPA may place a "windfall lien" on the property. A "windfall lien" is for costs incurred by EPA in cleaning up the property, not to exceed the amount saved by the purchaser of the property as a result of the existing contamination. Under the Final Rule, if information regarding the purchase price and market price of the property are not included in the report, the environmental professional should identify their omission as a gap and conduct the appropriate analysis as to its significance.
- 5. Shelf Life of the Report.** The Final Rule limits the shelf life of a report to one year, with certain updates, such as property use, being required after 180 days. ASTM 1527-00 only recommended updates of specific activities after 180 days.

Prospective purchasers should be familiar with the requirements of the Final Rule to be sure they preserve any available defenses under CERCLA. In particular, prospective purchasers should ensure that any environmental professional preparing a Phase I Environmental Site Assessment meets the technical requirements set forth in the Final Rule.

For additional information on either the Final Rule or the defenses to liability available under CERCLA, please contact Robert Kramer at (602) 916-5464 or Lisa Brautigam at (602) 916-5428.

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